IN THE MATTER OF

GLOBAL INDUSTRIAL TECHNOLOGIES, INC.

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

Docket C-3825. Complaint, Sept. 10, 1998--Decision, Sept. 10, 1998

This consent order, among other things, requires Global Industrial Technologies, Inc. ("Global"), the Texas-based producer of glass-furnace silica refractories, to restructure its proposed acquisition of AP Green Industries, Inc. ("AP Green"), and to divest certain assets of AP Green's silica refractories business to a Commission-approved buyer. The consent order provides that if Global does not complete the divestiture within the time-frame indicated, the Commission may appoint a trustee to complete the divestiture. In addition, the consent order contains a provision requiring Global to maintain the viability and marketability of the Global and AP Green silica refractories businesses pending the divestiture.

Participants

For the Commission: *Gregg Vicinanza, Joseph Krauss, William Baer, Russell Mangum,* and *Jonathan Baker.*

For the respondent: *D. Stuart Meiklejohn, Sullivan & Cromwell,* New York, NY.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that Global Industrial Technologies, Inc. ("Global"), hereinafter sometimes referred to as respondent, has agreed to acquire AP Green Industries, Inc. ("AP Green"), in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Global Industrial Technologies, Inc. is a corporation organized, existing and doing business under and by

virtue of the laws of Delaware with its office and principal place of business located at 2121 San Jacinto Street, Suite 2500 Dallas, Texas.

2. Respondent manufactures and sells refractories, which are heat-resistant materials used to line furnaces in industries that involve the heating or containment of solids, liquids, or gases at high temperatures.

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

II. THE ACQUIRED COMPANY

4. AP Green is a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its office and principal place of business located at Green Boulevard, Mexico, Missouri.

5. AP Green also manufactures and sells refractories.

6. For purposes of this proceeding, AP Green 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 PROPOSED ACQUISITION

7. On or about March 3, 1998, Global and AP Green entered into an Agreement and Plan of Merger pursuant to which Global, through a subsidiary, agreed to acquire AP Green.

8. Global and AP Green are substantial direct competitors in the United States market for glass-furnace silica refractories.

IV. THE RELEVANT MARKET

9. The relevant line of commerce in which to analyze the effects of the acquisition is the United States market for glass-furnace silica refractories, which are heat-resistant materials sold in the form of bricks, shapes, and mortar. Glass manufacturers, including producers of float glass (flat glass for homes, offices, and automobiles), container glass (for bottles and jars), and other types of glass (*e.g.*, for

video screens, light bulbs, lenses, and beakers), require glass-furnace silica refractories to build the roofs and several other areas of the glass-melting furnaces in which they melt raw materials—silica, soda ash, salt cake, and dolomite—into a homogenous mass of molten glass.

10. Glass-furnace silica refractories are used by glass manufacturers because they are resistant to acid slags, have a high melting temperature, resist fumes and dust, and do not spall (*i.e.*, flake) at high temperatures. Glass manufacturers would not substitute other materials for glass-furnace silica refractories even in response to a significant increase in price.

11. Imports of glass-furnace silica refractories into the United States are small. The potential for significant imports is constrained by overseas production costs, and shipping and handling costs. Product availability and product quality issues also limit the competitiveness of most of the glass-furnace silica refractories produced overseas. In any event, customers in the United States would require extensive testing over several years before using glass-furnace silica refractories produced overseas.

12. Total annual sales of glass-furnace silica refractories in the United States are approximately $4 million.

V. CONCENTRATION

13. Global and AP Green are the only two producers in the United States of glass-furnace silica refractories. Therefore, the United States glass-furnace silica refractories market is extremely concentrated as measured by the Herfindahl-Hirschmann Index, and the acquisition would result in a monopoly.

14. It is likely that Global will obtain unilateral market power in the United States market for glass-furnace silica refractories.

VI. ENTRY CONDITIONS

15. Entry into the glass-furnace silica refractories market would not be timely, likely or sufficient to deter or offset reductions in competition resulting from the acquisition.

16. Obtaining product qualification at glass producers, who require extensive life cycle testing before they will use glass-furnace silica refractories in their plants because these products are so critical to the manufacturing process, would require many years. The total

time from initial entry to significant market impact likely would be many years.

17. Entry would also be unlikely because it would require a large sunk capital investment. Moreover, efficient production would require entry at a scale that would be relatively large compared to the total sales available in the glass-furnace silica refractories market, making entry more risky and unlikely.

VII. EFFECTS OF THE ACQUISITION ON COMPETITION

18. The acquisition of AP Green by Global may substantially lessen competition and tend to create a monopoly in the United States market for glass-furnace silica refractories because, among other things:

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

b. It will eliminate substantial head-to-head competition between Global and AP Green;

c. It will leave Global as the sole producer of glass-furnace silica refractories in the United States, allowing Global unilaterally to exercise market power;

d. It will likely result in increased prices for glass-furnace silica refractories; and

e. It will likely result in diminished product innovation in glass-furnace silica refractories.

VIII. VIOLATIONS CHARGED

19. The acquisition agreement between Global and AP Green described in paragraph five violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

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

21. The proposed acquisition of AP Green by Global, if consummated, would allow Global to monopolize the United States markets for glass-furnace silica refractories in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by the respondent named in the caption above of AP Green Industries, Inc., and respondent having been furnished thereafter with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

The 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 the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that 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 Global Industrial Technologies, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its office and principal place of business located at 2121 San Jacinto Street, Suite 2500, Dallas, Texas.

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 "*Global*" means Global Industrial Technologies, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; and its subsidiaries, divisions, groups and affiliates controlled by Global Industrial Technologies, Inc., and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. "*AP Green*" means AP Green Industries, Inc., a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its office and principal place of business located at Green Boulevard, Mexico, Missouri.

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

D. "*Acquisition*" means the acquisition described in the Agreement and Plan of Merger, dated as of March 3, 1998, between Global and AP Green pursuant to which Global has agreed, through a subsidiary, to acquire AP Green.

E. "*Silica Refractories*" means refractory silica products, including silica bricks and shapes, and silica mortar, but excluding fused, foam, and vitreous silica.

F. "*Hile Plant*" means the manufacturing facility located in Northeast, Maryland that is currently owned and operated by Harbison-Walker Refractories Company ("HWR"), a subsidiary of Global.

G. "*Lehi Plant*" means the manufacturing facility located in Lehi, Utah that is currently owned and operated by AP Green.

H. "*Divested Assets*" means the assets required to be divested pursuant to paragraphs II and III of this order.

I. "*Acquirer*" means the entity to whom Global shall divest the Divested Assets.

J. "*Assets and Businesses*" means assets, properties, businesses, and goodwill, tangible and intangible, relating to the research, development, production, sale, or distribution of Silica Refractories, including, without limitation, the following:

1. All plant facilities, machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property;

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, dedicated management information systems, information contained in management information systems, rights to software, technology, know-how, ongoing research and development, specifications, designs, drawings, processes and quality control data;

3. All intellectual property rights, patents, patent rights, patent applications, formulas, inventions, copyrights, trade secrets, trademarks, and trade names;

4. Raw material and finished product inventories and goods in process;

5. All right, title and interest in and to owned or leased real property, together with appurtenances, licenses, and permits;

6. All right, title, interest, and contractual rights in and to sources of raw material for Silica Refractories;

7. All right, title, and interest in and to the contracts (together with associated bids) entered into in the ordinary course of business with customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

8. All rights under warranties and guarantees, express or implied;

9. All separately maintained, as well as relevant portions of not separately maintained books, records and files;

10. All federal, state, and local regulatory agency registrations, permits, and applications, and all documents related thereto; and

11. All items of prepaid expense.

K. "*AP Green Silica Refractories Properties to be Divested*" means AP Green's Lehi Plant, and all other Assets and Businesses of AP Green relating to the research, development, production, sale, or distribution of Silica Refractories, but excluding AP Green's manufacturing facility in Sproul, Pennsylvania provided however that, at the option of the Acquirer, Global shall install at the Lehi Plant prior to the divestiture the mixing equipment necessary to manufacture silica mortar.

L. "*HWR Silica Refractories Properties to be Divested*" means Global's Hile Plant, and all other Assets and Businesses of Global relating to the research, development, production, sale, or distribution of Silica Refractories, but excluding Global's manufacturing facility in Calhoun, Georgia provided however that, at the option of the Acquirer, Global shall install at the Hile Plant prior to the divestiture the mixing equipment necessary to manufacture silica mortar.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, at no minimum price, the AP Green Silica Refractories Properties to be Divested as an ongoing business. The divestiture shall be made either:

1. Within thirty (30) days of the date this order is accepted by the Commission for public comment to Robert R. Worthen and Dennis R. Williams (jointly or through a corporation or partnership to be established by them) in a manner that receives the prior approval of the Commission; or

2. Within ninety (90) days of the date this order is accepted by the Commission for public comment to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

B. The purpose of the divestiture of the Divested Assets is to ensure the continued use of the Divested Assets in the same business in which the Divested Assets are engaged at the time of the proposed Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the Divested Assets pursuant to paragraph II or paragraph III of this order, respondent shall take such actions as are necessary to maintain the viability and marketability of the Divested Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divested Assets except for ordinary wear and tear.

III.

It is further ordered, That:

A. If respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the AP Green Silica Refractories Properties to be Divested within ninety (90) days of the date this order is accepted by the Commission for public comment, then the Commission may appoint a trustee to divest, at the option of the Trustee, the AP Green Silica Refractories Properties to be Divested, or the HWR Silica Refractories Properties to be Divested. 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, respondent 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 (including, but not limited to, a court-appointed trustee) pursuant to the Federal Trade Commission Act or any other statute enforced by the Commission, for any failure by respondent to comply with this order.

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

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

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the AP Green Silica Refractories Properties to be Divested and the HWR Silica Refractories Properties to be Divested in order to accomplish the divestiture required by this order.

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

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3. of this order to accomplish the divestiture required by this order, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission (or, in the case of a court-appointed trustee, by the court); provided, however, the Commission may extend this period for no more than two (2) additional terms of twelve (12) months each.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the AP Green Silica Refractories Properties to be Divested and the HWR Silica Refractories Properties to be Divested, or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by the respondent shall extend the time for divestiture under paragraph III.B.4. of this order in an amount equal to the delay, as determined by the Commission (or, in the case of a court-appointed trustee, by the court).

