

Complaint

118 F.T.C.

IN THE MATTER OF

BPI ENVIRONMENTAL, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3535. Complaint, Oct. 17, 1994--Decision, Oct. 17, 1994*

This consent order prohibits, among other things, a Massachusetts-based corporation from making unsubstantiated degradability claims for its plastic grocery bags or any of its plastic products in the future. The order also requires the respondent to possess competent and reliable evidence to substantiate claims regarding any environmental benefit of its plastic products.

*Appearances*For the Commission: *Gary S. Cooper.*For the respondent: *Dennis N. Caulfield*, President, North Dighton, MA.

## COMPLAINT

The Federal Trade Commission, having reason to believe that BPI Environmental, Inc., successor to Beresford Packaging, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent BPI Environmental, Inc. ("BPI") is a Delaware corporation with its office and principal place of business located at 155 Myles Standish Boulevard, Taunton, Massachusetts.

Beresford Packaging, Inc. ("Beresford") was a Massachusetts corporation with its office and principal place of business located at 155 Myles Standish Boulevard, Taunton, Massachusetts.

On or about August 2, 1990, Beresford was merged into BPI, at which time the separate corporate existence of Beresford ceased and BPI became the surviving corporation. BPI, as the successor in merger to Beresford, is the legal successor to Beresford and is responsible for the acts or practices of Beresford alleged herein.

PAR. 2. Respondent has advertised, offered for sale, sold, and distributed throughout the United States plastic grocery bags or sacks containing cornstarch additives under such trade names as "BIO-SAC," and plastic grocery bags or sacks containing ultra-violet radiation enhancing additives under such trade names as "PHOTO-SAC."

PAR. 3. The acts or practices of respondent alleged in this complaint constitute the maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent, through the sale of its plastic grocery bags or sacks to third party purchasers, has caused plastic grocery bags or sacks containing product labeling, including, but not necessarily limited to the attached Exhibit A, to be distributed to consumers throughout the United States. In the course and conduct of its business, and for the purpose of promoting the sale or distribution of its plastic grocery bags or sacks, respondent has also disseminated or caused to be disseminated to purchasers of its plastic grocery bags or sacks various advertisements and promotional materials, including, but not necessarily limited to the attached Exhibit B.

PAR. 5. The product labeling, referred to in paragraph four above, an example of which is attached hereto as Exhibit A, contains, among others, the following statements or claims concerning respondent's BIO-SAC plastic grocery sack:

- a. "BIO-DEGRADABLE" [In large, bold typeface]
- b. "TOTALLY BIO-DEGRADABLE"
- c. "DECOMPOSES WITHOUT SUNLIGHT"
- d. "ENVIRONMENTALLY SAFE IN LANDFILLS AND INCINERATION"

PAR. 6. The advertisements or promotional materials, referred to in paragraph four above, an example of which is attached hereto as Exhibit B, contain, among others, the following statements or claims concerning respondent's BIO-SAC plastic grocery sack:

- a. "BIO-SAC IS SAFE FOR THE ENVIRONMENT" [In large typeface]
- b. "Cornstarch additives in the sack are attacked by micro-organisms which ultimately results in complete degradation of the plastic."
- c. "BIO-SAC will completely disappear when buried in landfills in 3 to 6 years"
- d. "BIO-SAC decomposes in the environment without sunlight, naturally"

PAR. 7. Through the use of the statements and claims referred to in paragraphs five and six above, and others not specifically set forth herein, respondent has represented, directly or by implication, that compared to untreated plastic grocery sacks, respondent's BIO-SAC plastic grocery sacks offer a significant environmental benefit when consumers dispose of them as trash.

PAR. 8. Through the use of the statements and claims referred to in paragraph six above, and others not specifically set forth herein, respondent has represented, directly or by implication, that respondent's BIO-SAC plastic grocery sacks will completely break down, decompose, and return to nature within 3 to 6 years when buried in landfills.

PAR. 9. The product labeling referred to in paragraph four above, contains, among others, the following statements or claims concerning respondent's PHOTO-SAC plastic grocery sack:

- a. "DEGRADABLE"
- b. "LANDFILL-SAFE"

PAR. 10. Through the use of the statements and claims referred to in paragraph nine above, and others not specifically set forth herein, respondent has represented, directly or by implication, that:

- a. Compared to untreated plastic grocery sacks, respondent's PHOTO-SAC plastic grocery sacks offer a significant environmental benefit when consumers dispose of them as trash.
- b. Respondent's PHOTO-SAC plastic grocery sacks will completely break down, decompose, and return to nature in a reasonably short period of time after consumers dispose of them as trash.

PAR. 11. Through the use of the statements and claims and the representations referred to in paragraphs five, six, seven, eight, nine and ten above, and others not specifically set forth herein, respondent has represented, directly or by implication, that at the time the representations set forth in paragraphs seven, eight and ten above were made respondent possessed and relied upon a reasonable basis for such representations.

PAR. 12. In truth and in fact, at the time the representations set forth in paragraphs seven, eight, and ten above were made, respon-

dent did not possess and rely upon a reasonable basis for such representations. Therefore, the representation set forth in paragraph eleven above was, and is, false and misleading.

PAR. 13. Respondent's dissemination of the false and misleading representations as alleged in this complaint, and the placement in the hands of others of the means and instrumentalities by and through which others may have used said false and misleading representations, constitute unfair or deceptive acts or practices in or affecting commerce and false advertisements in violation of Section 5(a) of the Federal Trade Commission Act.

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EXHIBIT A

EXHIBIT A

LABELING ON BIO-SAC PLASTIC SACK



beresford packaging inc.

155 myles standish blvd.  
taunton, massachusetts 02780

Tel. (508) 824-8636  
FAX (508) 822-6872  
IN MASS. (800) 641-8900  
OUTSIDE MASS. (800) 628-8206

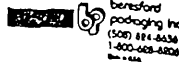
We care about  
our environment

• TOTALLY BIO-DEGRADABLE • DECOMPOSES  
WITHOUT SUNLIGHT • NON TOXIC • ENVIRONMENTALLY  
SAFE IN LANDFILLS AND INCINERATION.

BIO-DEGRADABLE  
BIO-DEGRADABLE  
BIO-DEGRADABLE  
BIO-DEGRADABLE



ADM is a registered trademark of ADM. ADM is a registered trademark of ADM. ADM is a registered trademark of ADM.



Complaint

## EXHIBIT B

EXHIBIT B  
PROMOTIONAL LITERATURE

## BIO-SAC™ IS SAFE FOR THE ENVIRONMENT.

Cornstarch additives in the sack are attacked by microorganisms which ultimately results in complete degradation of the plastic. Therefore:

**BIO-SAC™** will completely disappear when buried in landfills in 3 to 6 years.

**BIO-SAC™** decomposes in the environment without sunlight, naturally.

**BIO-SAC™** is printed with only water based inks.

**BIO-SAC™** leaves no toxic or harsh chemicals to harm the environment.

**BIO-SAC™** is incinerator safe.

**BIO-SAC™** is recyclable.

**BIO-SAC™** is non-leaching in landfills.

**BIO-SAC™** is available only from:

Beresford Packaging Inc.  
155 Myles Standish Blvd.  
Taunton, Massachusetts 02780  
Tel. (508) 824-8636 FAX (508) 822-6872

## 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 complaint which the Boston 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,

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 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 determined that it had reason to believe that the respondent has violated the Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, and having duly considered the recommendations of its staff to modify the consent agreement pursuant to the comments received and the supplemental letter agreement executed by the respondent's counsel, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent BPI Environmental, Inc. ("BPI") is a Delaware corporation with its office and principal place of business located at 155 Myles Standish Boulevard, Taunton, Massachusetts. Beresford Packaging, Inc. ("Beresford") was a Massachusetts corporation with its office and principal place of business located at 155 Myles Standish Boulevard, Taunton, Massachusetts. On or about August 2, 1990, Beresford was merged into BPI, at which time the separate corporate existence of Beresford ceased and BPI became the surviving

corporation. BPI, as the successor in merger to Beresford, is the legal successor to Beresford.

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

## ORDER

### DEFINITION

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

*“BPI Environmental plastic product”* means any product or product packaging composed of plastic, in whole or in part, including but not limited to plastic grocery bags or sacks, plastic T-shirt bags or sacks, plastic produce bags or sacks, and plastic bakery bags or sacks, that is offered for sale, sold, or distributed by respondent, its successors and assigns, or that is distributed to the public by any other person, corporation or third party who has purchased said plastic product from respondent, its successors and assigns, under the “BIO-SAC” or “PHOTO-SAC” brand names or any other brand name of respondent, its successors and assigns; and also means any plastic product that is sold or distributed to the public by third parties under private labeling agreements with respondent, its successors and assigns.

### I.

*It is ordered,* That respondent BPI Environmental, Inc., a corporation, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any BPI Environmental plastic product, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, by word or depiction:

(1) That any such plastic product is “degradable,” “biodegradable,” or “photodegradable”; or,



(2) Through the use of such terms as “degradable,” “biodegradable,” “photodegradable,” or any other substantially similar term or expression, that the degradability of any such plastic product offers any environmental benefits when disposed of as trash in a sanitary landfill, or when incinerated,

unless at the time of making such representation, respondent possesses and relies upon a reasonable basis for such representation, consisting of competent and reliable scientific evidence that substantiates such representation. For purposes of this order, competent and reliable scientific evidence shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

## II.

*It is further ordered,* That respondent BPI Environmental, Inc., a corporation, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any BPI Environmental plastic product, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, by word or depiction, that any such product offers any environmental benefit, unless at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

## III.

*It is further ordered,* That, for a period of three (3) years from the date that any representation covered by this order is last disseminated, respondent shall maintain and upon request make available to the Commission for inspection and copying:

A. All materials that were relied upon to substantiate such representation; and

B. All test reports, studies, surveys, demonstrations or other evidence in respondent's possession or control, that contradict, qualify, or call into question such representation or the basis relied upon for such representation.

#### IV.

*It is further ordered,* That respondent shall distribute a copy of this order within sixty (60) days after service of this order upon them to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation of labeling or the preparation or placement of advertisements or other such sales or promotional materials covered by this order.

#### V.

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

#### VI.

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

Commissioner Varney not participating.

Complaint

118 F.T.C.

IN THE MATTER OF

ADOBE SYSTEMS INCORPORATED, 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-3536. Complaint, Oct. 18, 1994--Decision, Oct. 18, 1994*

This consent order permits the consummation of the acquisition of Aldus Corporation by Adobe Systems Incorporated and requires, among other things, the two software firms to divest Aldus Corporation's FreeHand professional-illustration computer software and name to Altsys Corporation within six months. In addition, for ten years, the order requires the respondents to obtain Commission approval before acquiring any stock or other interest in any firm engaged in the development or sale of professional-illustration software for the Macintosh or Power Macintosh.

#### *Appearances*

For the Commission: *Mary Lou Steptoe and Mark Menna.*

For the respondents: *Wayne D. Collins, Sherman & Sterling, New York, N.Y. and Harvey I. Saferstein, Irell & Manella, Los Angeles, CA.*

#### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission (Commission), having reason to believe that respondent Adobe Systems Incorporated, a corporation, has agreed to acquire the Aldus Corporation, a corporation, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

## I. RESPONDENTS

1. Respondent Adobe Systems Incorporated ("Adobe") 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 at 1585 Charleston Road, Mountain View, California. Adobe, which had sales of approximately \$313.5 million in 1993, develops and markets computer software. Adobe develops and markets, among other graphics software, Illustrator, a professional illustration program.

2. Respondent Aldus Corporation ("Aldus") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its principal place of business at 411 First Avenue South, Seattle, Washington. Aldus, which had sales of approximately \$206.5 million in 1993, is also a producer of computer software, with the majority of its revenue derived from graphics products. Aldus markets FreeHand, a professional illustration program, under license from Altsys Corporation, which initially developed the program and continues to develop it in consultation with Aldus.

## II. JURISDICTION

3. Adobe and Aldus are, and at all time 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.

## III. THE ACQUISITION

4. Adobe and Aldus entered into an agreement on or about March 15, 1994, pursuant to which Adobe intends to acquire essentially all of the stock of Aldus in exchange for Adobe stock valued at the time at approximately \$525 million. On or about July 14, 1994, Adobe and Aldus agreed to revise their March 15 agreement, reducing the value of the proposed acquisition to approximately \$455 million.

## IV. MARKET STRUCTURE

5. One relevant line of the commerce in which to analyze the effects of the proposed acquisition is the development and sale of professional illustration software for use on Apple Macintosh and Power Macintosh computers. Illustrator and FreeHand are the only two products in that market, with combined 1993 worldwide sales of approximately \$60 million and combined 1993 U.S. sales of \$32 million, of which approximately 70 percent was attributed to sales of Illustrator and approximately 30 percent was attributable to sales of FreeHand.

6. Illustrator and FreeHand compete for sales to graphics arts professionals and are the only illustration programs which offer features and performance characteristics enabling graphics professionals efficiently and reliably to create and print high-quality illustrations.

7. Even if the relevant market is broadened to include the development and sale of all illustration software for use on Apple Macintosh and Power Macintosh computers, or is broadened even further to include the development and sale of illustration software for use on IBM-compatible computers with the Windows operating environment, the relevant market is highly concentrated and Adobe and Aldus have a combined share of more than 35% of sales. The products are differentiated and a significant share of sales in the broader markets is accounted for by customers who regard Illustrator and FreeHand as their first and second choices.

8. The relevant geographic market in which to consider the proposed acquisition is either the United States or worldwide. There are no significant impediments to the sale of imported illustration programs in the United States; however, most illustration software is published in the United States.

9. Entry into the market for professional illustration software for use on Apple Macintosh and Power Macintosh computers would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract anticompetitive effects. Developing a professional illustration program is difficult and time consuming. Marketing a technically comparable or even an improved illustration program would be difficult and time consuming because of network externalities associated with Illustrator's and FreeHand's extensive installed user bases. Repositioning of other programs to compete

with Illustrator and FreeHand would also be difficult, time consuming and unlikely.

10. Adobe and Aldus have competed vigorously against each other with respect to price and development of new versions of Illustrator and FreeHand.

#### V. EFFECTS OF THE ACQUISITION

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

- a. It will increase the already high concentration in the relevant markets;
- b. It will eliminate Aldus as a substantial independent competitive force in the relevant markets;
- c. It will eliminate actual, direct and substantial competition between Adobe and Aldus;
- d. It will eliminate competition between the two closest substitutes, Illustrator and FreeHand, among differentiated products in the relevant markets;
- e. It will allow the merged firm unilaterally to exercise market power;
- f. It will allow the merged firm to raise prices, either directly or through reduced discounting, promotions, or service, on either Illustrator or FreeHand or on both products;
- g. It will allow the merged firm to reduce innovation by delaying or reducing product development; and
- h. It will increase the likelihood of coordinated interaction.

#### VI. VIOLATIONS CHARGED

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

13. The proposed acquisition of Aldus by Adobe, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Varney not participating.

## DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by respondent Adobe Systems Incorporated of the stock of respondent Aldus Corporation, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, 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 Adobe Systems Incorporated is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1585 Charleston Road, Mountain View, California.
2. Respondent Aldus Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 411 First Avenue South, Seattle, Washington.