6. The trustee shall use his or her best efforts to expeditiously negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made only to an Acquirer or Acquirers that receive the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission as set out in paragraph II of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, the trustee shall submit all bids to the Commission, and if the Commission approves

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

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

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

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

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

11. The trustee may divest such additional ancillary assets related to the Divested Assets and effect such ancillary arrangements as are necessary to satisfy the requirements or purposes of this order.

12. The trustee shall have no obligation or authority to operate or maintain the AP Green Silica Refractories Properties to be Divested or the HWR Silica Refractories Properties to be Divested.

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

IV.

It is further ordered, That within thirty (30) days after the date this order becomes final, and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs II and III of this order, respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which respondent intends to comply, is complying, and has complied with paragraphs II and III of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties that have contacted respondent or that have been contacted by respondent. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

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

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect any facilities and 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 them, to interview officers, directors, or employees of respondent.

VII.

It is further ordered, That this order shall terminate on September 10, 2008.

IN THE MATTER OF

NUTRIVIDA, INC., ET AL.

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

Docket C-3826. Complaint, Sept. 10, 1998--Decision, Sept. 10, 1998

This consent order prohibits, among other things, the New York-based corporation and its officer from making any unsubstantiated claims regarding the health benefits, performance or efficacy of Cartilet (a dietary supplement comprised of shark cartilage), or any food, drug or dietary supplement. In addition, the consent order prohibits the use of testimonials, unless they reflect the typical experience of consumers or the required disclosure is made, and the consent order requires the respondents to disclose that radio or video presentations are paid advertisements.

Participants

For the Commission: *Donald D'Amato, Carole Paynter, Denise Tighe,* and *Michael Bloom.*

For the respondents: *Gary Hailey, Venable, Baetjer, Howard & Civiletti*, Washington, D.C. and *Jeffrey Rubin, Rubin & Shang*, New York, NY.

COMPLAINT

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

PARAGRAPH 1. Respondent Nutrivida, Inc. ("Nutrivida") is a New York corporation with its principal office or place of business at 25 Chapel Street, Brooklyn, New York. Nutrivida produces and distributes program length television advertisements, or "infomercials." These infomercials include an advertisement for Nutrivida's "Cartilet" shark cartilage capsules, a dietary supplement which purports to treat or cure, among other things, cancer, arthritis, and diabetes.

Respondent Frank Huerta is an officer and director of the corporate respondent. Individually or in concert with others, he

formulates, directs, participates in, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His business address is 25 Chapel Street, Brooklyn, New York.

PAR. 2. Respondents have manufactured, labeled, advertised, offered for sale, sold, and distributed products to the public, including Cartilet shark cartilage capsules. This product is a "food" and/or "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 52 and 55.

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 Nutrivida and Frank Huerta have disseminated or have caused to be disseminated advertisements for Cartilet shark cartilage capsules, including, but not limited to, the attached Exhibit A (partial transcript of a program length television advertisement). Advertisements for Cartilet shark cartilage capsules have been broadcast in Spanish language television media, including Telemundo's New York metropolitan cable channel. These advertisements contain the following statements:

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Narrator (male): "[F]rom the complexities of the ocean to the wonders of the natural. Shark cartilage. The shark does not sleep. We bring our cartilage from clean waters, without contamination. Its [shark cartilage's] marvelous properties are already known. It [shark cartilage] has been used in studies against cancer, arthritis, diabetes, and other illnesses."

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Copy on Screen: "It has been used in studies against:
Cancer Arthritis Diabetes"

*****

Dr. J. Casas: "My friends, as you all know, for there to be a tumorous process, for a fibroid, for a tumor in the body to grow, survive, it definitely needs nourishment. How do you nourish a tumor? How do you nourish a fibroid? Well, you only and exclusively nourish it through the blood vessels. It must have blood irrigation -- the main -- the best that shark cartilage has is that it inhibits the formation of blood vessels that irrigate and cause the tumor to grow. [T]his is a basic principle which has been documented various times, it is written in many books how shark cartilage has a predilection and goes directly to inhibit the growth of the

blood vessels that nourish the tumor. Because there are no nutrients, because there is no nourishment, because there is no blood to nourish that tumor, it has no alternative but to disappear and to give in to the shark cartilage. In few words, my friends, shark cartilage is the medium by which to inhibit any nutrients so that that tumor can not prosper.... Shark cartilage has many indications of being a potent anti-inflammatory. For that reason, it is indicated in the processes of rheumatism, in the processes of arthritis, in bursitis, in the circulatory process, in all that has to do with pain and inflammation. Remember, it is important to always visit your doctor . . . . It definitely works, because in it we find elements that help . . . those cells and arteries that nourish that cyst, that fibroid, that tumor, to simply stop providing nourishment . . . malnourishment to the blood and that fibroid, that cyst, can no longer grow. The results at this moment are extraordinary. Thank God. Shark cartilage, like they have properly stated, sharks do not get cancer . . . ."

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Consumer (female): "Dr. Pestano, I believe because the experience has been marvelous. I personally did not believe much in natural medicine, truly. But really, my son, who had visited Miami, came to my house and brought me . . . Cartilet. He said, 'Mom, try this.' I had suffered for a very long time from a pain in my left arm; my arm was paralyzed, I was tormented, I was desperate. I had taken other medicines, and nothing had been effective. I listened to my son and started to take the capsules of this wonderful product. I later learned it was shark cartilage, and it worked a miracle because my arm was cured."

Dr. R. Martinez: "What I want to emphasize is that to separate and place shark cartilage like a great medicine, as an independent weapon in the fight against these illnesses, is a mistake. Shark cartilage must be treated like a powerful weapon, but, within the combination of medicines and therapeutic possibilities we have; all natural, all complementary, but, directed towards the same end . . . ."

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Dr. R. Martinez: "When we speak about inflammation, we also speak about cancer, about arthritis, about rheumatism . . . . [T]he results in patients with different types of arthritis are parallel to the results obtained with different types of cancer -- regarding effectiveness. This all depends on the dosage -- in accordance with the individual's weight in accordance with the patient's immune system. But I repeat, the results with different types of arthritis were highly effective, without

> toxicity, and with little side effects. In comparison with the other weapons we have in the modern pharmacopoeia against these illnesses or to alleviate these illnesses, it has come to represent a step in advancement -- in my opinion -- extraordinary."

PAR. 5. Through the means described in paragraph four, respondents Nutrivida and Frank Huerta have represented, expressly or by implication, that:

a. Cartilet shark cartilage capsules are effective in the symptomatic relief, treatment, or cure of cancer;

b. Cartilet shark cartilage capsules are effective in the symptomatic relief or treatment of rheumatism, arthritis, diabetes, fibroids, bursitis, circulatory problems, and cysts; and

c. A testimonial from a consumer appearing in the advertisements for Cartilet shark cartilage capsules reflects the typical or ordinary experience of members of the public who use the product.

PAR. 6. Through the means described in paragraph four, respondents Nutrivida and Frank Huerta have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph five at the time the representations were made.

PAR. 7. In truth and in fact, respondents Nutrivida and Frank Huerta did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph five at the time the representations were made. Therefore, the representation set forth in paragraph six was, and is, false or misleading.

PAR. 8. Through the means described in paragraph four, respondents Nutrivida and Frank Huerta have represented, expressly or by implication, that studies prove that Cartilet shark cartilage capsules are effective in the symptomatic relief or treatment of cancer, arthritis, and diabetes.

PAR. 9. In truth and in fact, studies do not prove that Cartilet shark cartilage capsules are effective in the symptomatic relief or treatment of cancer, arthritis, and diabetes. Therefore, the representation set forth in paragraph eight was, and is, false or misleading.

PAR. 10. Through the advertising and dissemination of the program length television advertisement for Cartilet shark cartilage capsules, respondents Nutrivida and Frank Huerta have represented,

expressly or by implication, that the program length television advertisement for Cartilet shark cartilage capsules is an independent television program and is not paid commercial advertising.

PAR. 11. In truth and in fact, the program length television advertisement for Cartilet shark cartilage capsules is not an independent television program and is paid commercial advertising. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

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

EXHIBIT A

EXHIBIT A

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Narrator (male): "[F]rom the complexities of the ocean to the wonders of the natural. Shark cartilage. The shark does not sleep. We bring our cartilage from clean waters, without contamination. Its [shark cartilage's] marvelous properties are already known. It [shark cartilage] has been used in studies against cancer, arthritis, diabetes, and other illnesses."

"De los complejos del mar a la maravilla de lo natural. Cartílago de tiburón. El tiburón no duerme. Nuestro cartílago lo traemos de aguas limpias y sin contaminación. Ya se conoce sus maravillosas propiedades. Se ha utilizado en estudios contra el cáncer, artritis, diabetes, y otras enfermedades . . . ."

* * * * *

Copy on Screen: "It has been used in studies against:
Cancer
Arthritis
Diabetes"

"Se ha utilizado en estudios contra:
Cáncer
Artritis
Diabetes"

* * * * *

Dr. J. Casas: "My friends, as you all know, for there to be a tumorous process, for a fibroid, for a tumor in the body to grow, survive, it definitely needs nourishment. How do you nourish a tumor? How do you nourish a fibroid? Well, you only and exclusively nourish it through the blood vessels. It must have blood irrigation -- the main -- the best that shark cartilage has is that it inhibits the formation of blood vessels that irrigate and cause the tumor to grow. [T]his is a basic principle which has been documented various times, it is written in many books how shark cartilage has a

EXHIBIT A

predilection and goes directly to inhibit the growth of the blood vessels that nourish the tumor. Because there are no nutrients, because there is no nourishment, because there is no blood to nourish that tumor, it has no alternative but to disappear and to give in to the shark cartilage. In few words, my friends, shark cartilage is the medium by which to inhibit any nutrients so that that tumor can not prosper. . . . Shark cartilage has many indications of being a potent anti-inflammatory. For that reason, it is indicated in the processes of rheumatism, in the processes of arthritis, in bursitis, in the circulatory process, in all that has to do with pain and inflammation. Remember, it is important to always visit your doctor. . . . It definitely works, because in it we find elements that help . . . those cells and arteries that nourish that cyst, that fibroid, that tumor, to simply stop providing nourishment . . . malnourishment to the blood and that fibroid, that cyst, can no longer grow. The results at this moment are extraordinary. Thank God. Shark cartilage, like they have properly stated, sharks do not get cancer . . . ."

"Mis amigos, como ustedes todos saben para que haya un proceso tumoral, para que un fibroma, para que un tumor en el cuerpo pueda crecer, sobrevivir, se necesita definitivamente que se nutra. Como se nutre un tumor? Como se nutre un fibroma? Bueno, se nutre unica y exclusivamente por las vasos sanguineos. Tiene que tener riego sanguineos -- el principal -- lo mejor que tiene cartílago de tiburón es que precisamente inhibe la formación de vasos sanguineos que van ha irrigar y hacer que este tumor cresca. [E]ste es un principio básico el cual ya se ha documentado varias veces, esta escrito en muchos libros como el cartílago de tiburón tiene predilección y va directamente haya ha inhibir el crecimiento de esos vasos sanguineos que van ha alimentar el tumor. Como no hay nutriente, como no hay alimentación, como no hay sangre para nutrir ese tumor, el no tiene alguna alternativa que desvanecer y ceder ante el cartílago de tiburón. En pocas palabras, mis amigos, el cartílago de tiburón es el medio por lo cual se inhibe que haga cualquier tipo de nutrición para que ese tumor no pueda prosperar . . . El cartílago de tiburón tiene muchas indicaciónes por ser un anti-inflamatorio potente Por lo tanto, esta indicado en los procesos ruematicos, en los procesos artriticos, en la bursitis, en los procesos circulatorio, en todo aquello que tenga que ver con dolor y inflamación. Recuerden que siempre es importante visitar su médico . . . . Trabaja definitivamente, porque en el encontramos elementos que ayudan . . . ha que esas células, ha que esos vasitos

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arteriales que alimentan ese quiste, ese fibroma, que ayuda precisamente, que alimentan a ese tumor, pues que simplemente no le de mas nutrición para la alimentación para desnutriente, para la sangre, y por lo tanto ese fibroma, ese quiste, no puede crecer mas. Los resultados hasta el momento son extraordinario. Gracias a Dios. El cartílago de tiburón, como muy bien lo han dicho, los tiburónes no tienen cáncer . . . ."

* * * * *

Consumer (female): "Dr. Pestano, I believe because the experience has been marvelous. I personally did not believe much in natural medicine, truly. But really, my son, who had visited Miami, came to my house and brought me . . . Cartilet. He said, 'Mom, try this.' I had suffered for a very long time from a pain in my left arm; my arm was paralyzed, I was tormented, I was desperate. I had taken other medicines, and nothing had been effective. I listened to my son and started to take the capsules of this wonderful product. I later learned it was shark cartilage, and it worked a miracle because my arm was cured."

"Dra. Pestano, he creido, porque la experiencia ha sida maravillosa. Yo personalmente no creia mucha en la medicina natural, la verdad. Pero realmente, llego a mi casa mi hijo que fue a Miami. Me llevo . . . Cartilet. Me dice 'Mami, prueba con esto.' Porque sufria por mucho tiempo un dolor en el brazo izquierdo; que tenia mi brazo paralizado, era para mi tormentoso, yo estaba desesperada. Habia tomado otras medicinas y nada habia sido efectivo. Entonces le hice caso a mi hijo y empeze a tomar las capsulas de este maravilloso producto que despues vine a saber que se llamaba exactamente cartílago de tiburón, y que obro en mi un milagro, una maravilla, porque mi brazo se curo."

Dr. R. Martinez: "What I want to emphasize is that to separate and place shark cartilage like a great medicine, as an independent weapon in the fight against these illnesses, is a mistake. Shark cartilage, must be treated like a powerful weapon, but, within the combination of medicines and therapeutic possibilities we have; all natural, all complementary, but, directed towards the same end . . . ."

"Lo que quiero enfatizar es que separar al cartílago de tiburón como una gran medicina y colocarlo como una arma independiente en la lucha contra las enfermededas es un error. El cartílago de

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tiburón, hay que tratarlo como una arma poderosisima, pero dentro del conjunto de medicamentos y de posibilidades terapéutica que tenemos; todas naturales, todas complementarias, pero dirigido con el mismo fin . . . ."

* * * * *

Dr. R. Martinez: "When we speak about inflammation, we also speak about cancer, about arthritis, about rheumatism . . . . [T]he results in patients with different types of arthritis are parallel to the results obtained with different types of cancer - regarding effectiveness. This all depends on the dosage -- in accordance with the individual's weight in accordance with the patient's immune system. But I repeat, the results with different types of arthritis were highly effective, without toxicity, and with little side effects. In comparison with the other weapons we have in the modern pharmacopoeia against these illnesses or to alleviate these illnesses, it has come to represent a step in advancement -- in my opinion -- extraordinary."

"Cuándo se habla de inflamación, se habla tambien de cáncer, de artritis, se habla de reumatismo, se habla de . . . . [L]os resultados con pacientes de los diferentes clases de artritis son paralelos a los resultados que se han obtenido con distinto tipo de cáncer, en cuanto a la efectividad. Es muy importante dosisitar de acuerdo con el peso de la persona -- en acuerdo con el estado inicial del sistema inmunologico del paciente. Pero repito, el resultado con diferentes tipos de artritis son de altas efectividad, de ninguna toxicidad, y muy poco efecto secundario. Por lo tanto en comparación con todas las otras armas que tenemos en la farmocopeoia moderna en contra de estas enfermedades o para tratar de aliviar estas enfermedades, a venido a representar un paso de avance -- en mi opinion -- extraordinario."

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 New York 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 Nutrivida, Inc. ("Nutrivida") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 25 Chapel Street, Brooklyn, New York.

Respondent Frank Huerta is an officer and director of the corporate respondent. Individually or in concert with others, he formulates, directs or controls the policies, acts, or practices of the corporation. His business address is 25 Chapel Street, Brooklyn, New York.

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

ORDER

DEFINITIONS

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

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

2. Unless otherwise specified, "*respondents*" shall mean Nutrivida, Inc., a corporation, its successors and assigns and its officers; and Frank Huerta, individually and as an officer and director of the corporation; and each of the above's agents, representatives, and employees.

3. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

4. "*Video advertisement*" shall mean any advertisement intended for dissemination through television broadcast, cablecast, home video, or theatrical release.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Nutrivida's Cartilet shark cartilage capsules or any other product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that such product:

A. Is effective in the symptomatic relief, treatment, or cure of cancer; or
B. Is effective in the symptomatic relief or treatment of rheumatism, arthritis, diabetes, fibroids, bursitis, circulatory problems, or cysts,

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Nutrivida's Cartilet shark cartilage capsules, or any food, dietary supplement, or drug as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the health benefits, performance, or efficacy of such product, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Nutrivida's Cartilet shark cartilage capsules or any food, dietary supplement, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

IV.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any food, dietary supplement, or drug as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement (as endorsement is defined in 16 CFR 255.0(b)) of the food, dietary supplement, or drug represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or
B. Respondents disclose in the same language as the predominant language that is used in the advertisement, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

   1. What the generally expected results would be for users of the food, dietary supplement, or drug, or
   2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

V.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in the labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

VI.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in the labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration or under any new drug application approved by the Food and Drug Administration.

VII.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service, in or affecting commerce, do forthwith cease and desist from creating, producing, selling, or disseminating:

A. Any advertisement that misrepresents, expressly or by implication, that it is not a paid advertisement; and
B. Any commercial or other video advertisement fifteen (15) minutes in length or longer or intended to fill a broadcasting or cablecasting time slot of fifteen (15) minutes in length or longer

that does not display visually in the same language as the predominant language that is used in the advertisement, in a clear and prominent manner, and for a length of time sufficient for an ordinary consumer to read, within the first thirty (30) seconds of the commercial and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

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

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

C. Any radio advertisement fifteen (15) minutes in length or longer or intended to fill a time slot of fifteen (15) minutes in length or longer that does not state in the same language as the predominant language that is used in the advertisement, in a clear and prominent manner, and in a volume and cadence sufficient for an ordinary consumer to hear, within the first thirty (30) seconds of the commercial and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

"THE PROGRAM YOU ARE LISTENING TO IS A PAID ADVERTISEMENT FOR [THE PRODUCT OR SERVICE]."

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

VIII.

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

A. All advertisements and promotional materials containing the representation;
B. All materials that were relied upon in disseminating the representation; and
C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

IX.

It is further ordered, That respondent Nutrivida, Inc., and its successors and assigns, and respondent Frank Huerta, for a period of five (5) years after the date of issuance of this order, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

X.

It is further ordered, That respondent Nutrivida, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified

mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XI.

It is further ordered, That respondent Frank Huerta, for a period of three (3) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment that involves the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any food, dietary supplement, or drug as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XII.

It is further ordered, That respondent Nutrivida, Inc., and its successors and assigns, and respondent Frank Huerta shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XIII.

This order will terminate on September 10, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

IN THE MATTER OF

HERBAL WORLDWIDE HOLDINGS CORP., ET AL.

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

Docket C-3827. Complaint, Sept. 16, 1998--Decision, Sept. 16, 1998

This consent order prohibits, among other things, a Florida-based company and its two principal officers from making any unsubstantiated weight-loss claims for "Fattaché," a purported dietary product, or from representing that any dietary supplement, food or drug can cause or contribute to achieving or maintaining weight loss without dieting, that such a product can prevent the absorption of ingested fat, helps eliminate ingested fat, or has any beneficial effect, unless the claims are supported by competent and reliable scientific evidence. In addition, the consent order prohibits the respondents from representing that any endorsement or testimonial represents the typical experience of users, unless they can substantiate the experience or the respondents provide the required disclosure.

Participants

For the Commission: *Sylvia Kundig* and *Jeffrey Klurfeld.*

For the respondents: *Stephen Nagin, Nagin, Gallop & Figueredo*, Miami, FL.

COMPLAINT

The Federal Trade Commission, having reason to believe that Herbal Worldwide Holdings Corp., a corporation, José Diaz, individually and as an officer of the corporation, and Eduardo Naranjo, individually and as an officer of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Herbal Worldwide Holdings Corp. ("Herbal") is a Florida corporation with its principal office or place of business at 3326 Mary Street, Miami, Florida.

2. Respondent José Diaz is an owner and officer of respondent Herbal. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Herbal, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Herbal.

3. Respondent Eduardo N. Naranjo is an owner and officer of respondent Herbal. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Herbal, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Herbal.

4. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed an over-the-counter weight-loss product to the public called "Fattaché." The ingredients of Fattaché include psyllium, chitosan (from deacetylated shellfish shells), glucomannan, and apple pectin. Fattaché is a "food" and/or "drug," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

5. 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.

6. Respondents have disseminated or have caused to be disseminated Spanish-language advertisements for Fattaché, including but not necessarily limited to the attached Exhibit A, which is the transcription of a television advertisement with an English-language translation. The advertisement contains the following statements:

A. Fattaché, a revolutionary product to lose weight easily and in little time.
B. I obtained results very quickly without having to leave my favorite foods. [During this statement, a subscript states "voluntary testimonial"].
C. Nutrition specialists agree that Fattaché is the best alternative to absorb the fat in your body.
D. ... two capsules of Fattaché that will look for fat converting it into a layer of fiber which the body will automatically eliminate. That fat, if it remains in our body, is what causes weight gain ....
E. Fattaché helps eliminate the fat that enters your body before it is digested.

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

A. Fattaché causes weight loss without a change in diet.
B. Fattaché prevents the absorption of ingested fat.
C. Fattaché helps eliminate ingested fat before it is absorbed.
D. Testimonials from consumers appearing in advertisements for Fattaché reflect the typical or ordinary experience of members of the public who use Fattaché.

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

9. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph seven, at the time the representations were made. Among other reasons, much of the research relied on by respondents did not address the weight loss and fat absorption effects discussed in the advertisement, and/or the results of the research could not be extrapolated to the population as a whole because of methodological weaknesses. Therefore, the representation set forth in paragraph eight was, and is, false or misleading.

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

EXHIBIT A

TRANSLATION

Announcer: To show a nicer figure get Fattache.
Fattache, a revolutionary product to lose weight easily and in little time.
Subscript: "Voluntary testimony"
"I obtained result very quickly without having to leave my favorite foods."
Subscript: "Fattache helps eliminate the fat that enters your body before it is digested. It is not designed to directly reduce the fat already in your body. Results may vary individually."
Announcer: Nutrition specialists agree that Fattache is the best alternative to absorb the fat in your body. Mixing water with olive oil, we will add two capsules of Fattache that will look for fat, converting it into a layer of fiber which the body will automatically eliminate. That fat, if it remains in our body, is what causes weight gain and serious health problems.
Subscript: "Voluntary testimony:"
With Fattache, I lost what I was not able to lose with other diets.
Jar of Fattache with 180 tablets for only $39.95. Free gift of additional jar with 60 tablets.
Call toll free now at 1-800-600-4040
7940 SW 8th St., Miami, FL 33144

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PARA LUCIR UNA MEJOR FIGURA obtenga Fattache.
Fattache un producto revolucionario para adelgar facil y en poco tiempo.
"Testimonio voluntario"
Yo obtuve resultado muy rapido sin tener que dejar las comidas que mas me gustan."
"Fattache ayuda a eliminar la grasa que entra en su cuerpo antes que esta sea digerida. No esta disenada para directamente reducir la grasa que ya esta en su cuerpo. Los resultados pueden variar en cada persona."
Especialista en nutricion estan de acuerdo en que Fattache es la mejor alternative para absorber las grasas de su cuerpo. Mezclando agua con aceite de oliva, le agregaremos dos capsulas de Fattache que buscara la grasa convirtiendola en una capa de fibra que el cuerpo automaticamente eliminara. Esa grasa, si permanece en nuestro cuerpo es la que produce todas las causas de sobrepeso y problemas graves de salud.
"Testimonio voluntario:"
Con Fattache baje lo que no pude bajar con otras dietas.
Frasco de Fattache con 180 capsulas por tan solo $39.95. Te regalo con su orden reciba un frasco adicional con 60 capsulas.

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 Herbal Worldwide Holdings Corp. ("Herbal") is a Florida corporation with its principal office or place of business at 3326 Mary Street, Miami, Florida.

2. Respondent José Diaz is an owner and officer of proposed respondent Herbal. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Herbal, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Herbal.

3. Respondent Eduardo N. Naranjo is an owner and officer of proposed respondent Herbal. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Herbal, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Herbal.

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

ORDER

DEFINITIONS

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

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

2. "*Clearly and prominently*" shall mean as follows:

A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. Provided, however, that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the advertisement is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation.

B. In a print advertisement, promotional material or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.

C. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in all of the languages that are present in the advertisement. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

3. Unless otherwise specified, "*respondents*" shall mean Herbal Worldwide Holdings Corp., a corporation, its successors and assigns and their officers; José Diaz, individually and as an officer of Herbal, Eduardo Naranjo, individually and as an officer of Herbal, and each of the above's agents, representatives, and employees.

4. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

5. "*Drug*" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55.

6. "*Food*" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Fattaché®, or any food, drug or dietary supplement, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that:

A. Such product causes weight loss without a change in diet;
B. Such product prevents the absorption of ingested fat;
C. Such product helps eliminate ingested fat before it is absorbed; or
D. Such product has any beneficial effect,

unless at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the

product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or
B. Respondents disclose, clearly and prominently, and in close proximity to the testimonial or endorsement, either:

1. What the generally expected results would be for users of the product, or
2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0 (b).

III.

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

IV.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

V.

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

A. All advertisements and promotional materials containing the representation;
B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

It is further ordered, That respondent Herbal, and its successors and assigns, and respondents José Diaz and Eduardo N. Naranjo shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

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

VIII.

It is further ordered, That respondent Herbal, and its successors and assigns, and respondents José Diaz and Eduardo N. Naranjo shall,

within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IX.

It is further ordered, That respondents José Diaz and Eduardo N. Naranjo, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of their current business or employment, or of their affiliation with any new business or employment. The notice shall include the respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

X.

This order will terminate on September 16, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

IN THE MATTER OF

GERALD W. SCHWARTZ, 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-3828. Complaint, Sept. 17, 1998--Decision, Sept. 17, 1998

This consent order, among other things, prohibits, for ten years, Gerald W. Schwartz and his subsidiary, Sky Chefs, Inc., from acquiring any concern that controls the Las Vegas catering operations formerly operated by Ogden Aviation Food Services without prior Commission approval. In addition, for ten years, Sky Chefs is required to provide prior notice to the Commission before it acquires its only in-flight catering competitor at any airport in the United States.

Participants

For the Commission: *Stephen Riddell, Phillip Broyles, William Baer, Charlotte Wojcik,* and *Jonathan Baker.*

For the respondents: *Mark Godler, Kaye, Scholer, Fierman & Hays*, New York, N.Y. and *Steve Palmer, Swidler & Berlin*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Gerald W. Schwartz, through his subsidiaries, Onex Corporation, SC International Services, Inc. and Sky Chefs, Inc., entered into a letter of intent to acquire all the voting stock of Ogden Aviation Food Services, Inc. and Ogden Aviation Food Services (ALC), Inc., and that the acquisition, if consummated, would result in a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

A. The Respondents

1. Respondent Gerald W. Schwartz ("Schwartz") is a natural person with a principal place of business located at Onex Corporation, 161 Bay Street, Toronto, Ontario, Canada M5J 2S1.

2. Respondent Onex Corporation ("Onex"), a wholly-owned subsidiary of Gerald W. Schwartz, is a corporation organized, existing, and doing business under and by virtue of the laws of Ontario, Canada, with its office and principal place of business located at 161 Bay Street, P.O. Box 700, Toronto, Ontario, Canada M5J 2S1.

3. Respondents Schwartz and Onex are engaged in diverse businesses that include in-flight catering, chain restaurant food service, electronics manufacturing and other businesses.

4. Respondent SC International Services, Inc. ("SCIS"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 524 East Lamar, Arlington, TX. SCIS is an indirect subsidiary of Onex.

5. Respondent Sky Chefs, Inc. ("Sky Chefs"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 524 East Lamar, Arlington, TX. Sky Chefs is a wholly-owned subsidiary of SCIS.

6. Respondent Sky Chefs has in-flight catering kitchens situated throughout the United States and the world. In 1997, Sky Chef's worldwide catering kitchens posted sales of approximately $1.3 billion. Its 1997 revenue from its U.S. catering operations was over $1 billion to which its Las Vegas catering kitchen contributed $12.9 million.

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

8. At all times relevant herein, respondents Onex, SCIS and Sky Chefs have been and are now engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. 12, and are corporations whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

B. Ogden

9. Ogden is engaged in diverse businesses, including entertainment, energy and aviation support services. Ogden Aviation Food Services, a wholly-owned indirect subsidiary of Ogden Corporation, provides in-flight catering services to airlines. In 1997, Ogden posted sales of $164 million from its catering activities in the United States, of which $9.1 million were from its Las Vegas, Nevada, catering kitchen.

C. The Proposed Acquisition

10. On March 6, 1998, Mr. Schwartz, through his indirect subsidiary Sky Chefs, signed a Letter of Intent, whereby Sky Chefs proposed to acquire all of the voting stock of Ogden Aviation Food Services, Inc. ("proposed acquisition"). The proposed acquisition included Ogden's entire United States airline catering business and eight catering kitchens. One of these catering kitchens was located at the McCarran International Airport, Las Vegas, Nevada.

11. After being advised by Commission staff of potential competitive issues and concerns in connection with the proposed acquisition of all of Ogden's in-flight catering business and kitchens, respondents and Ogden modified their original proposal to exclude Ogden's Las Vegas in-flight catering business and kitchen. Under the modified agreement, SCIS would acquire the remainder of Ogden's catering business and kitchens.

12. On May 22, 1998, Ogden entered into an agreement to sell the Las Vegas in-flight catering business and kitchen to Dobbs International Services, Inc.

D. Trade and Commerce

13. The relevant product market in which to analyze the effects of Sky Chefs' proposed acquisition of Ogden's airline catering kitchens is the sale of in-flight catering services to airlines.

14. As used herein, in-flight catering services includes the preparation of meals, stocking of beverage carts, delivery of meals and carts to the aircraft, the loading of the galley, the unloading of incoming carts, utensils and trash, and cleaning and storage of carts and utensils.

15. The relevant geographic market in which to analyze the effects of Sky Chef's proposed acquisition is the McCarran International Airport, Las Vegas, Nevada.

16. Entry into the relevant market would not be timely, likely, or sufficient to prevent anticompetitive effects for the following reasons, among others. Entry requires a significant investment of several million dollars. A substantial portion of the investment would not be recoverable if the entrant failed to achieve the minimum viable scale of operation. It would be very difficult for an entrant in airline catering at McCarran Airport to reach a viable scale of operation. To be viable, an entrant would need to capture a large share of the catering business in this market, and some of that business is committed to the incumbents through multiple year contracts.