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

## ORDER

### I.

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

A. “*Adobe*” means Adobe Systems Incorporated, its predecessors, divisions, subsidiaries, groups and affiliates that it controls, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. “*Aldus*” means Aldus Corporation, its predecessors, divisions, subsidiaries, groups and affiliates that it controls, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. “*Respondents*” means Adobe and Aldus.

D. “*Altsys*” means Altsys Corporation, a Texas corporation located at 269 West Renner Parkway, Richardson, Texas.

E. “*Professional Illustration Software*” means a complete path-based illustration program native to Apple Macintosh or Power Macintosh computers, targeted to meet the needs of professional customers whose function is to create graphics for internal and external clients to be used in publications printed on a printing press, and excludes Computer Aided Design (CAD) and 3D programs.

F. “*FreeHand*” means the Professional Illustration Software program marketed and sold by Aldus under the name “Aldus FreeHand” pursuant to a Software License Agreement with Altsys dated as of July 20, 1987, as amended (the “License”); Aldus source code incorporated in FreeHand (for use in FreeHand); the name “FreeHand” (but not the name “Aldus”); the FreeHand customer names and addresses together with FreeHand specific information in the Aldus database (but not the underlying database application software); and all marketing, advertising, training and technical support information and materials for FreeHand.

G. “*Illustrator*” means the Professional Illustration Software program marketed and sold by Adobe under the name “Illustrator.”



H. “*Altsys Agreement*” means the July 11, 1994, agreement between Aldus and Altsys.

I. “*Acquisition*” means the stock acquisition of Aldus by Adobe.

J. “*Commission*” means the Federal Trade Commission.

## II.

*It is further ordered,* That, pending divestiture of FreeHand, respondents shall take such action as is necessary to maintain the viability and marketability of FreeHand and shall not cause or permit the destruction, removal from the market, wasting, deterioration or impairment of FreeHand. Pending divestiture of FreeHand, employees of respondents involved in the development, marketing, or sale of Illustrator or FreeHand shall not be involved in the development, marketing or sale of the other product; and employees of respondents involved in the development, marketing or sale of Illustrator or FreeHand shall not receive or have access to or the use of any “material confidential information” not in the public domain, with respect to the other product except as such information would be available to those employees in the normal course of business if the acquisition had not taken place. (“Material confidential information,” as used herein, means competitively sensitive or proprietary information not independently known from sources other than those employees involved in the development, marketing, or sale of FreeHand or Illustrator.)

## III.

*It is further ordered,* That within six (6) months after the acquisition is consummated respondents shall absolutely and in good faith divest FreeHand to Altsys in accordance with the Altsys agreement. Adobe and Aldus shall comply with all the terms of the Altsys agreement, except that the License shall be terminated no later than six (6) months after the acquisition. The purpose of the divestiture is to ensure the continuation of FreeHand as an ongoing viable Professional Illustration Software program, to maintain FreeHand as an independent competitor in the Professional Illustration Software business, and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission’s complaint.

## IV.

*It is further ordered,* That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of paragraphs II and III of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, or have complied with those provisions. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of this order.

## V.

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

A. Acquire any stock, share capital, equity or other interest in any concern, corporate or noncorporate, then engaged in the development or sale of Professional Illustration Software, provided, however, that an acquisition of such stock, share capital, equity or other interest will be exempt from the requirements of this paragraph if it is solely for the purpose of investment and respondents will hold no more than one percent of the shares of any class of security traded on a national securities exchange or authorized to be quoted in an interdealer quotation system of a national securities association registered with the United States Securities and Exchange Commission; or

B. Acquire any Professional Illustration Software or acquire or enter into any exclusive license to Professional Illustration Software; provided, however, that such an acquisition will be exempt from the requirements of this paragraph if the purchase price is less than \$2,000,000 (two million dollars).

## VI.

*It is further ordered,* That, for a period of ten (10) years from the date this order becomes final, unless respondents are required to seek

prior approval from the Commission pursuant to paragraph V, respondents shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, acquire any Professional Illustration Software or any exclusive license to Professional Illustration Software;

Said 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"). Respondents shall provide to the Commission at least ten days prior to acquiring any such interest (hereinafter referred to as the "first waiting period"), both the Notification and supplemental information either in respondents' possession or reasonably available to respondents. Such supplemental information shall include a copy of the proposed acquisition agreement; the names of the principal representatives of each respondent and of the firm respondents desire to acquire who negotiated the acquisition agreement; and any management or strategic plans discussing the proposed acquisition. If, within the first waiting period, representatives of the Commission make a written request for additional information, respondents shall not consummate the acquisition until twenty days after submitting such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a.

#### VII.

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

#### VIII.

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

respondents, respondents shall permit any duly authorized representatives of the Commission:

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

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

#### IX.

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

Commissioner Varney not participating.

## IN THE MATTER OF

## BOULDER RIDGE CABLE TV, ET AL.

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

*Docket C-3537. Complaint, Oct. 19, 1994--Decision, Oct. 19, 1994*

This consent order prohibits, among other things, two California-based cable companies and their officers from enforcing any rights they may have under certain paragraphs of an agreement not to compete, entered into as part of Boulder Ridge's acquisition of Three Palms, Ltd., and prohibits the respondents from entering into similar agreements not to compete with the seller or buyer of a cable television system or cable television service in any geographic area in the future.

*Appearances*

For the Commission: *Ronald B. Rowe, Jill M. Frumin and Mary Lou Steptoe.*

For the respondents: *Burt Braverman, Cole, Raywid & Braverman, Washington, D.C. and Ray Jacobsen, Howrey & Simon, Washington, D.C.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents Boulder Ridge Cable TV, a corporation, and Dean Hazen, individually and as an officer of said corporation, Weststar Communications, Inc., a corporation, and Rodney A. Hansen, individually, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

## I. RESPONDENTS

PARAGRAPH 1. Respondent Boulder Ridge Cable TV (hereinafter "Boulder Ridge") is a corporation organized, existing and doing

business under and by virtue of the laws of the State of California, with its principal office and place of business at 590 Kelly Ave., Half Moon Bay, California. During 1986, 1987, 1988, and 1989, respondent Boulder Ridge, doing business as Desert Cable TV, owned and operated a cable television system in Indian Wells Valley in the State of California.

PAR. 2. Respondent Dean Hazen is the president and majority shareholder of Boulder Ridge, and was the sole shareholder of Boulder Ridge at the time of the acts and practices referred to in paragraphs eight through twelve. His business address is 590 Kelly Ave., Half Moon Bay, California. Respondent Dean Hazen formulates, directs, and controls the acts and practices of respondent Boulder Ridge.

PAR. 3. Respondents Boulder Ridge and Dean Hazen are collectively and individually referred to herein as "Boulder Ridge Entities."

PAR. 4. Respondent Weststar Communications, Inc. (hereinafter "Weststar"), is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business at 2200 Sunrise Blvd., Suite 250, Rancho Cordova, California. Respondent Weststar indirectly owned a substantial interest in Three Palms, Ltd., (hereinafter "Three Palms").

PAR. 5. Respondent Rodney A. Hansen is a shareholder of Weststar and was a partner in Three Palms, Ltd., a dissolved California partnership. His business address is 8217 Hegseth Court, Fair Oaks, California. During 1986, 1987, and 1988, Three Palms or its predecessors owned and operated a cable television system in Indian Wells Valley in the State of California. Respondent Rodney A. Hansen, through his ownership interests in various corporations and partnerships, formulated, directed and controlled the acts and practices of Three Palms.

PAR. 6. Respondents Weststar and Rodney A. Hansen are collectively and individually referred to herein as "Three Palms Entities."

PAR. 7. At all times relevant herein, each of the respondents or their predecessors maintains or has maintained a substantial course of business, including the acts and practices hereinafter set forth, which are in or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

## II. THE NON-COMPETITION AGREEMENT

PAR. 8. On November 16, 1988, respondents entered into an asset purchase agreement in which Boulder Ridge agreed to acquire the assets of Three Palms.

PAR. 9. As Schedule Z to the asset purchase agreement referred to in paragraph eight, respondents entered into a NON-COMPETITION AND NON-DISCLOSURE AGREEMENT, dated November 22, 1988. In paragraphs 3 and 4 of the latter agreement, respondents agreed that: (a) respondents Boulder Ridge Entities would not "own, manage, operate, control, or engage or participate in the ownership, management, operation, or control of, or be connected as a stockholder, officer, director, agent, employee, consultant, partner, joint venturer, or otherwise with any business or organization, any part of which engages in the business of operating a cable television system, subscription television system, multipoint distribution system, direct broadcast system, private operational fixed microwave service, or any similar system or service (or obtaining or holding any authorizations or franchises for any of the foregoing)," located within fifteen (15) miles of the legal boundaries of a community in which respondents Three Palms Entities currently, or at any time in the future, own or operate a cable television system; and (b) respondents Three Palms Entities would not "own, manage, operate, control, or engage or participate in the ownership, management, operation, or control of, or be connected as a stockholder, officer, director, agent, employee, consultant, partner, joint venturer, or otherwise with any business or organization, any part of which engages in the business of operating a cable television system, subscription television system, multipoint distribution system, direct broadcast system, private operational fixed microwave service, or any similar system or service (or obtaining or holding any authorizations or franchises for any of the foregoing)," located within fifteen (15) miles of the legal boundaries of a community in which respondents Boulder Ridge Entities currently, or at any time in the future, own or operate a cable television system.

PAR. 10. On November 22, 1988, Boulder Ridge Entities owned and operated cable television systems on the Island of Oahu in the State of Hawaii and in eight counties in the State of California. On that date, Three Palm Entities owned and operated cable television systems in twenty-two (22) locations in the State of California.

PAR. 11. The purpose, capacity, tendency, or effect of the agreement described in paragraph nine has been, and continues to be, to restrain competition unreasonably and to injure competition and consumers in the following ways, among others:

- A. Preventing the respondents from competing for cable television subscribers;
- B. Restricting the supply and quality of cable television service and of alternate sources of home-video entertainment; and
- C. Maintaining monopoly pricing for cable television service.

### III. VIOLATIONS CHARGED

PAR. 12. The acts or practices of respondents 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 or practices are continuing and will continue or recur 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 respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violation of the Federal Trade Commission Act; and

The respondents, their officers, 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 Boulder Ridge Cable TV (hereafter "Boulder Ridge") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business at 590 Kelly Ave., Half Moon Bay, California.

2. Respondent Dean Hazen is the president and majority shareholder of Boulder Ridge, and was the sole shareholder of Boulder Ridge at the time of the acts and practices being investigated. His business address is 590 Kelly Ave., Half Moon Bay, California.

3. Respondent Weststar Communications, Inc. (hereafter "Weststar") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business at 2200 Sunrise Blvd., Suite 250, Rancho Cordova, California.

4. Respondent Rodney A. Hansen is a shareholder of Weststar and was a partner in Three Palms, Ltd., a dissolved California partnership. His business address is 8217 Hegseth Court, Fair Oaks, California.

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

#### ORDER

##### I.

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

(A) "*Boulder Ridge*" means (1) Boulder Ridge Cable TV, and its predecessors, successors and assigns, subsidiaries, and divisions, and their respective directors, officers, employees, agents, and representatives; and (2) partnerships, joint ventures, groups and affiliates that

Boulder Ridge Cable TV, controls, directly or indirectly, and their respective directors, officers, employees, agents, and representatives.

(B) "*Dean Hazen*" means Dean Hazen, individually, and all partnerships, joint ventures, and corporations that Dean Hazen controls, directly or indirectly, and their respective directors, officers, employees, agents, and representatives.

(C) "*Three Palms, Ltd.*," means (1) Three Palms, Ltd, and its predecessors, successors and assigns, subsidiaries, and divisions, and their respective directors, officers, employees, agents, and representatives; and (2) partnerships, joint ventures, groups and affiliates that Three Palms, Ltd., controlled, directly or indirectly, and their respective directors, officers, employees, agents, and representatives.

(D) "*Weststar Communications, Inc.*" means (1) Weststar Communications, Inc., and its predecessors, successors and assigns, subsidiaries, divisions, and their respective directors, officers, employees, agents, and representatives; and (2), partnerships, joint ventures, groups and affiliates that Weststar Communications, Inc., controls, directly or indirectly, and their respective directors, officers, employees, agents, and representatives.

(E) "*Rodney A. Hansen*" means Rodney A. Hansen, individually, and all partnerships, joint ventures, and corporations that Rodney A. Hansen controls, directly or indirectly, and their respective directors, officers, employees, agents, and representatives.

(F) "*Respondents*" means Boulder Ridge Cable TV, Dean Hazen, Weststar Communications, Inc., and Rodney A. Hansen.

(G) "*Cable Television Service*" means the delivery to the home of various entertainment and informational programming via a cable television system.

(H) "*Cable Television System*" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable television service, which includes video programming and which is provided to multiple subscribers within a community. The term does not include: (a) a facility that serves only to retransmit the television signals of one or more television broadcast stations; or (b) a facility that serves only subscribers in one or more multiple dwelling units under common ownership, control, or management, unless such facility or facilities uses a public right-of-way.

(I) "*NON-COMPETITION AGREEMENT*" means the "*NON-COMPETITION AND NON-DISCLOSURE AGREEMENT*" signed by respondents and Three Palms, Ltd., on November 22, 1988.

(J) "*Agreeing not to compete*" means agreeing directly or indirectly not to own, manage, operate, control (or engage or participate in the ownership, management, operation, or control of) a cable television system, subscription television system, multipoint distribution system, direct broadcast system, private operational fixed microwave service, or any similar multi-channel video distribution system or service (or obtaining or holding any authorizations or franchises for any of the foregoing) in competition with another person.

## II.

*It is ordered*, That respondents, in connection with the purchase, sale, or operation of any cable television system or cable television service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from enforcing any rights they may have under paragraphs three and four of the *NON-COMPETITION AGREEMENT*.

## III.

*It is further ordered*, That respondents, in the acquisition or sale of any cable television system or cable television service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from agreeing not to compete with the seller or buyer of such cable television system or cable television service in any geographic area. Provided, however, that this paragraph shall not apply to any agreement made in connection with the lawful acquisition or sale of a cable television system or cable television service in which the seller agrees not to compete with the buyer or buyers, or the buyer agrees not to compete with the seller or sellers, in a geographic area that is reasonably related to:

(A) The cable television system or cable television service that is being acquired or sold;

(B) A proximately located system or service of the buyer with which the cable television system or cable television service that is being acquired will be jointly operated; or

(C) A proximately located system or service of the seller with which the cable television system or cable television service that is being sold previously was jointly operated.

#### IV.

*It is further ordered,* That, within sixty (60) days after the date this order becomes final, and annually thereafter for a period of three (3) years on the anniversary date this order becomes final, and at such other times as the Commission or its staff may request, each respondent shall file with the Secretary of the Federal Trade Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying and has complied with this order.

#### V.

*It is further ordered,* That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on five days notice to any respondent, made to its principal office, such respondent shall permit any duly authorized representatives of the Federal Trade Commission:

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

(B) Without restraint or interference from respondent, an opportunity to interview officers or employees of respondent, who may have counsel present, regarding any matters contained in this order.

## VI.

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

Commissioner Varney not participating.