E. Market Structure

17. Ogden has an in-flight catering kitchen located at McCarran International Airport in Las Vegas, Nevada, that provides in-flight catering services to airlines at McCarran.

18. Sky Chefs has an in-flight catering kitchen located at McCarran International Airport in Las Vegas, Nevada, that provides in-flight catering services to airlines at McCarran.

19. The market for in-flight catering at McCarran International Airport is highly concentrated. Sky Chefs and Ogden are the only two firms that sell in-flight catering services to airlines departing or landing at Las Vegas' McCarran Airport. The acquisition, as originally proposed, would leave Sky Chefs with a monopoly of in-flight catering services at McCarran Airport. The proposed acquisition, as modified, would result in no change in market concentration.

F. Effects of the Proposed Acquisition

20. The proposed acquisition, as originally proposed and if consummated, would likely have led to a substantial lessening of competition in the McCarran Airport in-flight catering market in the following ways, among others:

a. By eliminating direct competition between Sky Chefs and Ogden; and
b. By increasing the likelihood that Sky Chefs would unilaterally exercise market power;

each of which would increase the likelihood that the price of in-flight catering services would increase and the quality of in-flight catering services would decline.

G. Violations Charged

21. The acquisition of the voting stock of the Ogden entities that operate in-flight catering kitchens by Sky Chefs, if consummated as originally proposed, would have violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of the voting securities of Ogden Aviation Food Services, Inc., and Odgen Aviation Food Services (ALC), Inc., by Gerald W. Schwartz, through his subsidiaries, Onex Corporation, SC International Services, Inc. and Sky Chefs, Inc., (collectively "respondents"), and it now appearing that respondents, having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

Respondents, their attorney, 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 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 Sky Chefs, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 524 East Lamar, Arlington, TX.

2. Respondent SC International Services, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 524 East Lamar, Arlington, TX.

3. Respondent Onex Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of Ontario, Canada, with its office and principal place of business located at 161 Bay Street, P.O. Box 700, Toronto, Ontario M5J 2S1.

4. Respondent Gerald W. Schwartz, is a natural person with a principal place of business located at Onex Corporation, 161 Bay Street, Toronto, Ontario, Canada M5J 2S1.

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. "*Respondents*" means Sky Chefs, Inc. ("Sky Chefs"), SC International Services, Inc. ("SCIS"), Onex Corporation ("Onex"), and Gerald W. Schwartz ("Mr. Schwartz"), their directors, officers, employees, agents and representatives, predecessors, successors, and assigns; their subsidiaries, divisions, groups and affiliates controlled by Sky Chefs, SCIS, Onex, or Mr. Schwartz, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

B. "*Ogden*" means Ogden Corporation, a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with a principal place of business located at Two Pennsylvania Plaza, New York, New York.

C. "*Proposed Acquisition*" means the proposed acquisition by Sky Chefs of all of the voting securities of Ogden Aviation Food Services, Inc. and Ogden Aviation Food Services (ALC), Inc., pursuant to a Letter of Intent, dated March 6, 1998.

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

E. "*Retained Airline Catering Kitchen*" means the airline catering kitchen owned by Ogden in the vicinity of the McCarran International Airport in Las Vegas, Nevada, which the respondents, pursuant to the "Stock Purchase Agreement Among SC International Services, Inc., Ogden Corporation and Ogden Entertainment, Inc.," dated May 1, 1998, and the "Amendment to Stock Purchase Agreement," dated May 7, 1998, no longer propose to acquire.

F. "*Single Competing Airline Catering Business*" means an airline catering business, owned by a person other than the respondents, located on or near an airport in the United States at which respondents own or operate the only other airline catering business, excluding any airline catering businesses that collectively account for no more than 1 % of the annual catering revenue realized at that airport.

II.

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

A. Acquire more than 1% of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, that owns, controls or otherwise has an interest in the Retained Airline Catering Kitchen; or

B. Acquire the Retained Airline Catering Kitchen or any assets thereof.

III.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not, without providing advance written notice to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire more than 1% (or, for investment purposes, 5%) of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, that owns, controls or otherwise has an interest in any Single Competing Airline Catering Business in the United States; or

B. Acquire any Single Competing Airline Catering Business in the United States.

Said prior notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 CFR 803.20), respondents shall not consummate the transaction until twenty (20) days after substantially complying with such request for additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

Provided, however, that prior notification shall not be required by paragraph III of this order for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

IV.

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

form in which they have complied and are complying with paragraphs II and III of this order.

V.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request and reasonable notice, respondents shall permit any duly authorized representative of the Commission:

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

B. Upon five (5) days' notice to the respondents, and without restraint or interference, to interview officers, directors, employees, agents or independent contractors of the respondents, who may have counsel present.

VI.

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

VII.

It is further ordered, That this order shall terminate on September 17, 2008.

IN THE MATTER OF

TRENDMARK, INC., ET AL.

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

Docket C-3829. Complaint, Sept. 23, 1998--Decision, Sept. 23, 1998

This consent order prohibits, among other things, the Tennessee-based corporation and its owners from making claims about the health benefits, performance or efficacy of its weight-loss products, called Neuro-Thin and Lipo-Thin, or any food, drug or device without competent and reliable scientific substantiation. The consent order also prohibits the respondents from misrepresenting the existence, result, or interpretation of any test, study, or research, and requires a disclosure concerning the testimonials and endorsements for the products.

Participants

For the Commission: *Ronald Waldman* and *Michael Bloom.*

For the respondents: *Regina Morrison, Hodges & Hodges*, Memphis, TN.

COMPLAINT

The Federal Trade Commission, having reason to believe that TrendMark Inc., a corporation, William McCormack, and E. Robert Gates, individually and as officers of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent TrendMark Inc. ("TrendMark") is a Tennessee corporation with its principal office or place of business at 3665 South Perkins, Suite 8, Memphis, TN.

2. Respondent William McCormack is an owner and officer of respondent TrendMark. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of TrendMark, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of TrendMark.

3. Respondent E. Robert Gates is an owner and officer of respondent TrendMark. Individually or in concert with others, he

formulates, directs, or controls the policies, acts, or practices of TrendMark, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of TrendMark.

4. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed over-the-counter weight-loss products to the public called "Neuro-Thin™" and "Lipo-Thin™." Neuro-Thin™ and Lipo-Thin™ are "foods" or "drugs," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

5. 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.

6. Respondents have disseminated or have caused to be disseminated advertisements, including but not necessarily limited to Exhibit A -- a copy of a bulk e-mail sent to users of America Online--which, among other things, directs the recipient to click on a hyperlink which takes the recipient directly to TrendMark's website (excerpts from a printout of the website are attached as Exhibit B). These advertisements contain the following statements:

A. **"NEW ALL-NATURAL WEIGHT LOSS PRODUCT, NOW ON THE MARKET!!!'**
If you've heard about the new 'Phen/Fen' Diet, and thought about trying it..... DON'T!!!
With the ALL NATURAL 'Thin-Thin Diet', you can achieve the same results, without the dangerous side-effect of Drugs! Eat the foods you want, and STILL lose 10-12 pounds per month! Patent Pending Thin-Thin Diet works for you to lose weight and KEEP IT OFF.
. . .
The Thin-Thin Diet Program is a Nutritional Breakthrough Program with a NO DIET, NO WILL POWER, easy way to LOSE UP TO 20 POUNDS PER MONTH and KEEP IT OFF!!"
(Exhibit A)

B. **"<u>Read what a few of the THIN-THIN DIET™ users are saying:</u>**
. . . 'Because of the THIN-THIN Diet™, I have reached my weight-loss goal and my diabetes is much less of a problem!'
***Toni H.*, Ohio**
'After my husband died, I suffered from depression and gained 50 pounds. I tried several diets, but just couldn't lose any of the weight. I've lost 14 pounds already on the THIN-THIN DIET™ and feel great!'
***Kay M.*, Tennessee**
NEURO-THIN™ turns your 'hunger switch' off.
. . .

NEURO-THIN™ help[s] balance the levels of serotonin and dopamine in your brain. The result? Food cravings and hunger pangs are eliminated . . . and . . . you'll be on the way to achieving your goal!
LIPO-THIN™ Features:
*Absorbs and binds fat.
*Inhibits LDL cholesterol and boosts HDL cholesterol.
*Promotes healing of ulcers and lesions.
. . .
*Helps prevent irritable bowel syndrome.
*Reduces levels of uric acid in the blood.
. . .
*Correlates with improved cardiovascular health.
LIPO-THIN™ eliminates fat before your body can absorb it.
Forbidden foods that you craved before beginning your **THIN-THIN DIET™** can still be eaten in moderation because the fat they contain is blocked by the chitin fiber found in **LIPO-THIN™.** This remarkable, naturally occurring ingredient acts like a 'fat magnet' or a 'fat sponge' in your digestive tract. It forms a non-digestible gel that binds with fat molecules and prevents their absorption into your body.
. . .
This program works. The THIN-THIN DIET™ is based on the latest scientific studies. It stops cravings and blocks fat absorption."
(Exhibit B)

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

A. Neuro-Thin™ controls appetite.
B. Taking Neuro-Thin™ and Lipo-Thin™ in combination causes significant weight loss without a change in diet.
C. Taking Neuro-Thin™ and Lipo-Thin™ in combination causes long-term or permanent weight loss.
D. Lipo-Thin™ helps prevent the absorption of ingested fat.
Lipo-Thin™ lowers LDL cholesterol and boosts HDL cholesterol.
F. Lipo-Thin™ promotes healing of ulcers and lesions.
G. Lipo-Thin™ helps prevent irritable bowel syndrome.
H. Lipo-Thin™ reduces levels of uric acid in the blood.
I. Lipo-Thin™ helps improve cardiovascular health.
J. Testimonials from consumers appearing in advertisements for the Thin-Thin Diet reflect the typical or ordinary experience of members of the public who use Neuro-Thin™ and Lipo-Thin™.

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

9. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph seven, at the time the representations were made. Among other reasons, the purported support which proposed respondents did rely upon for the above claims--studies on individual components of Neuro-Thin™ or Lipo-Thin™-- did not relate adequately to their advertising claims. For example, most of the studies that were submitted by the proposed respondents as support were test tube studies and studies of rats. These studies cannot be used as adequate support for the therapeutic effects of Neuro-Thin™ and Lipo-Thin™ in human beings. Therefore, the representation set forth in paragraph eight was, and is, false or misleading.

10. Through the means described in paragraph six, respondents have represented, expressly or by implication, that scientific studies prove that Neuro-Thin™ and Lipo-Thin™ cause significant weight loss.

11. In truth and in fact, scientific studies do not prove that Neuro-Thin™ and Lipo-Thin™ cause significant weight loss. Therefore, the representation set forth in paragraph ten was, and is, false or misleading.

12. Through the means described in paragraph six, respondents have represented that the statements of Toni Holcomb, John Vaught, and Kay Morton appearing in website advertisements are endorsements of Neuro-Thin™ and Lipo-Thin™. Respondents have failed to disclose adequately that these endorsers have a material connection with individuals and entities marketing and profiting from the sales of Neuro-Thin™ and Lipo-Thin™. At the time of providing their endorsements, Toni Holcomb and John Vaught were the spouses of independent distributors of Neuro-Thin™ and Lipo-Thin™. At the time of providing her endorsement, Kay Morton was an independent distributor of Neuro-Thin™ and Lipo-Thin™. These facts would be material to consumers in their purchase or use decisions regarding Neuro-Thin™ and Lipo-Thin™. The failure to disclose adequately this fact, in light of the representation made, was, and is, a deceptive practice.

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

EXHIBIT A

Subj: Fwd: New Product Intro / FREE Registration for Dream Vacation
Date: 97-08-11 14:39:45 EDT
From: CyberPro36
To: TrendMrk

Rich,

Here's the latest. Doing better????

Dave
913 321 3508

Forwarded Message:
Subj: New Product Intro / FREE Registration for Dream Vacation
Date: 97-08-11 13:57:50 EDT
From: cyberpro36temp@usa.net (Trend Mark International)
Reply-to: Hyperlink@below.com
To: cyberpro36temp@usa.net

****

NEW ALL-NATURAL WEIGHT LOSS PRODUCT, NOW ON THE MARKET !!!

****

If you've heard about the new "Phen/Fen" Diet, and thought about trying it..... DON'T!!!

With the ALL NATURAL "Thin-Thin Diet", you can achieve the same results, without the dangerous side-effects of Drugs! Eat the foods you want, and STILL lose 10-12 pounds per month! Patent Pending Thin-Thin Diet works for you to lose weight and KEEP IT OFF.

Find out the SECRET to losing weight and keeping it off with the Thin-Thin Diet Program! This Weight loss Program is based on cutting edge research, revealing how Serotonin and Dopamine can help you stop craving and bingeing. Helps you lose weight, eliminate fatigue and START FEELING GREAT!

The Thin-Thin Diet Program is a Nutritional Breakthrough Program with a NO DIET, NO WILL POWER, easy way to LOSE UP TO 20 POUNDS PER MONTH and KEEP IT OFF!!

Works 24 hours a day!!!

****

YOU CAN GO DIRECTLY TO OUR WEB SITE BY

CLICKING HERE

AND LEARN ALL ABOUT THE THIN-THIN DIET PROGRAM!!

****

We diligently remove all who do not wish to receive unsolicited emails.

EXHIBIT A

EXHIBIT B

Thin-Thin Diet™

Congratulations ! You've taken the first step toward losing weight and that's always the hardest. Let me introduce myself. My name is Cort McLeod and I'm the Director of Nutrition for TrendMark International. After 34 years of research, I have finally solved the weight-loss puzzle. Now, a 100-percent safe, non-addictive, weight-loss program is available for you at an affordable price.

Read what a few of the THIN-THIN DIET™ users are saying:

"My diabetes caused my weight to become uncontrollable and I had almost given up hope of ever being able to lose those extra pounds. Because of the THIN-THIN DIET™, I have reached my weight-loss goal and my diabetes is much less of a problem!"

***Toni H.*, Ohio**

"I tried a drug diet program but had to quit because of its side effects. Thanks to the Internet, I discovered the THIN-THIN DIET™ and today I'm losing weight and feeling good!"

***Bob L.*, Florida**

"Through the years, I've spent a lot of money on various diets. Unfortunately, I never lost the weight. Since using the THIN-THIN DIET™, however, I've lost more than 100 pounds in less

EXHIBIT B

than eight months and I feel great!"

***Virginia L.*, Tennessee**

"I've always been a big eater. The THIN-THIN DIET™ curbed my appetite almost immediately. If it worked for me, it can work for anybody!"

***John V.*, Texas**

"After my husband died, I suffered from depression and gained 50 pounds. I tried several diets, but just couldn't lose any of the weight. I've lost 14 pounds already on the THIN-THIN DIET™ and feel great!

***Kay M.*, Tennessee**

Order

Order now and get *TRIPLE* entries into our FREE VACATION DRAWING!!

PRODUCTS

NEURO-THIN™ Features

*All-natural amino acid and vitamin and mineral formula that restores proper brain chemistry.

*Unique, 100-percent safe formulation of commonly used ingredients -- all pharmaceutical grade, for your peace of mind.

*Non-addictive -- no withdrawal symptoms.

*Convenient, easy-to-take capsules.

*Hypoallergenic and contains no sugars, starches, yeast, salt, milk or preservatives.

NEURO-THIN™ turns your "hunger switch" off.

Food cravings originate in your brain when the levels of serotonin and dopamine are out of balance. These chemical neurotransmitters affect your body temperature, metabolic rate and mental state of being. The natural ingredients found in **NEURO-THIN™** help balance the levels of serotonin and dopamine in your brain. The result? Food cravings and hunger pangs are eliminated -- without the use of drugs. If you're not hungry, and you don't crave food, you'll be on the way to achieving your goal!

Click on the bottle for the ingredients.

EXHIBIT B

Home Page

LIPO-THIN™ Features

*Absorbs and binds fat.

*Inhibits LDL cholesterol and boosts HDL cholesterol.

*Promotes healing of ulcers and lesions.

*Antibacterial.

*Antacid properties.

*Helps prevent irritable bowel syndrome.

*Reduces levels of uric acid in the blood.

*Functions as non-digestible dietary fiber.

*Correlates with improved cardiovascular health.

LIPO-THIN™ eliminates fat before your body can absorb it.

Forbidden foods that you craved before beginning your **THIN-THIN DIET™** can still be eaten in moderation because the fat they contain is blocked by the chitin fiber found in **LIPO-THIN™**. This remarkable, naturally occurring ingredient acts like a "fat magnet" or a "fat sponge" in your digestive tract. It forms a non-digestible gel that binds with fat molecules and prevents their absorption into your body.

Click on the bottle for the ingredients.

Vacation Giveaway

Fill out the appropriate surveys below and/or order the THIN-THIN DIET™ and be entered into our weekly and monthly vacation drawings*.

THIS WEEKS WINNER: To be announced 8/25/97

THIS MONTHS WINNER: To be announced 8/25/97

Weekly prizes consist of 2for1 cruises ($800 Value)

Monthly prizes consist of 40 Land/Air/Sea Packages ($10,000 Value)

EXHIBIT B

Order now and get *TRIPLE* entries into our FREE VACATION DRAWING!!

*All winners must be at least 21 years of age at the time the survey/order is submitted. Verification of age will be required prior to awarding of prize.

To lose 5-20 pounds click on the target below.

To lose 20 pounds or more click on the target above.

Order

Order now and get *TRIPLE* entries into our FREE VACATION DRAWING!!

This Website designed by: Richard Carnegie

EXHIBIT B

Yes ☐

8. I'm afraid of any diet that isn't natural and uses stimulants.

Yes ☐

9. I don't want to lose weight only to gain it back.

Yes ☐

10. If I lost weight and could keep it off, I would tell everyone.

Yes ☐

11. Please let us know how you found out about this website. If one of our representatives sent you here please put the name and/or rep number of that person below:

12. When is the best time for a Weight Management Consultant to contact you?

Did you fill out the form completely?

Order now and get *TRIPLE* entries into our FREE VACATION DRAWING!!

Submit Form Reset Form

You've seen the power of NEURO-THIN™ and LIPO-THIN™. Now let me tell you six reasons why this is the best weight-loss program available today.

1. This program works. The THIN-THIN DIET™ is based on the latest scientific studies. It stops cravings and blocks fat absorption.

2. The products are all natural. This is safe, simple, non-addictive nutrition that uses only the highest quality pharmaceutical-grade ingredients.

3. We assign you a coach. We provide the support, at no cost to you.

4. National Support Line. Another free service to answer questions and provide support.

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 New York 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.a. Respondent TrendMark Inc. ("TrendMark") is a Tennessee corporation with its principal office or place of business at 3665 South Perkins, Suite 8, Memphis, TN.

1.b. Respondent William McCormack is an owner and officer of respondent TrendMark. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of TrendMark, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of TrendMark.

1.c. Respondent E. Robert Gates is an owner and officer of respondent TrendMark. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of

TrendMark, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of TrendMark.

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

ORDER

DEFINITIONS

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

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

2. "*Clearly and prominently*" shall mean as follows:

A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. Provided, however, that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation.

B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.

C. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in all of the languages that are present in the advertisement. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

3. Unless otherwise specified, "*respondents*" shall mean TrendMark Inc., its successors and assigns, and its officers William McCormack and E. Robert Gates, individually and as an officers of TrendMark Corp., and each of the above's agents, representatives, and employees.

4. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

5. "*Drug*" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55.

6. "*Food*" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Neuro-Thin™ and Lipo-Thin™, or any other product or program in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that:

A. Such product or program controls appetite;

B. Such product or program causes significant weight loss without a change in diet;

C. Such product or program causes long-term or permanent weight loss;

D. Such product or program prevents or helps prevent the absorption of ingested fat;

E. Such product or program lowers LDL cholesterol or boosts HDL cholesterol;

F. Such product or program promotes healing of ulcers or lesions;

G. Such product or program helps prevent irritable bowel syndrome;

H. Such product or program reduces levels of uric acid in the blood; or

I. Such product or program helps improve cardiovascular health,

unless at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or

B. Respondents disclose, clearly and prominently, and in close proximity to the testimonial or endorsement, either:

1. What the generally expected results would be for users of the product, or

2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

III.