## IN THE MATTER OF

## HEALTHTRUST, INC. - THE HOSPITAL COMPANY

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

*Docket C-3538. Complaint, Oct. 20, 1994--Decision, Oct. 20, 1994*

This consent order requires, among other things, a Tennessee-based corporation, that provides acute care hospital services, to divest Holy Cross Hospital of Salt Lake City to a Commission approved acquirer; to complete the divestiture within six months of the date of the order; and to consent to the appointment of a trustee, if the divestiture is not completed within six months. In addition, the consent order requires the respondent, for ten years, to obtain prior Commission approval before purchasing any acute care hospital or any hospital, medical or surgical diagnostic or treatment service or facility in the Utah counties of Weber, Davis, and Salt Lake.

*Appearances*

For the Commission: *Mark J. Horoschak, Philip M. Eisenstat and Rendell Davis.*

For the respondent: *Phil Proger, Jones, Day, Reavis & Pogue, Washington, D.C. and G. Scott Rayson, Waller, Lansden, Dortch & Davis, Nashville, TN.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Healthtrust, Inc. - The Hospital Company ("Healthtrust"), a corporation subject to the jurisdiction of the Commission, has entered into an agreement whereby Healthtrust will acquire certain assets from Holy Cross Health System Corporation; that the acquisition agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its

complaint, pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

#### DEFINITIONS

PARAGRAPH 1. For purposes of this complaint, the following definitions shall apply:

a. "*Acute care hospital*" means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized medical staff, that provides 24-hour inpatient care, as well as outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

b. "*Acute care inpatient hospital services*" means 24-hour inpatient health care, and related medical or surgical diagnostic and treatment services, for physically injured or sick persons with short-term or episodic health problems or infirmities.

#### THE PARTIES TO THE PROPOSED ACQUISITION

PAR. 2. Healthtrust, Inc. - The Hospital Company ("Healthtrust") is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal place of business at 4525 Harding Road, Nashville, Tennessee. Healthtrust and/or its subsidiaries own and operate six acute care hospitals in Utah, including Lakeview Hospital in Bountiful, Pioneer Valley Hospital in West Valley City, and Mountain View Hospital in Payson.

PAR. 3. Holy Cross Health System Corporation ("Holy Cross") is a corporation organized, existing, and doing business under and by virtue of the laws of Indiana, with its principal place of business at 3606 East Jefferson Blvd., South Bend, Indiana. Holy Cross Health Services of Utah, a wholly-owned subsidiary of Holy Cross, owns three acute care hospitals in Utah: St. Benedict's Hospital in Ogden, Holy Cross Hospital in Salt Lake City, and Holy Cross-Jordan Valley Hospital in West Jordan.

## JURISDICTION

PAR. 4. Healthtrust and Holy Cross 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. The businesses of Healthtrust and Holy Cross are, and at all times relevant herein, have been, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

## THE PROPOSED ACQUISITION

PAR. 5. On or about December 3, 1993, Healthtrust and Holy Cross entered into an agreement whereby Healthtrust will acquire from Holy Cross substantially all the assets of Holy Cross hospitals in Utah and related Holy Cross assets in Utah. The total value of the Holy Cross assets to be acquired by Healthtrust is approximately \$125 million.

## NATURE OF TRADE AND COMMERCE

PAR. 6. For the purposes of this complaint, the relevant line of commerce in which to analyze the proposed acquisition is the production and sale of acute care inpatient hospital services and/or any narrower group of services contained therein.

PAR. 7. For the purposes of this complaint, the relevant sections of the country are the Salt Lake City area, encompassing Salt Lake County and southern Davis County; and the Salt Lake City - Ogden Metropolitan Statistical Area, an area encompassing three contiguous counties in northern Utah: Weber County, Davis County, and Salt Lake County.

## MARKET STRUCTURE

PAR. 8. The relevant markets -- *i.e.* the relevant line of commerce in the relevant sections of the country -- are highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or by four-firm concentration ratios.



## ENTRY CONDITIONS

PAR. 9. Entry into the relevant markets is difficult. In particular, substantial lead times are required to establish a new acute care hospital in the relevant sections of the country.

## COMPETITION

PAR. 10. In the relevant markets, Healthtrust and Holy Cross acute care hospitals are actual and potential competitors.

## EFFECT

PAR. 11. The effect of the aforesaid acquisition may be substantially to lessen competition in the relevant markets in the following ways, among others:

- (a) It would eliminate actual and potential competition between Healthtrust's and Holy Cross' hospitals in the relevant markets;
- (b) It would significantly increase the already high level of concentration in the relevant markets;
- (c) It would eliminate Holy Cross' hospitals from the relevant markets as a substantial independent competitive force;
- (d) It may increase the possibility of collusion or interdependent coordination by the remaining firms in the relevant markets; and
- (e) It may deny patients, physicians, third-party payers, and other consumers of hospital services in the relevant markets the benefits of free and open competition based on price, quality, and service.

## VIOLATIONS CHARGED

PAR. 12. The acquisition agreement described in paragraph five above violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 13. The acquisition described in paragraph five, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation into the proposed acquisition by Healthtrust, Inc. - The Hospital Company of assets of Holy Cross Health System Corporation, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of Section 7 of the Clayton Act, as amended, 15 U. S. C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

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

1. Respondent Healthtrust, Inc. - The Hospital Company 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 at 4525 Harding Road, in the City of Nashville in the State of Tennessee.

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

## ORDER

## I.

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

A. "*Respondent*" or "*Healthtrust*" means Healthtrust, Inc. - The Hospital Company, its partnerships, joint ventures, companies, subsidiaries, divisions, groups and affiliates controlled by respondent, and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

B. The "*acquisition*" means the acquisition by Healthtrust of certain assets of Holy Cross Health System Corporation including Holy Cross Hospital of Salt Lake City, Holy Cross-Jordan Valley Hospital, and St. Benedict's Hospital.

C. "*Acute care hospital*" means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized medical staff, that provides 24-hour inpatient care, as well as outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

D. To "*operate an acute care hospital*" means to own, lease, manage, or otherwise control or direct the operations of an acute care hospital, directly or indirectly.

E. "*Affiliate*" means any entity whose management and policies are controlled in any way, directly or indirectly, by the person with which it is affiliated.

F. "*Person*" means any natural person, partnership, corporation, company, association, trust, joint venture or other business or legal entity, including any governmental agency.

G. "*Three-County Area*" means the area consisting of the following three Utah counties: Salt Lake County, Davis County, and Weber County.

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

I. "*Schedule A Assets*" means assets acquired by the respondent and listed on the attached Schedule A.

J. "*Viability and competitiveness*" means that the Schedule A Assets are capable of functioning independently and competitively.

K. “*Assets and Businesses*” include, but are not limited to, all assets, properties, businesses, rights, privileges, contractual interests, licenses, and goodwill of whatever nature, tangible and intangible, including, without limitation, the following:

1. All real property interests (including fee simple interests and real property leasehold interests, whether as lessor or lessee), together with all buildings, improvements and fixtures located thereon, all construction in progress thereat, all appurtenances thereto, and all licenses and permits related thereto (collectively, the “Real Property”);

2. All contracts and agreements with physicians, other health care providers, unions, third-party payors, HMOs, customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, cosigners and consignees (collectively, the “contracts”);

3. All machinery, equipment, fixtures, vehicles, furniture, inventories and supplies (other than such inventories and supplies as are used in the ordinary course of business during the time that Healthtrust owns the assets) (collectively, the “Personal Property”);

4. All research materials, technical information, management information systems, software, software licenses, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes, and quality control data (collectively, the “Intangible Personal Property”);

5. All books, records and files, excluding, however, the corporate minute books and tax records of Healthtrust and its Affiliates; and

6. All prepaid expenses.

## II.

*It is ordered, That:*

A. Respondent shall divest, absolutely and in good faith, within six (6) months of the date this order becomes final, the Schedule A Assets, and shall also divest such additional assets and businesses ancillary to Holy Cross Hospital of Salt Lake City, Utah (excluding Pioneer Valley Hospital, Lakeview Hospital, Jordan Valley Hospital, St. Benedict’s Hospital, Salt Lake Industrial Clinic, and West Jordan

Clinic), and effect such arrangements as are necessary to assure the marketability and the viability and competitiveness of the Schedule A Assets.

B. Respondent shall divest the Schedule A Assets only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Schedule A Assets is to ensure the continuation of the Schedule A Assets as an ongoing, viable acute care hospital and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

C. Respondent shall comply with all terms of the Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I. Said agreement shall continue in effect until such time as respondent has fulfilled the divestiture requirements of this order or until such other time as the Agreement to Hold Separate provides.

D. Pending divestiture of the Schedule A Assets, respondent shall take such actions as are necessary to maintain the viability and competitiveness and the marketability of the Schedule A Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Scheduled Assets except for ordinary wear and tear.

E. A condition of approval by the Commission of the divestiture shall be a written agreement by the acquirer of the Schedule A Assets that it will not sell for a period of ten (10) years from the date of divestiture, directly or indirectly, through subsidiaries, partnerships or otherwise, without the prior approval of the Commission, the Schedule A Assets to any person who operates, or will operate immediately following the sale, any other acute care hospital in the Three-County Area. Provided, however, that the acquirer is not required to seek prior approval of the Commission for the sale of any of the assets identified in Part II of Schedule A.

### III.

*It is further ordered, That:*

A. If the respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the Schedule A Assets, in accordance with this order, within six (6) months of the date this order becomes final, the Commission may appoint a trustee

to divest the Schedule A Assets. In the event that the Commission or the Attorney General brings an action for any failure to comply with this order or in any way relating to the acquisition, 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, the 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 available to it 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, the 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 the 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 Schedule A Assets.

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

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3. to accomplish the divestiture, 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 Schedule A Assets or to any other relevant information as the trustee may request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the 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 the respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by respondent from among those approved by the Commission.

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

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses

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

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

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

11. The trustee shall have no obligation or authority to operate or maintain the Schedule A Assets.

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

#### IV.

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

A. Acquire any stock, share capital, equity, or other interest in any person presently engaged in, or within the two years preceding such acquisition engaged in, operating an acute care hospital in the Three-County Area;

B. Acquire any assets used, or previously used, in the Three-County Area (and still suitable for use) for operating an acute care hospital from any person presently engaged in, or within the two years preceding such acquisition engaged in, operating an acute care hospital in the Three-County Area;

C. Enter into any agreement or other arrangement to obtain direct or indirect ownership, management, or control of any acute care hospital, or any part thereof, in the Three-County Area,



including but not limited to, a lease of or management contract for any such acute care hospital;

D. Acquire or otherwise obtain the right to designate directly or indirectly directors or trustees of any acute care hospital in the Three-County Area;

E. Permit any acute care hospital it operates in the Three-County Area to be acquired by any person that operates, or will operate immediately following such acquisition, any other acute care hospital in the Three-County Area.

Provided, however, that such prior approval shall not be required for:

1. The establishment of a new hospital service or facility (other than as a replacement for a hospital service or facility, not operated by respondent, in the Three-County Area, pursuant to an agreement or understanding between respondent and the person operating the replaced service or facility);

2. Any transaction otherwise subject to this paragraph IV of this order if the fair market value of (or, in case of an asset acquisition, the consideration to be paid for) the acute care hospital or part thereof to be acquired does not exceed one million dollars (\$1,000,000); or

3. The acquisition of products or services in the ordinary course of business.

#### V.

*It is further ordered,* That, for a period of ten (10) years from the date this order becomes final, respondent shall not, directly or indirectly, through subsidiaries, partnerships or otherwise, without providing advance written notification to the Commission, consummate any joint venture or other arrangement with any other acute care hospital in the Three-County Area for the joint establishment or operation of any new acute care hospital, hospital medical or surgical diagnostic or treatment service or facility, or part thereof, in the Three-County Area. Such advance notification shall be filed immediately upon respondent's issuance of a letter of intent for, or execution of an agreement to enter into, such a transaction, whichever is earlier.

Said notification required by this paragraph V of this order 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), 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 need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent is not required to observe any waiting period for said notification required by this paragraph V.

Respondent shall comply with reasonable requests by the Commission staff for additional information concerning any transaction subject to this paragraph V of this order, within fifteen (15) days of service of such requests.

Provided, however, that no transaction shall be subject to this paragraph V of this order if:

1. The fair market value of the assets to be contributed to the joint venture or other arrangement by acute care hospitals not operated by respondent does not exceed one million dollars (\$1,000,000);
2. The service, facility or part thereof to be established or operated in a transaction subject to this order is to engage in no activities other than the provision of the following services: laundry; data processing; purchasing; materials management; billing and collection; dietary; industrial engineering; maintenance; printing; security; records management; laboratory testing; personnel education, testing, or training; or health care financing (such as through a health maintenance organization or preferred provider organization); or
3. Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a, or prior approval by the Commission is required, and has been requested, pursuant to paragraph IV of this order.

## VI.

*It is further ordered,* That, for a period of ten (10) years from the date this order becomes final, respondent shall not permit all or any substantial part of any acute care hospital it operates in the Three-County Area to be acquired by any other person (except pursuant to the divestiture required by paragraph II of this order) unless the acquiring person files with the Commission, prior to the closing of such acquisition, a written agreement to be bound by the provisions

of this order, which agreement respondent shall require as a condition precedent to the acquisition.

## VII.

*It is further ordered, That:*

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until the respondent has fully complied with paragraph II of this order, the 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 paragraph II 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 paragraph II of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

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

## VIII.

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

## IX.

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

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

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

## SCHEDULE A

The assets to be divested ("Schedule A Assets") shall consist of, without limitation, all Assets and Businesses relating to Holy Cross Hospital of Salt Lake City (the "Hospital"), which were acquired by Healthtrust pursuant to the acquisition (including all improvements, additions and enhancements made to such assets prior to divestiture), and shall include, without limitation, the Assets and Businesses of the following:

## PART I

1. Holy Cross Hospital of Salt Lake City, 1050 East South Temple, Salt Lake City;

## PART II

2. Moreau Medical Building, 1002 East South Temple, Salt Lake City;

3. Salt Lake Professional Building, 24 South 1100 East, Salt Lake City;

4. Foothill Family Clinic, 2295 Foothill Drive, Salt Lake City;

5. Eastridge Clinic medical office suites, 160 South 10th East, Salt Lake City;

6. Southeast Health Center, 1275 East Fort Union Boulevard, Midvale, Utah (Southeast Center for Family Medicine; Holy Cross Medical Park);

7. Southwest Health Center, 1990 West 7800 South, West Jordan Valley, Utah (Southwest Center for Family Medicine; Southwest Emergency Clinic);

8. The Magna Health Clinic, 8370 West 3500 South, Magna, Utah; and

9. The Hospital's Park City, Utah Ambulance Service.

10. The Real Property located at:

A. 45 South 1100 East, Salt Lake City - approximately .227 acres with house thereon;

B. 57 South 1100 East, Salt Lake City - approximately .21 acres with house thereon;

C. 59 South 1100 East, Salt Lake City - approximately .086 acres with house/office thereon;

D. 42 South 1000 East, Salt Lake City - approximately .1875 acres of unimproved land;

11. Option to purchase four contiguous residential properties consisting of approximately .54 acres in the aggregate located at approximately 1014 through 1026 East 100 South, Salt Lake City.

\* \* \*

*It is further provided,* That to the extent that any of the contracts, warranties with respect to Personal Property, licenses or other interests in the Intangible Personal Property, or other Schedule A Assets:

(A) Also applies to facilities or operations other than those included in the Schedule A Assets, then during the period (the "Contract Period") beginning on the closing date of the acquisition and ending on the earlier of (1) the expiration of the term of the given contract or other right and (2) the second anniversary of Healthtrust's divestiture of the Schedule A Assets, Healthtrust, at the request of the owner or acquirer of the Schedule A Assets, shall use its reasonable best efforts to cause the services, property or other benefits provided or made available under such a contract or other Schedule A Asset to continue to be available to the owner or acquirer of the Schedule A Assets on terms and conditions substantially similar to those presently in effect; or

(B) Requires the consent of a third party in order to transfer or assign such contract or other Schedule A Asset, then Healthtrust, at the request of the owner or acquirer of the Schedule A Assets, shall use its reasonable best efforts to obtain such consent and, if such consent cannot be obtained, to cooperate in any reasonable arrangement with the owner or acquirer of the Schedule A Assets designed to provide to such owner or acquirer the benefits of the given contract or other Schedule A Asset during the Contract Period on terms and conditions substantially similar to those presently in effect.

Commissioner Varney not participating.

#### APPENDIX I

##### AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Agreement") is by and between Healthtrust, Inc. - The Hospital Company ("respondent" or "Healthtrust"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 4525 Harding Road, Nashville, Tennessee; and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

*Whereas*, on or about December 3, 1993, respondent entered into an agreement with Holy Cross Health System Corporation ("Holy Cross"), an Indiana corporation, whereby respondent will acquire from Holy Cross certain Holy Cross assets in Utah (hereinafter the "Acquisition"); and

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

*Whereas*, if the Commission accepts the Agreement Containing Consent Order ("Consent Order"), which would require the divestiture of certain assets listed in Schedule A of the Consent Order ("Schedule A Assets"), including Holy Cross Hospital ("HCH") in Salt Lake City, Utah, the Commission must place the Consent Order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

*Whereas*, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the Schedule A Assets during the period prior to the final acceptance and issuance of the Consent Order by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

*Whereas*, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Schedule A Assets as described in paragraph II of the Consent Order and the Commission's right to have HCH continue as a viable independent acute care hospital; and

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

- (i) Preserve HCH as a viable independent acute care hospital pending its divestiture, and
- (ii) Remedy any anticompetitive effects of the Acquisition;

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

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

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

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

2. Respondent agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 2.a - 2.b, it will comply with the provisions of paragraph 3 of this Agreement:

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

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

3. Respondent will hold the Schedule A Assets as they are presently constituted separate and apart on the following terms and conditions:

a. The Schedule A Assets, as they are presently constituted, shall be held separate and apart and shall be operated independently of respondent (meaning here and hereinafter, Healthtrust excluding the Schedule A Assets) except to the extent that respondent must exercise direction and control over the Schedule A Assets to assure compliance with this Agreement or the Consent Order, and except as otherwise provided in this Agreement.

b. Prior to or simultaneously with its acquisition of the Holy Cross assets in Utah, respondent shall organize a distinct and separate legal entity, either a corporation, limited liability company, general or limited partnership ("New Company") and adopt constituent documents for the New Company that are not inconsistent with other provisions of this Agreement or the Consent Order. Respondent shall transfer all ownership and control of all Schedule A Assets to the New Company.

c. The board of directors of the New Company, or, in the event respondent organizes an entity other than a corporation, the governing body of the entity ("New Company Board") shall have five members. Respondent may elect the members of the New Company Board; provided, however, that the New Company Board shall include no more than two members who are a director, officer, employee, or agent of respondent ("the respondent's New Company Board member(s)"). The New Company Board shall include a chairman who is independent of respondent and is competent to assure the continued viability and competitiveness of the Schedule A Assets. Meetings of the New Company Board during the term of this



Agreement shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Agreement.

d. Respondent shall not exercise direction or control over, or influence directly or indirectly, the Schedule A Assets, the independent Chairman of the Board of the New Company, the New Board, or the New Company or any of its operations or businesses; provided, however, that respondent may exercise only such direction and control over the New Company as is necessary to assure compliance with this Agreement or the Consent Order.

e. Respondent shall maintain the viability and competitiveness and the marketability of the Schedule A Assets and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair their viability and competitiveness or their marketability.

f. Except for the respondent's New Company Board members, respondent shall not permit any director, officer, employee, or agent of respondent to also be a director, officer, or employee of the New Company.

g. The New Company shall be staffed with sufficient employees to maintain the viability and competitiveness of the Schedule A Assets, which employees shall be selected from Holy Cross' existing employee base and may also be hired from sources other than Holy Cross.

h. With the exception of the respondent's New Company Board Members, respondent shall not change the composition of the New Company Board unless the independent chairman consents. The independent chairman shall have power to remove members of the New Company Board for cause. Respondent shall not change the composition of the management of the New Company except that the New Company Board shall have the power to remove management employees for cause.

i. If the independent chairman ceases to act or fails to act diligently, a substitute chairman shall be appointed in the same manner as provided in paragraph 3.c. of this Agreement.

j. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or defending or prosecuting litigation, or negotiating agreements to divest assets, or complying with this Agreement or the Consent Order, respondent shall not receive or have access to, or use or continue to use, any material confidential

information not in the public domain about the New Company or the activities of the New Company Board. Nor shall the New Company or the New Company Board receive or have access to, or use or continue to use, any material confidential information not in the public domain about respondent and relating to respondent's acute care hospitals in Utah. Respondent may receive on a regular basis aggregate financial information relating to the New Company necessary and essential to allow respondent to prepare United States consolidated financial reports, tax returns and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to respondent from sources other than the New Company, and includes but is not limited to customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.)

k. Except as permitted by this Agreement, the respondent's New Company Board members shall not in their capacity as New Company Board members, receive material confidential information and shall not disclose any such information received under this Agreement to respondent or use it to obtain any advantage for respondent. The respondent's New Company Board members shall enter a confidentiality agreement prohibiting disclosure of material confidential information. The respondent's New Company Board members shall participate in matters that come before the New Company Board only for the limited purposes of considering a capital investment or other transaction exceeding \$250,000, approving any proposed budget and operating plans, and carrying out respondent's responsibilities under this Agreement and the Consent Order. Except as permitted by this Agreement, the respondent's New Company Board members shall not participate in any matter, or attempt to influence the votes, of the other members of the New Company Board with respect to matters, that would involve a conflict of interest if respondent and the New Company were separate and independent entities.

1. If necessary to assure compliance with the terms of this Agreement, the Consent Agreement, or the Consent Order, respondent may, but is not required to, assign an individual to the New Company for the purpose of overseeing such compliance ("on-site person"). The on-site person shall have access to all officers and

employees of the New Company and such records of the New Company as he deems necessary and reasonable to assure compliance. Such individual shall enter into a confidentiality agreement prohibiting disclosure of material confidential information.

m. Any material transaction of the New Company that is out of the ordinary course of business must be approved by a majority vote of the New Company Board; provided that the New Company shall engage in no transaction, material or otherwise, that is precluded by this Agreement.

n. All earnings and profits of the New Company shall be retained separately in the New Company. If necessary, respondent shall provide the New Company with sufficient working capital to operate at its current rate of operation, and to carry out any capital improvement plans for the New Company which have already been approved.

o. During the period commencing on the date this Agreement is effective and terminating on the earlier of (i) six months after the date the Consent Order becomes final, or (ii) the date contemplated by subparagraph 2.b (the "Initial Divestiture Period"), respondent shall make available for use by the New Company funds sufficient to perform all necessary routine maintenance to, and replacements of, the Schedule A Assets ("normal repair and replacements"). After termination of the Initial Divestiture Period and until the earlier of the date contemplated by either subparagraph 2.a or 2.b, respondent shall make available for use by the New Company each year an amount not less than that required for normal repair and replacement, plus \$1,000,000 for capital improvements to the Schedule A Assets, unless a smaller amount is requested or required by the New Company, in its sole discretion, for capital expenditures. Provided, however, that in any event, respondent shall provide the New Company with such funds as are necessary to maintain the viability and competitiveness and marketability of the Schedule A Assets.

4. Should the Federal Trade Commission seek in any proceeding to compel respondent to divest any of the Schedule A Assets, as provided in the Consent Order, or to seek any other injunctive or equitable relief for any failure to comply with the Consent Order or this Agreement, or in any way relating to the Acquisition, as defined in the draft complaint, respondent shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust

Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Respondent also waives all rights to contest the validity of this Agreement.

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

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

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

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

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

## IN THE MATTER OF

## AMERICAN BODY ARMOR AND EQUIPMENT, INC.

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

*Docket C-3539. Complaint, Oct. 21, 1994--Decision, Oct. 21, 1994*

This consent order prohibits, among other things, a Florida-based company from misrepresenting that its bullet-resistant garments are certified, approved, endorsed, or sanctioned by any government body or private organization. In addition, the respondent is required to contact certain past purchasers and offer to provide replacement vests at a reduced cost.

*Appearances*

For the Commission: *Lisa B. Kopchik, Joel C. Winston and Maureen Enright.*

For the respondent: *Eugene Gulland, Covington & Burling, Washington, D.C.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that American Body Armor and Equipment, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent American Body Armor and Equipment, Inc. is a Florida corporation, with its office and principal place of business located at 85 Nassau Place, Yulee, Florida.

PAR. 2. Respondent has manufactured, advertised, marketed, offered for sale, sold and distributed personal body armor, also known as bullet-resistant vests, to the public, including police departments and other law enforcement agencies. Body armor consists of a ballistic panel made up of a number of layers of ballistic resistant fabric, enclosed in a cover. Body armor is intended to protect the wearer from gunfire.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce.

PAR. 4. In the course of advertising, promoting, soliciting the sale of and selling its body armor, respondent has represented, directly or by implication, to purchasers and potential purchasers of its armor, that its body armor has been certified by the National Institute of Justice ("NIJ") as complying with NIJ's current voluntary performance standard, Ballistic Resistance of Police Body Armor, (Standard 0101.03) (April 1987) (".03 Standard").

PAR. 5. In truth and in fact, in numerous instances, the body armor respondent has sold has not been certified by NIJ as complying with the .03 Standard, because said body armor differs significantly from that certified by NIJ in certain respects, including but not limited to one or more of the following:

- a. Waterproofing on the ballistic panel;
- b. Configuration of stitching on the ballistic panel, including label-stitching through the ballistic panel;
- c. The type of material used on the vest covers;
- d. The presence or absence of foam padding on the vest cover;
- e. The removability of the cover from the ballistic panel; and
- f. The method of closure of the vest (*e.g.*, front closure or side closure).

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

PAR. 6. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials for body armor treated with "Black Magic" treatment. Typical of respondent's advertisements and promotional materials, but not necessarily all-inclusive thereof, are the attached Exhibits A through D. The aforesaid advertisements and promotional materials contain the following statements:

1. "Black Magic ... strengthens Kevlar, the material used in soft body armor, better than any other treatment. Wear the best." (Exhibit A)
2. "Less Layers, More Protection ... The more layers of Kevlar ... the better protection - until Black Magic. Black Magic ... toughener strengthens our vest to eliminate heavy, uncomfortable and unnecessary layers with no loss of performance." (Exhibit B) (emphasis in original)

3. "The ballistic technicians at American Body Armor, manufacturer of light-weight police armor, invented Black Magic .... This technological breakthrough is unparalleled in the industry. When Kevlar is treated with Black Magic, a chemical fusion takes place. The fusion of Kevlar and Black Magic produces a tougher, stronger and longer lasting product. A Level II garment with Black Magic treated Kevlar contains only 17 plies. The extra weight and discomfort of 5-7 unnecessary plies of Kevlar has been eliminated, with no loss of ballistic performance. In fact, American Body Armor effectively exceeds current U.S. Government backface deformation criteria." (Exhibit C)

4. "Black Magic increases comfort and performance in the following ways ... Black Magic effectively controls blunt trauma." (Exhibit D)

PAR. 7. Through the use of the statements set forth in paragraph six, and others not specifically set forth herein, respondent has represented, directly or by implication, that Black Magic treatment effectively improves the ballistic performance of respondent's body armor.

PAR. 8. Through the use of the statements set forth in paragraph six, and others not specifically set forth herein, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph seven, respondent possessed and relied upon a reasonable basis for such representation.

PAR. 9. In truth and in fact, at the time respondent made the representation set forth in paragraph seven, respondent did not possess and rely upon a reasonable basis for such representation. Therefore, respondent's representation as set forth in paragraph eight was, and is, false and misleading.

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

EXHIBIT A

# IT WON'T WORK... IF YOU DON'T USE IT!

Exhibit A

You're in the  
business of saving  
lives.

We're in the  
business of saving  
yours.

American Body Armor's  
Armitron IIIA soft body  
armor vest leads the  
industry in maximum pro-  
tection, comfort and con-  
cealability. Black Magic  
(Patent No. 4,522,871)  
strengthens Kevlar<sup>®</sup>, the  
material used in soft body  
armor, better than any other  
treatment. Wear the best.  
Armitron IIIA is the vest for  
protection. If you need any more  
reasons to wear an Armitron IIIA  
vest, just ask your family.

AMERICAN  
BODY ARMOR AND EQUIPMENT, INC.

ONE KAPLAN COURT, P.O. DRAWER 1769 FERNANDINA BEACH, FL 32034, U.S.A.  
(904) 261-4035 • TLX 1691170 ABAVEST FAX NUMBER 904-261-4035



EXHIBIT B

# THE BEST FIT. THE BEST PROTECTION.



## PROTECT YOURSELF WITH THE BEST

The American Body Armor Black Magic™ Technology. Armtron™ is designed to provide maximum protection, flexibility and freedom. Armtron's sculptured padding and special engineering eliminates pressure points, chafe points and bucking. Armtron actually molds to and follows every curve and contour of your body. And, it features a 5 x 8 Shok Plate™ as standard equipment.

Elastic and velcro closure system helps achieve the perfect fit while Armtron's hand washable design (clean your vest with mild soap and water) ensures years of dependable wear.

### Less Layers.

### More Protection.

There used to be no secret to the construction of lightweight, concealable armor. The more layers of Kevlar®...the better protection — until Black Magic. Black Magic™ Patent No. 4,522,871 toughener strengthens our vest to eliminate heavy, uncomfortable and unnecessary layers with no loss of performance. No wonder Armtron™ IIIA is the lightest, toughest and most comfortable vest available.

\*Pocket will also accommodate the optional 6 x 8 Super Shok Plate

Available in Navy, Light Blue, Green, Grey, Tan, White, Black and Camouflage.



**AMERICAN**

BODY ARMOR & EQUIPMENT, INC.

American Body Armor & Equipment, Inc.

P.O. Box 1769, Fernandina Beach, Florida 32034 U.S.A.  
(904) 261-4035 • TLX #6971170 ABAVEST

Circle No. 5 on Reader Information Card

EXHIBIT C



**Conventional Untreated Kevlar**

This .357 Magnum 158 gr. bullet at 1274 f.p.s. tore through many layers of conventional untreated Kevlar.