It is further ordered, That respondents, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Neuro-Thin™ or Lipo-Thin™, or any other food, dietary supplement, drug, or device, as "food," "drug," and "device" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any

representation, in any manner, expressly or by implication, about the health benefits, performance, or efficacy of such product, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

IV.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study, or research.

V.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, shall disclose, clearly and prominently, a material connection, when one exists, between a person providing an endorsement for any product or program, as "endorsement" is defined in 16 CFR 255.0(b), and any respondent, or any individual or entity labeling, advertising, promoting, offering for sale, selling, or distributing such product or program. For purposes of this Part, "material connection" shall mean any relationship that might materially affect the weight or credibility of the endorsement and would not reasonably be expected by consumers.

VI.

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

VII.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

VIII.

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

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

IX.

It is further ordered, That, for a period of ten (10) years after the date of issuance of this order, respondent TrendMark, and its successors and assigns, and respondents William McCormack and E. Robert Gates shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

X.

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

XI.

It is further ordered, That each of respondents William McCormack and E. Robert Gates, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XII.

It is further ordered, That respondent TrendMark, and its successors and assigns, and respondents William McCormack and E. Robert Gates shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XIII.

This order will terminate on September 23, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

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

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

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

IN THE MATTER OF

SOUTH LAKE TAHOE LODGING ASSOCIATION

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

Docket C-3830. Complaint, Oct. 7, 1998--Decision, Oct. 7, 1998

This consent order prohibits, among other things, the California-based trade association, representing the interest of motel and hotel operators, from participating in, suggesting, or assisting any agreement, combination or conspiracy with its members to restrict the posting of signs advertising the prices at which its individual members offer lodging. The consent order requires the respondent to amend its by-laws to incorporate the provisions of this order and requires the respondent to distribute copies of the amended by-laws to each of its members.

Participants

For the Commission: *David Newman, Jeffrey Klurfeld, Willard Tom, William Baer, Oliver Grawe,* and *Jonathan Baker.*

For the respondent: *J. Dennis Crabb, Rollston, Henderson, Rasmussen & Crabb*, South Lake Tahoe, CA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, (15 U.S.C. 41, *et seq.*) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that South Lake Tahoe Lodging Association (hereinafter "respondent") has violated the provisions of Section 5 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, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent South Lake Tahoe Lodging Association is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business located at P.O. Box 5746, South Lake Tahoe, California.

PAR. 2. Respondent is a trade association representing the interests of motel and hotel operators and other operators of lodging

properties in the South Lake Tahoe area. For purposes of this complaint, the South Lake Tahoe area comprises those portions of El Dorado County, California, and Douglas County, Nevada, lying within the Lake Tahoe basin. Respondent's members are generally engaged in the offering of short-term lodging in the South Lake Tahoe area. Respondent has approximately 63 members, who, together with certain of respondent's associate members, constitute approximately 70 percent of the available lodging units in the South Lake Tahoe area. Except to the extent that competition has been restrained as alleged herein, respondent's members have been and are now in competition among themselves and with other motels, hotels, and lodging properties.

PAR. 3. Respondent is organized for the purpose of guarding and fostering the interests of its members. Respondent engages in activities that further its members' pecuniary interests. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 4. Respondent's acts and practices, including the acts and practices alleged herein, are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 5. Respondent has been and is acting in agreement, combination or conspiracy with its members, or in agreement, combination or conspiracy with some of its members, to restrain trade in the offering of lodging in the South Lake Tahoe area by eliminating the posting of signs advertising the prices at which its individual members offer such lodging.

PAR. 6. The purposes or effects of the agreement, combination or conspiracy and respondent's acts or practices as described in paragraph five are and have been to restrain competition unreasonably and to deprive consumers of the benefits of competition in one or more of the following ways, among others:

(a) By foreclosing, reducing and restraining competition among providers of lodging in the South Lake Tahoe area;

(b) By depriving consumers of truthful information concerning the prices of lodging in the South Lake Tahoe area; and

(c) By depriving consumers of the benefits of competition among providers of lodging in the South Lake Tahoe area.

PAR. 7. The aforesaid acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. These acts and practices are continuing and will continue in the absence of the relief requested.

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 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 South Lake Tahoe Lodging Association is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business located at P.O. Box 5746, South Lake Tahoe, California.

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

ORDER

I.

It is ordered, That for the purposes of this order, "respondent" or "SLTLA" shall mean the South Lake Tahoe Lodging Association, its predecessors, successors and assigns, and its directors, committees, officers, delegates, representatives, agents and employees.

II.

It is further ordered, That SLTLA, directly or indirectly, or through any person or any corporate or other device, in or in connection with its activities as a trade association, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from carrying out, participating in, inducing, suggesting, urging, encouraging, or assisting any agreement, combination or conspiracy with its members, or agreement, combination or conspiracy with some of its members, to restrict the posting of signs advertising the prices at which its individual members offer lodging;

Provided, however, that nothing in this order shall be construed to prevent respondent or its members from exercising rights protected under the First Amendment to the United States Constitution to petition any federal, state or local government executive agency or legislative body concerning legislation, rules, programs, or procedures, or to participate in any federal, state or local administrative or judicial proceeding.

III.

It is further ordered, That SLTLA shall:

A. Within sixty (60) days after the date this order becomes final, amend its by-laws to incorporate by reference paragraph II of this order, and distribute by first-class mail a copy of the amended by-laws to each of its members;

B. Within thirty (30) days after the date this order becomes final, distribute by first-class mail a copy of this order and the complaint to each of its members;

C. For a period of five (5) years after the date this order becomes final, provide each new member with a copy of this order, the complaint, and the amended by-laws within thirty (30) days of the new member's admission to SLTLA; and

D. Within seventy-five (75) days after the date this order becomes final, and annually thereafter for a period of five (5) years on the anniversary of the date this order becomes final, file with the Secretary of the Commission a verified written report setting forth in detail the manner and form in which SLTLA has complied with and is complying with this order.

IV.

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

V.

It is further ordered, That for the purposes of determining or securing compliance with this order, respondent shall permit any duly authorized representative of the Commission:

A. Upon seven (7) days notice to respondent, to have 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 seven (7) days notice to respondent and without restraint or interference from it, to interview directors, committees, officers, delegates, representatives, agents and employees.

VI.

It is further ordered, That this order shall terminate on October 7, 2018.

IN THE MATTER OF

NORTEK, INC.

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

Docket C-3831. Complaint, Oct. 8, 1998--Decision, Oct. 8, 1998

This consent order requires, among other things, Nortek, Inc., to divest M & S, its wholly-owned subsidiary and seller of hard-wired residential intercoms, to a Commission-approved third-party within six months, and to provide technical assistance at the purchaser's request, for up to one year after the sale. The consent order also requires that Nortek preserves and maintains the competitive viability of M & S and operates M & S separately from Nortek until the divestiture is completed.

Participants

For the Commission: *Paul Block, Gary Cooper, Colleen Lynch, David Keniry, Andrew Caverly, William Baer, Leslie Farber, Hajime Hadeishi,* and *Jonathan Baker.*

For the respondent: *Kevin Arquit, Rogers & Wells*, New York, N.Y. and *John Christie, Hale & Dorr*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Nortek, Inc., a corporation subject to the jurisdiction of the Commission, through its wholly-owned subsidiary NTK Sub, Inc., has agreed to acquire all the outstanding shares of the capital stock of NuTone Inc., a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would be in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. "*Hard-Wired Residential Intercoms*" means electrical devices installed in residences to provide audio-only room-to-room or room-

to-entrance communication or monitoring functions through in-the-wall low voltage wiring, including, but not limited to, such devices that incorporate music features.

II. RESPONDENT

2. Respondent Nortek, 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 at 50 Kennedy Plaza, Providence, Rhode Island. In 1997, Respondent Nortek, Inc. had net sales of $1.13 billion. M & S Systems LP 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 2861 Congressman Lane, Dallas, Texas. Broan Mfg. Co., Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Wisconsin, with its principal place of business located at 926 W. State Street, Hartford, Wisconsin. M & S Systems LP and Broan Mfg. Co., Inc. are wholly-owned subsidiaries of Nortek, Inc.

3. Respondent, through its wholly-owned subsidiaries M & S Systems LP and Broan Mfg. Co., Inc., is engaged in, among other things, the manufacture, production and sale of Hard-Wired Residential Intercoms. In 1997, respondent's total sales of these products were approximately $14 million.

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 business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE ACQUIRED COMPANY

5. NuTone 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 at Madison & Red Banks Roads, Cincinnati, Ohio. In 1997, NuTone Inc.'s net sales were approximately $199 million. NuTone Inc. is a wholly-owned subsidiary of Williams Y&N Holdings, Inc., which 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 700 Nickerson Road, Marlborough, Massachusetts.

Williams Y&N Holdings, Inc. is a wholly-owned subsidiary of Williams U.S. Holdings Inc., which 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 700 Nickerson Road, Marlborough, Massachusetts. Williams U.S. Holdings Inc. is a wholly-owned subsidiary of Williams PLC, which is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at Pentagon House, Sir Frank Whittle Road, Derby DE2 4XA England.

6. NuTone Inc. is engaged in, among other things, the manufacture, production and sale of Hard-Wired Residential Intercoms. In 1997, NuTone Inc.'s total sales of these products were approximately $25 million.

7. NuTone Inc., Williams Y&N Holdings, Inc., Williams U.S. Holdings Inc., and Williams PLC are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

8. On or about March 9, 1998, Williams Y&N Holdings, Inc. and NTK Sub, Inc. entered into a stock purchase and sale agreement whereby NTK Sub, Inc., a wholly-owned subsidiary of respondent Nortek, Inc., agreed to acquire all of the outstanding shares of the capital stock of NuTone Inc. for approximately $242.5 million ("Acquisition").

V. THE RELEVANT MARKETS

9. The relevant line of commerce in which to analyze the effects of the Acquisition is the manufacture, production and sale of Hard-Wired Residential Intercoms.

10. The United States is the relevant geographic market in which to analyze the effects of the Acquisition in the relevant line of commerce.

VI. STRUCTURE OF THE MARKET

11. The parties to the Acquisition are the two leading producers and suppliers of Hard-Wired Residential Intercoms in the United States. Respondent Nortek, Inc. has an approximately 31% share and NuTone Inc. has an approximately 56% share. The market for the manufacture, production and sale of Hard-Wired Residential Intercoms is very highly concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI"), or the two-firm and four-firm concentration ratios. The two-firm concentration ratio is approximately 87%; the four-firm concentration ratio is approximately 98%; and the post-acquisition HHI would be over 7600.