**With Black Magic**

The .357 Magnum 158 gr. bullet at 1277 f.p.s. was stopped on the surface of the Kevlar test target treated with Black Magic Patent No.

**BLACK MAGIC TECHNOLOGY**

PATENT NO. 4,522,871

**Black Magic Performance**

Patent No. 4,522,871

Until now there was no secret to the construction of lightweight concealable armor. It was previously thought the more plies of Kevlar® added, the greater the ballistic capability.

For example: Some industry experts quote the following concerning 1000 denier 31 X 31 ballistic grade Kevlar® : "Body armor intended for use as a level II garment should contain 22-24 individual plies of Kevlar®."

The ballistic technicians at American Body Armor, manufacturer of lightweight police armor, invented Black Magic Patent No. 4,522,871. This technological breakthrough is unparalleled in the industry. When Kevlar® is treated with Black Magic, a chemical fusion takes place. The fusion of Kevlar® and Black Magic produces a tougher, stronger and longer lasting product. A Level II garment with Black Magic treated Kevlar® contains only 17 plies. The extra weight and discomfort of 5-7 unnecessary plies of Kevlar® has been eliminated, with no loss of ballistic performance. In fact, American Body Armor effectively exceeds current U.S. Government backface deformation criteria.

The Research and Development Team at American Body Armor is constantly seeking ways to utilize the advanced technology of Black Magic, enhancing the full range of products manufactured by American Body Armor.

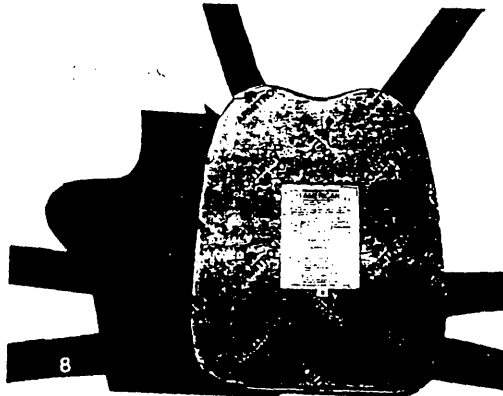
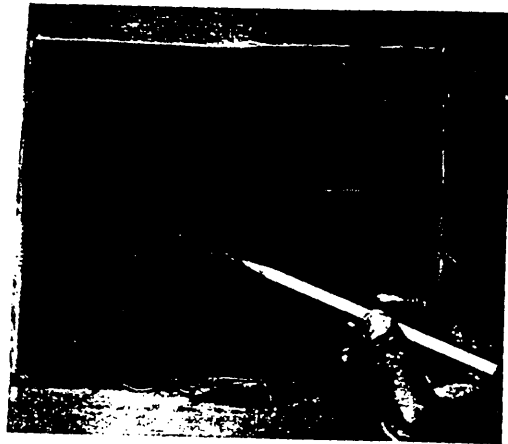
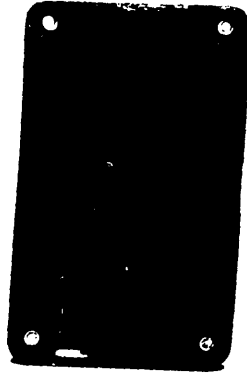


Exhibit C

Complaint

118 F.T.C.

## EXHIBIT D

**STANDARD FEATURE**

With All Concealable Vests SHOK PLATE

The Shok Plate is a comfortable lightweight non-ricochet metal insert that protects the heart and sternum. The Shok Plate can be easily shaped by the wearer for a perfect comfortable fit. It is lightweight, undetectable and can be removed if desired.

The Shok Plate helps to protect against the following in conjunction with vest:

1. Knives, icepicks and sharp instruments.
2. Impact and blunt trauma received from car wrecks, magnums, shotguns and blunt instruments.

**BLACK MAGIC**

Patent No. 4,522,871

Black Magic increases comfort and performance in the following ways:

1. Overall weight of ballistic garment is considerably reduced.
2. Black Magic gives our vests "shape memory". The vest stays smooth at all times never developing any uncomfortable bumps or lumps.

**WE GUARANTEE IT!**

3. Black Magic effectively controls blunt trauma. All American Body Armor vests exceed current U.S. government backface deformation criteria.

**Tapered Edges,  
High Quality Materials,  
Elastic Straps, Velcro Closure**

All vests are fully tapered and easily concealed under a uniform shirt. Top quality materials are used for a dependable long lasting product. Elastic straps are used to allow the vest to conform and move with your body. All vests have velcro closures for an adjustable comfortable fit.

**STANDARD SELECTION**

WITH ALL CONCEALABLE VESTS  
TWO TYPES OF VEST COVERINGS

- |   |  |
|---|--|
| <b>PERMANENT<br/>HAND WASHABLE</b>                      | American Body Armor 420 denier nylon. Pac- is urethane backed to keep moisture and penetration away from your lifesaving ballistic panels cover is our most popular. It is extremely light durable and easy to maintain for long life period.                                    |
| <b>REMOVABLE<br/>MACHINE WASHABLE<br/>OUTER CARRIER</b> | A 50/50% cotton/polyester outer carrier available. This style allows the outer carrier to be laundered once ballistic panels are removed. Ballistic panels are protected from moisture, penetration and ultraviolet light by use of a lightweight carrier urethane coated nylon. |

## DECISION AND ORDER

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

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

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

1. American Body Armor and Equipment, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and its principal place of business at 85 Nassau Place, Yulee, Florida;
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

1. For purposes of this order, "body armor" or "vest" shall mean any garment intended to protect the wearer's torso against gunfire.

2. For purposes of this order, “.03 Standard” shall mean the U.S. Department of Justice, National Institute of Justice (“NIJ”), Ballistic Resistance of Police Body Armor (Standard 0101.03) (April 1987).

3. For purposes of this order, “NIJ-certified” shall mean certified by the National Institute of Justice under the current .03 Standard, under any subsequent modification, amendment or revision of that Standard, or under any new Standard for body armor promulgated by NIJ.

4. For purposes of this order, “eligible purchaser” shall mean any individual or organization that purchased in the United States body armor manufactured by respondent that is labeled or otherwise represented in any manner as complying with or certified under the .03 Standard, where the manufacture of said body armor took place (a) prior to January 1, 1990; or (b) between January 1, 1990, and the date of service of this order if the body armor differs from the corresponding NIJ-certified model in any of the following respects, excluding minor deviations unavoidable due to the manufacturing process:

- i. Waterproofing on the ballistic panels;
- ii. Configuration of stitching on the ballistic panels, including label-stitching through the ballistic panels, or stitching of the ballistic panels that penetrates the cover;
- iii. The method of closure of the vest (*e.g.*, front closure or side closure);
- iv. The number of ballistic panels that comprise the vest;
- v. The carrier, unless the sole difference from the corresponding NIJ-certified model is that the carrier is (a) a different color or a different fabric, or (b) backed with foam for flotation purposes, where the corresponding NIJ-certified model was not backed with foam, or (c) designed to be permanently attached to the ballistic panel where the carrier on the corresponding NIJ-certified model was designed to be removable; or
- vi. Any other change: (a) to the ballistic elements; or (b) that otherwise may diminish the level of ballistic protection provided by the vest.

5. For purposes of this order, “concealable body armor” shall mean body armor intended to be worn underneath the wearer’s clothing, except for the “concealable tactical” vest.

6. For purposes of this order, "tactical body armor" shall mean body armor intended to be worn over the wearer's clothing and shall include the "concealable tactical" vest.

7. For purposes of this order, "purchased in the United States" shall mean (a) purchased in the United States or its possessions or territories; or (b) sold to any individual who is a citizen of the United States or its possessions or territories, any organization incorporated in the United States or its possessions or territories, or any United States government entity.

## I.

*It is ordered,* That respondent American Body Armor and Equipment, Inc. ("ABA"), a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, packaging, offering for sale, sale or distribution of any body armor in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication, in any manner:

A. That any such body armor is or has been certified under or in compliance with the .03 Standard, is NIJ-certified, or is approved, endorsed, or sanctioned by the National Institute of Justice;

B. That any such body armor is equivalent to, comparable to, the same as, or similar to any other body armor that is NIJ-certified; and

C. That any such body armor is certified under or in compliance with any performance standard, or is approved, endorsed, or sanctioned by any governmental body or private organization.

## II.

*It is further ordered,* That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, packaging, offering for sale, sale or distribution of any body armor purchased in the United States in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from

representing, directly or by implication, in any manner, that any such body armor provides any specified threat level or degree of ballistic protection or is tested, approved, endorsed, certified or sanctioned, unless such body armor:

A. Is NIJ-certified at the represented threat level, or

B. Has been certified to meet the specified threat level under a different ballistic standard or test, provided that respondent discloses, clearly and prominently in close proximity to the representation

(1) The standard or test under which the body armor is certified or tested, including the person or organization that promulgated that standard or conducted the test, and

(2) That the standard used or test conducted is different from the National Institute of Justice Standard, if any National Institute of Justice body armor standard is then in effect.

### III.

*It is further ordered,* That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, packaging, offering for sale, sale or distribution of any body armor in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, in any manner, the ballistic efficacy or performance of Black Magic or any other treatment applied to the ballistic panel of any body armor unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

For purposes of this provision, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession or science to yield accurate and reliable results.

## IV.

*It is further ordered,* That respondent, its successors and assigns, and its officers, employees, agents and representatives, shall offer replacement body armor to purchasers of respondent's body armor, in accordance with the provisions of this Part.

*A. Notification of Eligible Purchasers*

1. Within 30 days from the date of service of this order, respondent shall compile a current mailing list containing the names and last known addresses of eligible purchasers following the procedures set out below.

a. Respondent shall search its own files for the names and addresses of such purchasers; and

b. Respondent shall use its best efforts to identify other such purchasers, including but not limited to sending the letter set forth in Appendix A to all of its wholesalers, distributors, retailers or others to whom it sold or provided body armor for resale to the public. In the event that any such entity fails to provide any names or addresses of eligible purchasers in its possession, respondent shall provide the names and addresses of all such entities to the Federal Trade Commission within sixty (60) days of service of this order.

2. Within 30 days from the date of service of this order, respondent shall mail the following items by first class mail, certified, return receipt requested, to the last known address of no fewer than one-third of eligible purchasers named on the mailing list compiled in accordance with Part IV.A.1:

a. A dated and signed armor notification letter in the form set forth in Appendix B to this order ("armor notification");

b. A replacement program description in the form set forth in Appendix C to this order;

c. An armor application in the form set forth in Appendix D to this order ("armor application");

d. A price list in the form set forth in Appendix E to this order;



e. A copy of the most recent edition of respondent's catalog containing all models of respondent's body armor listed on Appendix E; and

f. A request for extension of time in the form set forth in Appendix F to this order ("extension form").

The front of the envelope transmitting the above items shall be in the form set forth in Appendix G to this order. The phrase "ATTENTION: BODY ARMOR REPLACEMENT PROGRAM" shall appear on the front of the envelope in typeface equal or larger in size to that set forth in Appendix G. The envelope shall be addressed to the head of the organization to which it is sent (if an organization), and the words "Forward & Address Correction Requested" shall appear in the upper, left-hand corner one-quarter of an inch beneath the return address. Except as otherwise provided by this order, no information other than that required by this Part shall be included in or added to the above items, nor shall any other material be transmitted therewith.

3. Within 75 days from the date of service of this order, respondent shall mail those items set forth in Part IV.A.2(a-f) by first class mail, certified, return receipt requested, to the last known address of no fewer than two-thirds of eligible purchasers named on the mailing list compiled in accordance with Part IV.A.1.

4. Within 120 days from the date of service of this order, respondent shall mail those items set forth in Part IV.A.2(a-f) by first class mail, certified, return receipt requested, to the last known address of each eligible purchaser named on the mailing list compiled in accordance with Part IV.A.1.

5. Respondent shall also mail the items listed in Part IV.A.2(a-f) to any person or organization not on the mailing list prescribed in Part IV.A.1 about whom respondent later receives information indicating that the person or organization is likely to be an eligible purchaser, and to any purchaser whose armor notification is returned by the U.S. Postal Service as undeliverable and for whom respondent thereafter obtains a corrected address. The mailing required by this subpart shall be made within ten (10) days of respondent's receipt of a corrected address or information identifying each such purchaser.

6. Respondent shall also mail the items listed in Part IV.A.2(a-f) to any person or organization who otherwise meets the definition of "eligible purchaser" contained in this order but has failed to make all

payments due for the body armor to be replaced. Said mailing shall include an additional letter stating that the purchaser is not eligible for participation in the replacement program until the purchaser has made payment in full for the body armor to be replaced, and stating the amount due.

*B. Respondent's Obligation to Provide Replacement Body Armor*

Respondent shall provide replacement body armor to each eligible purchaser who submits a completed armor application to respondent within one-hundred and twenty (120) days after the purchaser's receipt of the armor notification and other items required by Part IV.A.2(a-f) of this order.

1. Respondent shall not charge any such purchaser who complies with the requirements of this Part an amount greater than that listed in Appendix E to this order for the selected model, provided that respondent shall not impose any additional charge, on the basis of a late payment or a late return of the body armor to be replaced, on any purchaser who meets said requirements within ten (10) business days of the deadlines provided for by subparts IV.B.7 and IV.B.9.

2. Respondent shall extend the time for submitting a completed application for each eligible purchaser who, within 120 days of his or her receipt of the armor notification, returns a completed and signed extension form to respondent or otherwise notifies respondent in writing that he or she is unable to apply for replacement body armor within 120 days due to specified procurement or purchasing regulations, procedures, policies or other official requirements, and requests an extension of time to apply. Respondent shall extend the time for application in the amount of time requested by the purchaser up to a maximum of eighteen (18) months from the date of receipt of the armor notification.

3. In any case where respondent is unable to provide replacement body armor to a purchaser due to an incomplete or deficient armor application, respondent shall within fifteen (15) business days of receipt of the application mail to the purchaser a written notice of the deficiency. The purchaser shall have the amount of time remaining in the 120 day period, but in any case no less than fifteen (15) days from the date of receipt of the notice, in which to submit a completed armor application.

4. The replacement body armor shall be in the sizes and models specified by the purchaser. The purchaser shall have the option of selecting any model offered by respondent of the threat level of the replaced body armor and listed in Appendix E; or, if no vests are offered at that threat level, any model offered by respondent of the next highest threat level available; provided that respondent shall not be required to provide a tactical body armor model as a replacement for concealable body armor.

5. The replacement body armor shall be new and shall not differ from the corresponding NIJ-certified model, other than differences in size, color and minor deviations unavoidable due to the manufacturing process, unless the purchaser requests in writing modification(s) to the body armor, respondent agrees to such modification(s), and respondent informs the purchaser in writing that such differences may affect the NIJ-certification status of the body armor. Provided that if any binding law, rule, or regulation is promulgated that prohibits the sale or distribution of body armor which is not NIJ-certified, this order shall not be construed to authorize respondent to make any modifications to a purchaser's replacement body armor that would cause the body armor to violate such law, rule or regulation.

6. Respondent shall ship, at its cost, all replacement body armor selected by the purchaser within sixty (60) days of its receipt of the completed armor application and any payment required by this order.

7. Respondent shall not require the tendering of any payment for the replacement body armor except as follows:

(a) For law enforcement units, governmental entities, military units, businesses, firms, educational institutions or other institutional purchasers, full payment as set forth in Part IV.B.1 within 30 days of the purchaser's receipt of the replacement body armor.

(b) For individual purchasers, full payment as set forth in Part IV.B.1 at the time of the delivery of the replacement body armor (C.O.D.).

8. Respondent shall notify the Commission or its designated staff of its intent to refuse a request for an extension of time in which to submit an armor application. The final determination of eligibility for an extension of time shall rest with the Commission or its designated staff and shall be made within a reasonable time. If the Commission or its designated staff determines that the purchaser is

not eligible for an extension of time, respondent shall, within fifteen (15) business days of receiving the determination of ineligibility, send to the purchaser by first class mail, certified, return receipt requested, a written notice of his or her ineligibility. The purchaser shall have the amount of time remaining in the 120 day period, but in any case no less than fifteen (15) days from the date of receipt of the notice of ineligibility, to submit a completed armor application.

9. Respondent shall not require the return to it by the purchaser of the body armor to be replaced until sixty (60) days after the purchaser's receipt of the replacement body armor.

### *C. Respondent's Record-Keeping Requirements*

Respondent, its successors and assigns, shall, for three (3) years after the date of service of this order, maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

1. Sufficient records to identify:
  - a. The name and address of each eligible purchaser;
  - b. The name and last known address of each person sent an armor notification pursuant to Part IV.A.2 of this order and the date the armor notification was mailed;
  - c. The name and last known address of each person sent an armor notification pursuant to Part IV.A.3 of this order and the date the armor notification was mailed;
  - d. The name and last known address of each person sent an armor notification pursuant to Part IV.A.4 of this order and the date the armor notification was mailed;
  - e. The name and last known address of each person sent an armor notification pursuant to Part IV.A.5 of this order and the date the armor notification was mailed;
  - f. The name and last known address of each person sent an armor notification pursuant to Part IV.A.6 of this order and the date the armor notification was mailed;
  - g. The name and address of each purchaser who returns an extension form or otherwise notifies respondent in writing that he or she is unable to file an armor application within 120 days due to procurement or purchasing regulations, procedures, policies or other

official requirements and requests an extension of time, and the disposition of each such request.

h. The name and address of each purchaser who is notified by respondent that his or her armor application is deficient;

i. The name and address of each wholesaler, distributor, retailer, or other sent a letter pursuant to Part IV.A.I(b) of this order and the date the letter was mailed;

j. For each purchaser who applied for replacement body armor pursuant to Part IV.B:

- (1) The name and last known address;
- (2) The date the armor application was received;
- (3) The date the replacement body armor was shipped;
- (4) The model number and threat level of the replacement body armor;
- (5) The total number of body armor units replaced;
- (6) The total price paid for the replacement body armor.

2. The name and last known address of each person who requested replacement body armor and was refused, the reason for each refusal and the dates of the request and refusal.

3. Sample copies of all letters, descriptions, applications and forms sent to purchasers or others pursuant to this order.

4. Each and every armor application received from respondent's purchasers.

5. Each and every extension form received from respondent's purchasers.

6. All correspondence relating to any purchaser's request for an extension of time in which to file an application for replacement body armor.

7. All correspondence and written memorializations of oral communications, not otherwise covered by this Part, relating to the replacement of respondent's body armor pursuant to this order between respondent and any person.

## V.

*It is further ordered*, That respondent, its successors and assigns, shall, for three (3) years after the date of the last dissemination of the representation to which they pertain, maintain and upon request make

available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon by respondent in disseminating any representation covered by this order; and

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

#### VI.

*It is further ordered,* That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as a dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations under this order. The respondent shall require, as a condition precedent to the closing of any sale or other disposition of all or a substantial part of its assets, that the acquiring party file with the Commission, prior to the closing of such sale or other disposition, a written agreement to be bound by the provisions of this order.

#### VII.

*It is further ordered,* That within 45 days from the date of service of this order, respondent shall mail a letter in the form set forth in Appendix H to this order to all operating divisions, subsidiaries, officers, managerial employees, all of its employees engaged in the preparation and placement of advertisements, labels, or promotional materials covered by this order, and to all of its wholesalers, distributors and retailers of body armor.

#### VIII.

*It is further ordered,* That respondent shall, within sixty (60) days after service upon it of this order and at such other times as the Commission may require, file with the Commission a report, in

writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Varney not participating.

APPENDIX A

ABA letterhead

Date

Dear [name of wholesaler, distributor or retailer]:

This letter is to request your assistance in a very important program involving American Body Armor & Equipment, Inc.'s customers.

We have settled a dispute with the Federal Trade Commission ("FTC") regarding the certification of ABA body armor by the National Institute of Justice ("NIJ"). The FTC has charged that ABA misrepresented that certain of its vests were certified under the National Institute of Justice ("NIJ") 0101.03 Standard. As you are probably aware, manufacturers may voluntarily submit vests to NIJ for ballistic testing. Models that pass the test are then certified by NIJ as complying with the standard.

Certain ABA vests that were sold in 1989 and 1990 as certified by the NIJ were re-tested according to the NIJ standard and failed those tests due to bullet penetrations. In some cases, there were multiple penetrations. The FTC is concerned that some ABA vests could fail in actual use to provide the claimed level of protection.

The FTC has observed differences between certain ABA vests sold as NIJ-certified and the sample vests that were tested as part of the certification procedure. The differences that FTC has observed include: 1) the lack of NIJ-required labels stitched through the ballistic panels; 2) the lack of waterproofing on the ballistic panels; and 3) the use of different kinds of vest covers. The FTC has charged that, in some cases, there were other, additional differences in the vests. The FTC believes that these differences may make the vests less effective than claimed, and that vests with these changes should have been retested and therefore are not certified.

We deny these charges and believe our vests are effective. To our knowledge, in actual use, no ABA vest has ever failed to provide the level of protection that the vest was designed to provide under the NIJ standard. Nevertheless, as part of our settlement with the FTC, we have agreed to provide replacement vests at a reduced price to purchasers of ABA body armor represented to be certified under NIJ's 0101.03 standard. (A summary of the FTC's order is enclosed.) This program covers ABA vests sold in 1989 and 1990. ABA has also agreed to replace vests sold after that time that differ from the NIJ-certified vests, if any.

As part of our agreement with the FTC, we are required to compile a mailing list containing the names and addresses of ABA customers. In order to do this, we must request from you and our other trade customers a list containing the names of all persons or organizations who purchased ABA body armor from you prior to

January 1, 1990, that was labeled or otherwise represented as complying with the 0101.03 standard. We are also requesting that you provide us with a separate list of names of customers who purchased ABA .03 body armor from you after January 1, 1990. In both cases we will need the following information for each customer:

1. Name of individual or organization and contact person
2. Address and phone number
3. Number of vests purchased
4. Date of purchase
5. Model number(s) and threat level(s)
6. Serial numbers
7. Any amount of money that is due and unpaid from each customer.

Please provide us with these lists as soon as possible, but no later than 20 days after receiving this letter.

You should be aware that the FTC's order requires us to provide the FTC with the names of any wholesaler, distributor or retailer who does not provide us with this information.

Because we realize this may cause you some inconvenience, we are willing to assist you in compiling these lists. Please contact us at (904) 261-4035 to discuss any questions you have. We appreciate your cooperation.

Very truly yours,

Name  
Title

Enc.: Summary of Consent Agreement

#### APPENDIX B

Dear American Body Armor Customer:

We are writing to inform you of the Federal Trade Commission's ("FTC") concerns that certain body armor sold by American Body Armor & Equipment, Inc. ("ABA") could fail in actual use to provide the level of ballistic protection claimed.

This armor was represented as complying with the 0101.03 standard of the National Institute of Justice ("NIJ"), but, the FTC has charged, may not in fact comply with that standard. Certain ABA vests that were sold in 1989 and 1990 as certified by the NIJ were re-tested according to the NIJ standard and failed those tests due to bullet penetrations. In some cases, there were multiple penetrations. The FTC is concerned that some ABA vests could fail in actual use to provide the claimed level of protection.

Although ABA denies the FTC's allegations, there should be no question when it comes to the safety of our customers. Therefore, we have agreed to send this letter and offer a replacement program to settle the FTC charges without costly



litigation. This program covers ABA vests sold in 1989 and 1990. ABA has also agreed to replace vests sold after that time that differ from the NIJ-certified vests, if any.

ABA is offering to replace vests purchased by you and other eligible customers at a reduced cost to the purchaser. The replacement program is described more fully in materials enclosed with this letter. You must notify us within 120 days if you wish to participate in this program, so your prompt attention is necessary.

The FTC has charged that ABA misrepresented that certain of its vests were certified under the NIJ 0101.03 standard (".03 standard"). As you are probably aware, manufacturers may voluntarily submit vests to NIJ for ballistic testing. Models that pass the test are then certified by NIJ as complying with the standard.

The FTC has observed differences between certain ABA vests sold as NIJ-certified and the sample vests that were tested as part of the certification procedure. The differences that FTC has observed include: 1) the lack of NIJ-required labels stitched through the ballistic panels; 2) the lack of waterproofing on the ballistic panels; and 3) the use of different kinds of vest covers. The FTC has charged that, in some cases, there were other, additional differences in the vests. The FTC believes that these differences may make the vests less effective than claimed and that vests with these changes should have been retested and therefore are not certified.

ABA believes that none of these differences affects the ballistic performance of its vests, that it complied with NIJ standards and procedures, and that its vests are effective. To our knowledge, in actual use, no ABA vest has ever failed to provide the level of protection that the vest was designed to provide under the NIJ standard.

If you choose to participate in the replacement program, you must agree to relinquish any and all claims you may have against ABA with respect to the vests being replaced.

The FTC recommends that you discuss the replacement program with the appropriate persons in your organization so that you can determine the best course of action for you.

If you have any questions, you can contact us at (904) 261-4035, or you can call Lisa Kopchik at the Federal Trade Commission at (202) 326-3139.

Very truly yours,

\_\_\_\_\_  
Name, Position

American Body Armor and Equipment, Inc.

Enclosures: "The Body Armor Replacement Program" information sheet  
Body Armor application

## APPENDIX C

THE BODY ARMOR REPLACEMENT PROGRAM

American Body Armor ("ABA") has agreed to replace certain body armor at a reduced cost to the purchaser. Your body armor, manufactured by ABA and represented as certified under the National Institute of Justice's 0101.03 standard, is eligible for replacement under this program if it has not been rendered unusable by ballistic testing or other destructive damage.

The replacement vests will be as identical as possible in construction to the corresponding models that were submitted for certification testing. However, the FTC will not be inspecting all replacement vests.

In this replacement program, you can choose any vest of the level of protection ("threat level") that you originally ordered, or if no vests are available at that level, you can choose a vest at the next highest threat level available. However, you may not select a tactical vest (including the "tactical concealable" vest) to replace a concealable vest. Our records indicate that the vest(s) you purchased was (were) represented to be threat level \_\_\_\_\_. You can therefore choose as a replacement any ABA vest certified at that threat level, if available. If no vests are available at that threat level, you can choose a vest at the next highest threat level. The vest you receive will be covered by ABA's standard warranty. Enclosed is an ABA catalogue. Models \_\_\_\_\_ are certified vests at threat level \_\_\_\_\_.

To help defray the costs of the program, you must pay a reduced price for the replacement vest(s). The enclosed price list shows the current list prices for our vests. It also shows your price for each model under this program. The replacement prices are 40% of the current list prices.

If you choose to participate in this program you must turn in your old vest(s) to ABA, but not until after you receive replacements. If you want to replace your body armor under this program, you must fill out and mail to us the enclosed application within 120 days of your receipt of this letter, specifying the model number(s) and size(s) of the vest(s) you are ordering. We will ship your replacement vests within sixty (60) days after we receive your application.

The payment terms for your new vests are as follows:

- If you are an individual purchaser, full payment is due C.O.D. when the vests are delivered.
- If you are an institutional purchaser (police department, government agency, business firm, military, etc.), full payment is due within 30 days of your receipt of the new body armor.

If you are unable to order replacement vests within 120 days due to procurement or purchasing regulations, procedures, policies, or other official requirements, an exception can be made for you. You must complete the enclosed Extension Form, sign it and return it to ABA within 120 days. Please explain the specific circumstances why you need the extension and you will receive the amount of time shown to be necessary (up to 18 months).

**To qualify for the special terms of this replacement program, you must make all payments when required and return the old vest(s) to ABA no later than 60 days after receiving the replacement vests.**



Information about the vests you want as replacements

8. Please send  
 \_\_\_\_\_ of Model \_\_\_\_\_ in color \_\_\_\_\_, size \_\_\_\_\_.  
 (Number)  
 \_\_\_\_\_ of Model \_\_\_\_\_ in color \_\_\_\_\_, size \_\_\_\_\_.  
 \_\_\_\_\_ of Model \_\_\_\_\_ in color \_\_\_\_\_, size \_\_\_\_\_.  
 \_\_\_\_\_ of Model \_\_\_\_\_ in color \_\_\_\_\_, size \_\_\_\_\_.  
 \_\_\_\_\_ of Model \_\_\_\_\_ in color \_\_\_\_\_, size \_\_\_\_\_.  
 \_\_\_\_\_ of Model \_\_\_\_\_ in color \_\_\_\_\_, size \_\_\_\_\_.  
 \_\_\_\_\_ of Model \_\_\_\_\_ in color \_\_\_\_\_, size \_\_\_\_\_.  
 \_\_\_\_\_ of Model \_\_\_\_\_ in color \_\_\_\_\_, size \_\_\_\_\_.

(Reminder: the model you select must be one of the models listed in the third paragraph of your information sheet on "THE REPLACEMENT PROGRAM.")