VII. CONDITIONS OF ENTRY

12. Entry into the market for the manufacture, production and sale of Hard-Wired Residential Intercoms would not be timely, likely, or sufficient to deter or counteract the adverse competitive effects described in paragraph thirteen because of, among other things, the difficulty of establishing a network of wholesale distributors, and gaining brand name recognition and customer acceptance.

VIII. EFFECTS OF THE ACQUISITION

13. The effects of the Acquisition, if consummated, 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, in the following ways, among others:

(a) By eliminating actual, direct and substantial competition between respondent Nortek, Inc. and NuTone Inc. in the relevant market;

(b) By increasing the likelihood that respondent Nortek, Inc. will unilaterally exercise market power in the relevant market; and

(c) By increasing the likelihood of or facilitating collusion or coordinated interaction between respondent Nortek, Inc. and its remaining competitors in the relevant market;

each of which increases the likelihood that the prices of Hard-Wired Residential Intercoms will increase, and that services and innovation will decline.

IX. VIOLATIONS CHARGED

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

15. 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 ("Commission"), having initiated an investigation of the acquisition by the respondent Nortek, Inc. ("Nortek"), through its wholly-owned subsidiary NTK Sub, Inc., of all the outstanding shares of the capital stock of NuTone Inc., and respondent having been furnished with a draft of complaint which, if issued by the Commission, would charge respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

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

The Commission, having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that 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, makes the following jurisdictional findings and enters the following order:

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

Delaware with its office and principal place of business located at 50 Kennedy Plaza, Providence, Rhode Island.

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 "*Nortek*" means Nortek, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, including but not limited to M & S Systems LP, and its divisions, groups and affiliates controlled by Nortek, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. M & S Systems LP ("M & S") 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 2861 Congressman Lane, Dallas, Texas. M & S is a wholly-owned subsidiary of Nortek.

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

D. "*Hard-Wired Residential Intercoms*" means electrical devices installed in residences to provide audio-only room-to-room or room-to-entrance communication or monitoring functions through in-the-wall low voltage wiring, including, but not limited to, such devices that incorporate music features.

E. "*Assets To Be Divested*" means M & S and all its assets, properties, business and goodwill, tangible and intangible, including, but not limited to, the following:

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

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, trade secrets, intellectual property, patents and patent applications and formulas, technology, know-how, specifications, designs, engineering, drawings, processes and quality control data;

3. All copyrights, brands, brand names, trade marks and trade names owned or used by M & S, and all rights relating thereto, except that the Broan and Novi trade names and trade marks shall not be included;

4. Inventory and storage capacity;

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

6. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

7. All rights under warranties and guarantees, express or implied;

8. All books, records, and files; and

9. All items of prepaid expense.

F. "*Proposed Acquisition*" means the proposed acquisition by Nortek of all of the shares of the capital stock of NuTone Inc.

II.

It is further ordered, That:

A. Respondent shall divest at no minimum price, absolutely and in good faith, within six (6) months from the date respondent executes the agreement containing consent order, the Assets To Be Divested.

B. Respondent shall divest the Assets To Be Divested 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 Assets To Be Divested is to ensure the continued use of the Assets To Be Divested in the same business in which the Assets To Be Divested are engaged at the time of the Proposed Acquisition, and to remedy the lessening of competition in the manufacture, production and sale of Hard-Wired Residential Intercoms resulting from the Proposed Acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the Assets To Be Divested, respondent shall take such actions as are necessary to maintain the viability and marketability of the Assets To Be Divested and to prevent the

destruction, removal, wasting, deterioration, or impairment of any of the Assets To Be Divested except for ordinary wear and tear.

D. Upon reasonable notice from the acquirer to respondent, respondent shall provide such technical assistance to the acquirer as is reasonably necessary to enable the acquirer to manufacture and sell products in substantially the same manner and quality as they were manufactured and sold prior to the divestiture of the assets described in paragraph I.E of this agreement, except that Nortek shall only be required to provide such technical assistance that is within its operation or control and shall not be required to provide third-party technical assistance. Such assistance shall include reasonable consultation with knowledgeable employees and training at the acquirer's or the respondent's facility, at the acquirer's option, for a period of time sufficient to satisfy the acquirer's management that its personnel are appropriately trained in the skills necessary to manufacture and sell the products. Respondent shall convey all know-how necessary to manufacture and sell the products in substantially the same manner and quality as they were manufactured and sold prior to the divestiture. However, respondent shall not be required to continue providing such assistance for more than one year from the date of the divestiture. Respondent shall charge the acquirer at a rate no more than its own direct costs for providing such technical assistance.

E. Respondent shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Appendix I. The Agreement to Hold Separate shall continue in effect until such time as respondent has divested all the Assets To Be Divested as required by this order.

III.

It is further ordered, That:

A. If Nortek has not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested within the time period in paragraph II, the Commission may appoint a trustee to divest the Assets To Be Divested. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*), or any other statute enforced by the Commission, Nortek shall consent to the appointment of a trustee in such action. Neither the

appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

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

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

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.

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

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

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

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

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

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

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

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

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

11. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.

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

IV.

It is further ordered, That within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until respondent has fully complied with the provisions of paragraphs II or III of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture. The final compliance report shall include a statement that the divestiture has been accomplished in the manner approved by the Commission and shall include the date the divestiture was accomplished.

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 that may affect compliance obligations arising out of the order, 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.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondent shall permit any duly authorized representative of the Commission:

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

B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, employees, agents or independent contractors of respondent.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate is by and between Nortek, Inc. ("Nortek"), a corporation organized and existing under the laws of the State of Delaware, M & S Systems LP ("M & S"), a limited partnership organized and existing under the laws of the State of Delaware and a wholly-owned subsidiary of Nortek, 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.*

PREMISES

Whereas, Nortek, through its wholly-owned subsidiary NTK Sub, Inc., has proposed to acquire all the outstanding shares of the capital stock of NuTone Inc. ("Proposed Acquisition"); and

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

Whereas, Nortek has entered into an Agreement Containing Consent Order ("Consent Agreement"), which requires, among other things, Nortek to divest certain assets of M & S, as defined therein; and

Whereas, if the Commission accepts the Consent Agreement, the Commission will place it on the public record for a period of at least sixty (60) days and subsequently may either withdraw such acceptance or issue and serve its complaint and decision in disposition of the proceeding pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached preserving the status of M & S during the period prior to the final issuance of the Consent Agreement by the Commission (after the 60-day public notice period), there may be interim competitive harm and divestiture or other relief resulting from a proceeding challenging the legality of the Proposed Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, Nortek and M & S entering into this Agreement to Hold Separate shall in no way be construed as an admission by Nortek that the Proposed Acquisition constitutes a violation of any statute; and

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

Now, therefore, upon the understanding that the Commission has not yet determined whether it will challenge the Proposed Acquisition, and in consideration of the Commission's 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, Nortek and M & S agree as follows:

1. Nortek agrees to execute and be bound by the terms of the order contained in the Consent Agreement, as if it were final, from the date Nortek signs the Consent Agreement.

2. The terms capitalized herein shall have the same definitions as in the Consent Agreement.

3. Nortek agrees that from the date the Proposed Acquisition is consummated until the earlier of the dates listed in subparagraphs 3.a - 3.b, it will comply with the provisions of paragraph 4 of this Agreement to Hold Separate:

a. Ten (10) 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 required by the Consent Order has been completed.

4. To ensure the complete independence and viability of M & S and to assure that no competitive information is exchanged between the M & S and Nortek, Nortek shall hold M & S separate and apart on the following terms and conditions:

a. Nortek will cause to be appointed, within three (3) days of the date the Proposed Acquisition is consummated, Richard Denman to manage and maintain M & S who will make no changes to M & S other than changes made in the ordinary course of business. This individual ("the Manager") shall manage M & S independently of the management of Nortek's other businesses. The Manager shall not be involved in any way in the operations or management of any other Nortek business.

b. The Manager shall have exclusive control over M & S, with responsibility for the management of M & S and for maintaining the independence of M & S.

c. Nortek shall not exercise direction or control over, or influence, directly or indirectly, the Manager relating to the operation of M & S; provided, however, that Nortek may exercise only such direction and control over the Manager and M & S as is necessary to assure compliance with this Agreement to Hold Separate and with all applicable laws.

d. Nortek and M & S shall maintain the marketability, viability, and competitiveness of M & S and shall not sell, transfer, encumber it (other than in the normal course of business or to assure compliance with the Consent Agreement), or otherwise impair its marketability, viability or competitiveness.

e. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Proposed Acquisition, defending investigations or litigation, negotiating

and executing agreements to divest the Assets To Be Divested, complying with this Hold Separate Agreement or the consent order, or as necessary to comply with its reporting requirements as a public company, Nortek shall not receive or have access to, or the use of, non-public business information, or any material confidential information about M & S or the activities of the Manager or support service employees involved in the operation of M & S, not in the public domain. In addition, Nortek may receive aggregate financial information relating to M & S, but only to the extent necessary to allow Nortek to prepare federal and state consolidated financial reports or tax returns and to comply with its reporting requirements as a public company. Such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

f. Nortek shall circulate to all its employees involved with M & S, or any line of products that M & S manufactures and sells, and appropriately display, a copy of this Agreement to Hold Separate and the Consent Agreement.

g. If the Manager ceases to act or fails to act diligently, a substitute Manager shall be appointed subject to the Commission's approval.

h. The Manager shall have access to and be informed about all companies who inquire about or seek or propose to buy any of the Assets To Be Divested. M & S may require the Manager to sign a confidentiality agreement prohibiting the disclosure of any material confidential information gained as a result of his or her role as a Manager to anyone other than the Commission.

i. The Manager shall report in writing to the Commission every thirty (30) days concerning his or her efforts to accomplish the purposes of this Agreement to Hold Separate.

5. Nortek waives all rights to contest the validity of this Agreement to Hold Separate.

6. For the purpose of determining or securing compliance with this Agreement to Hold Separate, subject to any legally recognized privilege, and upon written request, and on reasonable notice, to Nortek made to its principal office, Nortek and M & S shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Nortek and M & S, and in the presence of counsel, to inspect any facilities and to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Nortek or M & S relating to compliance with this Agreement to Hold Separate; and

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

7. This Agreement to Hold Separate shall not be binding until accepted by the Commission.