9. Cost to you for each replacement vest \_\_\_\_\_.  
 (From the enclosed price list.)

10. Total cost \_\_\_\_\_.  
 (Cost of each replacement vest multiplied by number of vests to be replaced.)

**Reminder:**

**If you are an institutional purchaser, the total cost (#10) will be due within thirty (30) days of receiving your replacement vest(s).**

**If you are an individual purchaser, the total cost (#10) is due at the time the vests are delivered (C.O.D.).**

By requesting and accepting replacement vest(s), I understand that I waive any and all claims I may have against American Body Armor and Equipment, Inc. with respect to the vest(s) being replaced. I also understand that I must pay all balances when required and return each old vest for which I have received a replacement within sixty (60) days after receiving the replacement in order to qualify for the special terms of this replacement program. I will send those old vests to:

American Body Armor and Equipment, Inc.  
85 Nassau Place  
Yulee, Florida 32097

Signed: \_\_\_\_\_  
Name: \_\_\_\_\_  
(Print or type name of person who signed)  
Position: \_\_\_\_\_  
Date: \_\_\_\_\_

Send this completed and signed form to:  
American Body Armor and Equipment, Inc.  
85 Nassau Place  
Yulee, Florida 32097

Decision and Order

118 F.T.C.

## APPENDIX E

## PRICE LIST

## BODY ARMOR VEST MALE CONTOUR

CATALOG PAGE 2

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
504 A IIA CONTOUR REMOVABLE (IIA-C-R)	IIA	\$181.60	\$454.00
504 A IIA CONTOUR NYLON (IIA-C-M)	IIA	\$181.60	\$454.00
504 A IIA CONTOUR TRICOT (IIA-C-T)	IIA	\$181.60	\$454.00
600 II CONTOUR REMOVABLE (II-C-R)	II	\$205.60	\$514.00
600 II CONTOUR NYLON (II-C-N)	II	\$205.60	\$514.00
600 II CONTOUR TRICOT (II-C-T)	II	\$205.60	\$514.00
610 IIIA CONTOUR REMOVABLE (IIIA-C-R)	IIIA	\$276.80	\$692.00
610 IIIA CONTOUR NYLON (IIIA-C-N)	IIIA	\$276.80	\$692.00
610 IIIA CONTOUR TRICOT (IIIA-C-T)	IIIA	\$276.80	\$692.00

## BODY ARMOR VEST FEMALE CONTOUR

CATALOG PAGE 2

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
504 A-F FEMALE IIA CONTOUR REMOVABLE (F-IIA-C-R)	IIA	\$181.60	\$454.00
504 A-F FEMALE IIA CONTOUR NYLON (F-IIA-C-M)	IIA	\$181.60	\$454.00
504 A-F FEMALE IIA CONTOUR TRICOT (F-IIA-C-T)	IIA	\$181.60	\$454.00
600-F FEMALE II CONTOUR REMOVABLE (F-II-C-R)	II	\$205.60	\$514.00
600-F FEMALE II CONTOUR NYLON (F-II-C-N)	II	\$205.60	\$514.00
600-F FEMALE II CONTOUR TRICOT (F-II-C-T)	II	\$205.60	\$514.00
610-F FEMALE IIIA CONTOUR REMOVABLE (F-IIIA-C-R)	IIIA	\$276.80	\$692.00

AMERICAN BODY ARMOR AND EQUIPMENT, INC. 1007

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610-F	FEMALE IIIA CONTOUR NYLON (F-IIIA-C-N)	IIIA	\$276.80	\$692.00
610-F	FEMALE IIIA CONTOUR TRICOT (F-IIIA-C-T)	IIIA	\$276.80	\$692.00

Added charge of 10% for size 50-52, 20% for size 54-56 and 30% for size 58-60.

BODY ARMOR VEST MALE FULLSIDE COVERAGE CATALOG PAGE 2

MODEL		THREAT LEVEL	REPLACEMENT PRICE	LIST
504 A	IIA FULLSIDE REMOVABLE (IIA-FS-R)	IIA	\$205.60	\$514.00
504 A	IIA FULLSIDE NYLON (IIA-FS-N)	IIA	\$205.60	\$514.00
504 A	IIA FULLSIDE TRICOT (IIA-FS-T)	IIA	\$205.60	\$514.00
600 II	FULLSIDE REMOVABLE (II-FS-R)	II	\$234.40	\$586.00
600 II	FULLSIDE NYLON (II-FS-N)	II	\$234.40	\$586.00
600 II	FULLSIDE TRICOT (II-FS-T)	II	\$234.40	\$586.00
610 IIIA	FULLSIDE REMOVABLE (IIIA-FS-R)	IIIA	\$311.20	\$778.00
610 IIIA	FULLSIDE NYLON (IIIA-FS-N)	IIIA	\$311.20	\$778.00
610 IIIA	FULLSIDE TRICOT (IIIA-FS-T)	IIIA	\$311.20	\$778.00

BODY ARMOR VEST FEMALE  
FULLSIDE COVERAGE

CATALOG PAGE 2

MODEL		THREAT LEVEL	REPLACEMENT PRICE	LIST
504 A-F	FEMALE IIA FULLSIDE REMOVABLE (F-IIA-FS-R)	IIA	\$205.60	\$514.00
504 A-F	FEMALE IIA FULLSIDE NYLON (F-IIA-FS-N)	IIA	\$205.60	\$514.00
504 A-F	FEMALE IIA FULLSIDE TRICOT (F-IIA-FS-T)	IIA	\$205.60	\$514.00
600-F	FEMALE II FULLSIDE REMOVABLE (F-II-FS-R)	II	\$234.40	\$586.00
600-F	FEMALE II FULLSIDE NYLON (F-II-FS-M)	II	\$234.40	\$586.00
600-F	FEMALE II FULLSIDE TRICOT (F-II-FS-T)	II	\$234.40	\$586.00

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610-F	FEMALE IIIA FULLSIDE REMOVABLE (F-IIIA-FS-R)	IIIA	\$311.20	\$778.00
610-F	FEMALE IIIA FULLSIDE NYLON (F-IIIA-FS-N)	IIIA	\$311.20	\$778.00
610-F	FEMALE IIIA FULLSIDE TRICOT (F-IIIA-FS-T)	IIIA	\$311.20	\$778.00

Added charge of 10% for size 50-52, 20% for size 54-56 and 30% for size 58-60.

BODY ARMOR VEST MALE WEAVER

CATALOG PAGE 2

MODEL		THREAT LEVEL	REPLACEMENT PRICE	LIST
504 A	IIA WEAVER REMOVABLE (IIA-W-R)	IIA	\$236.00	\$590.00
504 A	IIA WEAVER NYLON (IIA-W-N)	IIA	\$236.00	\$590.00
504 A	IIA WEAVER TRICOT (IIA-W-T)	IIA	\$236.00	\$590.00
600	WEAVER REMOVABLE (II-W-R)	II	\$270.40	\$676.00
600 II	WEAVER NYLON (II-W-N)	II	\$270.40	\$676.00
600 II	WEAVER TRICOT (II-W-T)	II	\$270.40	\$676.00
610 IIIA	WEAVER REMOVABLE (IIIA-W-R)	IIIA	\$343.20	\$858.00
610 IIIA	WEAVER NYLON (IIIA-W-N)	IIIA	\$343.20	\$858.00
610 IIIA	WEAVER TRICOT (IIIA-W-T)	IIIA	\$343.20	\$858.00

BODY ARMOR VEST FEMALE WEAVER

CATALOG PAGE 2

MODEL		THREAT LEVEL	REPLACEMENT PRICE	LIST
504 A-F	FEMALE IIA WEAVER REMOVABLE (F-IIA-W-R)	IIA	\$236.00	\$590.00
504 A-F	FEMALE IIA WEAVER NYLON (F-IIA-W-N)	IIA	\$236.00	\$590.00
504 A-F	FEMALE IIA WEAVER TRICOT (F-IIA-W-T)	IIA	\$236.00	\$590.00

AMERICAN BODY ARMOR AND EQUIPMENT, INC. 1009

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600-F	FEMALE II WEAVER REMOVABLE (F-II-W-R)	II	\$270.40	\$676.00
600-F	FEMALE II WEAVER NYLON (F-II-W-N)	II	\$270.40	\$676.00
600-F	FEMALE II WEAVER TRICOT (F-II-W-T)	II	\$270.40	\$676.00
610-F	FEMALE IIIA WEAVER REMOVABLE (F-III-A-W-R)	IIIA	\$343.20	\$858.00
610-F	FEMALE IIIA WEAVER NYLON (F-III-A-W-N)	IIIA	\$343.20	\$858.00
610-F	FEMALE IIIA WEAVER TRICOT (F-III-A-W-T)	IIIA	\$343.20	\$858.00

Added charge of 10% for size 50-52, 20% for size 54-56 and 30% for size 58-60.

EXECUTIVE VEST

CATALOG PAGE 26

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
504 A IIA-EV (IIA-EV)	IIA	\$320.80	\$802.00
600 II-EV (II-EV)	II	\$368.00	\$920.00
610 IIIA-EV (IIIA-EV)	IIIA	\$492.00	\$1,230.00

CONCEALABLE TACTICAL BODY ARMOR

CATALOG PAGE 9

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
600 II TAC FS NYLON (II-TAC-FS-M)	II	\$268.00	\$670.00
600 II TAC FS FIRE RETARDANT (II-TAC-FS-FR)	II	\$308.00	\$770.00
610 IIIA TAC FS NYLON (IIIA-TAC-FS-N)	IIIA	\$324.00	\$810.00
610 IIIA TAC FS FIRE RETARDANT (IIIA-TAC-FS-FR)	IIIA	\$364.00	\$910.00



## POLICE JACKET

CATALOG PAGE 6

MODEL		THREAT LEVEL	REPLACEMENT PRICE	LIST
504A-FO (front opening)	IIA PJ (IIA-PJ)	IIA	\$451.20	\$1,128.00
600-FO (front opening)	II PJ (II-PJ)	II	\$509.60	\$1,274.00
610-FC (front closure)	IIIA PJ (IIIA-PJ)	IIIA	\$649.60	\$1,624.00

## NARCOTIC VEST

CATALOG PAGE 5

MODEL		THREAT LEVEL	REPLACEMENT PRICE	LIST
504A-FO (front opening)	IIA WVIIA (IIA-WV)	IIA	\$370.40	\$926.00
600-FO (front opening)	II NV (II-MV)	II	\$411.20	\$1,028.00
610-FC (front closure)	IIIA NV (IIIA-NV)	IIIA	\$512.00	\$1,280.00

Add 20% for extended shoulder coverage.

Added charge of 10% for size 50-52, 20% for size 54-56 and 30% for size 58-60.

## M65 JACKET

NOT LISTED IN CATALOG

MODEL		THREAT LEVEL	REPLACEMENT PRICE	LIST
504A-FO (front opening)	IIA M65 (IIA-M65)	IIA	\$396.00	\$990.00
600-FO (front opening)	II M65 (II-M65)	II	\$438.40	\$1,096.00
610-FC (front closure)	IIIA M65 (IIIA-M65)	IIIA	\$553.60	\$1,384.00

## MEDIC PROTECTIVE VEST

CATALOG PAGE 7

MODEL		THREAT LEVEL	REPLACEMENT PRICE	LIST
504A-FO (front opening)	IIA MPV CORDURA (IIA-KPV-C)	IIA	\$500.80	\$1,252.00
504A-FO (front opening)	IIA MPV FIRE RETARDANT (IIA-NPV-FR)	IIA	\$616.80	\$1,542.00

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600-FO II MPV CORDURA (front opening) (II-MPV-C)	II	\$551.20	\$1,378.00
600-FO II MPV FIRE RETARDANT (front opening) (II-MPV-FR)	II	\$667.20	\$1,668.00
610-FC IIIA MPV CORDURA (front closure) (IIIA-MPV-C)	IIIA	\$680.00	\$1,700.00
610-FC IIIA MPV FIRE RETARDANT (front closure) (IIIA-MPV-FR)	IIIA	\$796.00	\$1,990.00

AK-47 LIGHT WEIGHT MILITARY BODY ARMOR CATALOG PAGE 8

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
600 II AK-47 NYLON (II-AK-47-N)	II	\$446.40	\$1,116.00
600 II AK-47 FIRE RETARDANT (II-AK-47-FR)	II	\$486.40	\$1,216.00
610 IIIA AK-47 NYLON (IIIA-AK-47-M)	IIIA	\$559.20	\$1,398.00
610 IIIA AK-47 FIRE RETARDANT (IIIA-AK-47-FR)	IIIA	\$599.20	\$1,498.00

Added charge of 10% for size 50-52, 20% for size 54-56 and 30% for size 58-60.

TACTICAL JACKET CATALOG PAGE 7

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
600-FO II TACTICAL JACKET (front opening) NYLON (II-TJ-N)	II	\$576.00	\$1,440.00
600-FO II TACTICAL JACKET FIRE (front opening) RET. (II-TJ-FR)	II	\$616.00	\$1,540.00
610-FC IIIA TACTICAL JACKET (front closure) NYLON (IIIA-TJ-N)	IIIA	\$752.00	\$1,880.00
610-FC IIIA TACTICAL JACKET FIRE (front closure) RET. (IIIA-TJ-FR)	IIIA	\$792.00	\$1,980.00

DELTA LIGHTWEIGHT TACTICAL ARMOR CATALOG PAGE 9

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
600 II DELTA NYLON (II-DELT-N)	II	\$466.40	\$1,166.00
600 II DELTA FIRE RETARDANT (II-DELT-FR)	II	\$506.40	\$1,266.00

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610 IIIA DELTA NYLON (IIIA-DELT-M)	IIIA	\$600.00	\$1,500.00
610 IIIA DELTA FIRE RETARDANT (IIIA-DELT-FR)	IIIA	\$640.00	\$1,600.00

## HIGH COVERAGE TACTICAL ARMOR

CATALOG PAGE 9

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
610 IIIA ESU NYLON (IIIA-WEPT-N)	IIIA	\$924.00	\$2,310.00
610 IIIA ESU FIRE RETARDANT (IIIA-NYPD-FR)	IIIA	\$964.00	\$2,410.00

## ARMORED LOAD BEARING VEST

CATALOG PAGE 6

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
610-FC IIIA ALB NYLON (front closure) (IIA-ALB-N)	IIIA	\$649.60	\$1,624.00
610-FC IIIA ALB FIRE RETARDANT (front closure) (IIIA-ALB-FR)	IIIA	\$689.60	\$1,724.00

Added charge of 10% for size 50-52, 20% for size 54-56 and 30% for size 58-60.

## FLAK JACKET USA

CATALOG PAGE 5

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
600-FO II FLAK USA NYLON (front opening) (II-FLAK-N)	II	\$480.80	\$1,202.00
600-FO II FLAK USA FIRE (front opening) RETARDANT (II-FLAK-FR)	II	\$520.80	\$1,302.00
610-FC IIIA FLAK USA NYLON (front closure) (IIIA-FLAK-M)	IIIA	\$596.00	\$1,490.00
610-FC IIIA FLAK USA FIRE (front closure) RETARDANT (IIIA-FLAK-FR)	IIIA	\$636.00	\$1,590.00

TACTICAL ASSAULT VEST-WITH OVER  
THE SHOULDER PROTECTION

CATALOG PAGE 8

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
600 II TAC ALT NYLON (II-TAC-A-N)	II	\$364.80	\$912.00
600 II TAC ALT FIRE RETARDANT (II-TAC-A-FR)	II	\$404.80	\$1,012.00
610 IIIA TAC ALT NYLON (IIIA-TAC-A-N)	IIIA	\$479.20	\$1,198.00
610 IIIA TAC ALT FIRE RETARDANT (IIIA-TAC-A-FR)	IIIA	\$519.20	\$1,298.00

AV-1 AVIATORS CREW SUPPORT VEST

CATALOG PAGE 12

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
610-FC IIIA AV-1 NYLON (front closure) (IIIA-AV-1-N)	IIIA	\$540.00	\$1,350.00
610-FC IIIA AV-1 FIRE RETARDANT (front closure) (IIIA-AV-1-FR)	IIIA	\$580.00	\$1,450.00

AV-2 AVIATORS VEST

CATALOG PAGE 12

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
610 IIIA AV-2 NYLON (IIIA-AV-2-N)	IIIA	\$391.20	\$978.00
610 IIIA AV-2 FIRE RETARDANT (IIIA-AV-2-FR)	IIIA	\$431.20	\$1,078.00

Added charge of 10% for size 50-52, 20% for size 54-56 and 30% for size 58-60.

AVIATION FLOATATION VEST

CATALOG PAGE 12

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
610 IIIA AFV NYLON (IIIA-AFV-N)	IIIA	\$580.00	\$1,450.00
610 IIIA AFV FIRE RETARDANT (IIIA-AFV-FR)	IIIA	\$620.00	\$1,550.00

PASSIVE/ACTIVE FLOTATION VEST

CATALOG PAGE 12

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
610 IIIA P/A-FV NYLON (IIIA-P/A-FV-N)	IIIA	\$668.00	\$1,670.00
610 IIIA P/A-FV FIRE RETARDANT (IIIA-P/A-FV-FR)	IIIA	\$708.00	\$1,770.00

Added charge of 10% for size 50-52, 20% for size 54-56 and 30% for size 58-60.

APPENDIX F

REQUEST FOR EXTENSION OF TIME

You must complete this form if you need an extension of time beyond 120 days to order your replacement body armor. The extension must be based on procurement or purchasing regulations, procedures, policies or other official requirements.

Please provide the requested information, sign the form, and return it to:

American Body Armor and Equipment, Inc.  
85 Nassau Place  
Yulee, Florida 32097

This form must be returned within 120 days.

Additional time is needed in which to order replacement body armor. The amount of time needed is: \_\_\_\_\_.

(up to 18 months)

The additional time requested is necessary to comply with the following procurement or purchasing regulations, procedures, policies or other official requirements (please be specific):

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We understand that this request for extension of time does not obligate this organization to order and pay for replacement body armor, but it is our present intention to do so, subject to compliance with the requirements specified above.

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title or position

APPENDIX G

American Body Armor & Equipment, Inc.  
85 Nassau Pike  
Yulee, FL 32097

FORWARD & ADDRESS CORRECTION REQUESTED

**ATTENTION: BODY ARMOR REPLACEMENT PROGRAM**

Chief of Police  
Anywhere Police Department  
Anywhere, USA 10000

## APPENDIX H

SUMMARY OF FTC CONSENT AGREEMENT WITH  
AMERICAN BODY ARMOR

The Federal Trade Commission has entered into a consent order with American Body Armor & Equipment, Inc. (“ABA”) settling its charges against ABA. The FTC alleged that ABA misrepresented that certain of the body armor it sold was certified by the National Institute of Justice, when, according to FTC’s charges, this armor was not certified because it differed in certain significant ways from the models that had been certified. The FTC has also alleged that ABA did not have substantiation for its claims that its “Black Magic” treatment effectively improves the ballistic performance of its body armor. ABA denies all charges that it has violated the law, but has agreed to enter into the consent order. The following is a summary of the requirements of the Order.

First, the Order prohibits ABA from misrepresenting that its body armor is certified under the NIJ standard unless it has been tested and certified strictly in accordance with the NIJ procedures; it also prohibits ABA from falsely claiming (that is, misrepresenting) that its body armor carries the approval, endorsement, or sanction of NIJ or any other organization, or that its body armor is the same as or similar to NIJ-approved body armor.

Second, the Order prohibits ABA from representing that its body armor provides any specified degree of ballistic protection, or is tested, approved, endorsed or certified, unless the armor is either:

- a. NIJ-certified at the represented threat level, or
- b. Certified under a different standard or test, so long as ABA discloses the identity of the standard or test and that it is different from the NIJ standard.

Third, the Order requires ABA to have competent and reliable scientific evidence to substantiate any claims of ballistic efficacy or performance it makes for Black Magic or any other ballistic treatment.

Fourth, the Order requires ABA to offer replacement body armor to purchasers of ABA vests represented as certified by NIJ under its 0101.03 standard. All U.S. purchasers of ABA .03 vests are eligible for replacement vests, if the vest was purchased before January 1, 1990. U.S. purchasers of ABA .03 vests are also eligible for replacement vests if the vest was purchased after January 1, 1990, and it differs from the certified model with respect to waterproofing or configuration of stitching on the ballistic panels, method of closure of the vest, the number of panels or the removability of the panels from the vest, the cover (except for certain differences only in the color, use of foam for flotation purposes, or removability of the ballistic panel from the cover), or any other change to the ballistic elements or that may diminish the ballistic protection provided by the vest. “U.S. purchasers” includes purchasers who either: (a) bought vests in the United States; or (b) are United States citizens, corporations or government entities.

The Order requires that ABA compile a list of all purchasers eligible for replacement vests from its own files and by contacting wholesalers, distributors and retailers of ABA vests. After the Order is entered, ABA must mail to the

purchasers a letter and replacement program description, an ABA catalog and price list, and application forms. The letter explains the FTC's charges against ABA and its concern that the vests ABA sold could fail in actual use to provide the level of ballistic protection claimed, and contains ABA's denial of these allegations and its belief that the vests are effective. Purchasers who have not yet fully paid for their vests, but are otherwise eligible, will be sent an additional letter by ABA explaining their need to complete payments to be eligible for the program.

The Order further requires ABA to provide replacement body armor to eligible purchasers who apply for it within 120 days of their receipt of the letter. In those cases where the purchasers cannot meet the 120-day deadline due to procurement or purchasing regulations, procedures, policies or other official requirements, they may submit an application form specifying the official requirements in order to receive an extension of time to apply of up to 18 months.

Under the Order, the purchaser may request any model of armor of the same threat level as the vests to be replaced, or the next higher level, if none is available at the level of the vest to be replaced. However, tactical vests cannot be ordered as replacements for concealable vests. The vests will be provided in the color and size specified by the purchaser. The replacement armor will be new and cannot differ from the corresponding certified model except for minor deviations unavoidable due to the manufacturing process. However, if the purchaser requests a modification from the certified model, ABA may elect to supply the modified vest if it informs the purchaser that the modification may affect its certification by NIJ.

The Order provides for partial payment by the purchaser for the replacement vests in order to defray some of ABA's costs. The cost to the purchaser varies by model. The replacement cost is 40% of ABA's current list price for the vest. The Order further specifies the payment terms. ABA will ship the replacement vests, at its cost, within 60 days of the application. Institutional purchasers must make payment in full within 30 days after receiving the replacement vests, and for individual purchasers, the total cost is due at the time the vests are delivered. Purchasers then have 60 days to return the old vests to ABA, which cannot have been destroyed by ballistic testing or other destructive damage.

Under the Order, ABA must keep records and file reports of its compliance with the provisions of the Order, notify the FTC of changes in its corporate structure, and provide a copy of this Summary to its affiliates, officers, managers, advertising employees, and trade customers. This Summary is not intended to constitute an official interpretation of the Order or to modify in any way its terms.



Complaint

118 F.T.C.

IN THE MATTER OF

REVCO D.S., 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-3540. Complaint, Oct. 31, 1994--Decision, Oct. 31, 1994*

This consent order requires, among other things, an Ohio-based drugstore chain to divest, within twelve months, to a Commission approved acquirer, either the pharmacy business that it owns or the pharmacy business acquired from Hook-SupeRx, Inc. (HSI) in each of three geographic areas in Virginia. If the divestitures are not completed within twelve months, the order requires the respondent to consent to the appointment of a trustee to divest the assets. In addition, the consent order requires the respondent to obtain prior Commission approval, for ten years, before acquiring any similar business interest in any of the three specified geographic areas.

#### *Appearances*

For the Commission: *Laura Wilkinson, Ann Malester, Jacqueline Mendel and Mary Lou Steptoe.*

For the respondent: *Louis Sernoff and Alan Ward, Baker & Hostetler, Washington, D.C.*

#### COMPLAINT

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

## I. DEFINITIONS

For the purposes of this complaint the following definitions apply:

1. "*Revco*" means Revco D.S. Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, its directors, officers, employees, agents and representatives, its domestic and foreign parents, predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, employees, agents and representatives of its domestic and foreign predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures. The words "subsidiary," "affiliate" and "joint venture" refer to any firm in which there is partial (10 percent or more) or total ownership or control between corporations or partnerships.

2. "*HSP*" means Hook-SupeRx, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, its directors, officers, employees, agents and representatives, its domestic and foreign parents, predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, employees, agents and representatives of its domestic and foreign predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures. The words "subsidiary," "affiliate" and "joint venture" refer to any firm in which there is partial (10 percent or more) or total ownership or control between corporations or partnerships.

## II. THE RESPONDENT

3. Respondent Revco is a corporation organized and existing under the laws of Delaware, with its principal place of business at 1925 Enterprise Parkway, Twinsburg, Ohio.

4. 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.

## III. THE ACQUIRED COMPANY

5. HSI is a corporation organized and existing under the laws of the State of Delaware, with its headquarters at 175 Tri County Parkway, Cincinnati, Ohio.

6. HSI 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.

## IV. THE ACQUISITION

7. On or about March 31, 1994, Revco and HSI entered an agreement providing for the sale of HSI to Revco, for consideration totaling approximately \$600 million ("acquisition").

## V. THE RELEVANT MARKETS

8. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the acquisition is the sale of prescription drugs in retail stores.

9. For purposes of this complaint, the relevant sections of the country in which to analyze the effects of the acquisition are: Covington, Virginia; Marion, Virginia; and Radford, Virginia.

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

11. Entry into the relevant markets is difficult or unlikely.

12. Revco and HSI are actual competitors in the relevant markets.

## VI. EFFECTS OF THE ACQUISITION

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

- a. By eliminating direct actual competition between Revco and HSI;
- b. By increasing the likelihood that Revco will unilaterally exercise market power; or
- c. By increasing the likelihood of collusion in the relevant markets.

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

#### VII. VIOLATIONS CHARGED

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

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

#### DECISION AND ORDER

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

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 Revco D.S., Inc. ("Revco") is a corporation organized and existing under the laws of Delaware with its office and principal place of business at 1925 Enterprise Parkway, Twinsburg, Ohio.
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. "*Revco*" means Revco D.S., Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by Revco, and their respective directors, officers, employees, agents, representatives, and their respective successors and assigns.

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

C. "*Acquisition*" means the acquisition of all the voting stock of Hook-SupeRx, Inc. ("HSI") by respondent Revco.

D. "*Acquirer*" means the party or parties to whom respondent Revco divests the assets herein ordered to be divested.

E. "*Prescription drugs*" means ethical drugs available at retail only by prescription.

F. "*HSI Pharmacy Business*" means HSI's business of selling prescription drugs at any of the retail stores listed in paragraph I.(J) of this order, but does not include HSI's business of selling other products in those retail stores.

G. “*HSI Pharmacy Assets*” means all assets constituting the HSI Pharmacy Business, excluding those assets pertaining to the Hook, SupeRx, and Brooks trade names, trade dress, trade marks and service marks, and to Revco’s proprietary point of sale equipment or its PAL<sup>®</sup> system, and including but not limited to:

1. Leases, at the Acquirer’s option;
2. Zoning approvals and registrations, at the Acquirer’s option;
3. Books, records, manuals, and operations reports relating to the HSI Pharmacy Business, but only if the divestiture is to an Acquirer that does not already operate a pharmacy in any location;
4. Inventory instruction, or, at the Acquirer’s option, lists of stock keeping units (“SKUs”), *i.e.*, all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales and inventories;
5. Lists of all prescription drug customers, including but not limited to third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, the unit and dollar amounts of sales, by product, to each customer, and store profit and loss statement(s);
6. All names and addresses of prescription drug manufacturers and distributors that supply or have supplied HSI within the six months preceding the date this order becomes final; and
7. Goodwill, tangible and intangible, utilized in the sale of prescription drugs.

H. “*Revco Pharmacy Business*” means Revco’s business of selling prescription drugs at any of the retail stores listed in paragraph I.(J). of this order, but does not include Revco’s business of selling other products in those retail stores.

I. “*Revco Pharmacy Assets*” means all assets constituting the Revco Pharmacy Business, excluding those assets pertaining to the Revco trade names, trade dress, trade marks and service marks, and to Revco’s proprietary point of sale equipment or its PAL<sup>®</sup> system, and including but not limited to:

1. Leases, at the Acquirer’s option;
2. Zoning approvals and registrations, at the Acquirer’s option;
3. Books, records, manuals, and operations reports, relating to the Revco Pharmacy Business, but only if the divestiture is to an Acquirer that does not already operate a pharmacy in any location;

4. Inventory instruction, or, at the Acquirer's option, lists of SKUs, *i.e.*, all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales and inventories;

5. Lists of all prescription drug customers, including but not limited to third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, the unit and dollar amounts of sales, by product, to each customer, and store profit and loss statement(s);

6. All names and addresses of prescription drug manufacturers and distributors that supply or have supplied Revco within the six months preceding the date this order becomes final; and

7. Goodwill, tangible and intangible, utilized in the sale of prescription drugs.

J. "*Assets To Be Divested*" means either the HSI Pharmacy Assets or the Revco Pharmacy Assets constituting the HSI Pharmacy Business or the Revco Pharmacy Business in the following cities or towns:

1. Covington, Virginia;
2. Marion, Virginia; and
3. Radford, Virginia.

K. "*Competitiveness, viability and marketability*" of the Assets To Be Divested mean that respondent shall continue the operation of the Assets To Be Divested in the ordinary course of business without material change or alteration that would adversely affect the value or goodwill of the Assets To Be Divested.

## II.

*It is further ordered, That:*

A. Respondent shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Assets To Be Divested.

B. Respondent shall divest the Assets To Be Divested only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of

the Commission. The purpose of the divestiture of the Assets To Be Divested is to ensure the continued use of the Assets To Be Divested as ongoing viable pharmacies engaged in the same businesses in which the Assets To Be Divested are presently employed and to remedy the lessening of competition resulting from the 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 competitiveness, viability and marketability of the Assets To Be Divested and to prevent the destruction, removal, wasting, deterioration, or impairment of any Assets To Be Divested except for ordinary wear and tear.

D. If a divestiture includes a lease of physical space, and if pursuant to that lease respondent through default of the lease or otherwise regains possession of the space, respondent must notify the Commission of such repossession within thirty (30) days and must redinvest such assets or interest pursuant to paragraph II of this order within six (6) months of such repossession. If respondent has not redinvested such assets or interest pursuant to paragraph II of this order within six (6) months of such repossession, the provisions of paragraph III shall apply to these assets.

### 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 Assets To Be Divested within twelve (12) months of the date this order becomes final, the Commission may appoint a trustee to divest the Assets 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 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 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.

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 reasonably request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the 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 at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order. Provided, however, if the trustee receives *bona fide* offers from more than one acquirer, and if the Commission determines to approve more than one such acquirer, the trustee shall divest to the acquirer or acquirers 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 reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of 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, and respondent shall either defend against such claims or pay the trustee's expenses, including all reasonable fees of counsel and other expenses incurred in connection with the preparations for, or defense of any such 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 to the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

#### IV.

*It is further ordered,* That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise: (A) Acquire any stock, share capital, equity, leasehold or other interest in any concern, corporate or non-corporate, presently engaged in, or within the six months preceding such acquisition engaged in, the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.(J). of this order; or (B) Acquire any assets used for, or previously used for (and still suitable for use for), the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.(J). of this order from any concern, corporate or non-corporate, presently engaged in or within the six months preceding such acquisition engaged in, the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.(J). of this order. Provided, however, that these prohibitions shall not relate to the construction of new facilities.

#### V.

*It is further ordered,* That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs II and III of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with those provisions. Respon-

dent 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 also shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

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

## VI.

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

## VII.

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

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

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

Commissioner Varney not participating.