

## IN THE MATTER OF

## AMERICAN HOME PRODUCTS CORPORATION

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

*Docket C-3557. Complaint, Feb. 14, 1995--Decision, Feb. 14, 1995*

This consent order requires, among other things, the New Jersey-based corporation to divest its tetanus and diphtheria vaccine business to a Commission-approved buyer; to license Cyanamid's rotavirus vaccine research to a Commission-approved licensee; and to change a previously established licensing agreement to ensure that it does not obtain certain competitively sensitive information. The consent order also prohibits, for ten years, the respondent from acquiring any interest in any entity engaged in the clinical development, manufacture, or sale of tetanus, diphtheria, or rotavirus vaccines in the United States without prior Commission approval.

*Appearances*

For the Commission: *Claudia Higgins, Ann Malester and Mary Lou Steptoe.*

For the respondent: *Michael Sohn, Arnold & Porter, Washington, D.C. Kenneth Logan, Simpson, Thacher & Bartlett, New York, N.Y. Kenneth Prince, Sherman & Sterling, New York, N.Y.*

## 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, American Home Products Corporation ("AHP"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the voting stock of American Cyanamid Company ("Cyanamid"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act as amended, ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof

would be in the public interest, hereby issues its complaint, stating its charges as follows:

#### I. RESPONDENT

1. Respondent American Home Products Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its principal place of business located at Five Giralda Farms, Madison, New Jersey.

#### II. THE ACQUIRED COMPANY

2. American Cyanamid Company is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Maine, with its principal executive offices located at One Cyanamid Plaza, Wayne, New Jersey.

#### III. JURISDICTION

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

#### IV. THE ACQUISITION

4. On or about August 17, 1994, AHP and Cyanamid signed an Agreement and Plan of Merger whereby AHP would acquire 100 percent of the voting securities of Cyanamid for approximately \$9.7 billion ("Acquisition").

#### V. THE RELEVANT MARKETS

5. For purposes of this complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are:

(1) The manufacture and sale of combined tetanus and diphtheria vaccine approved by the United States Food and Drug Administration

("FDA") for sale in the United States for adults and children seven years old and older, known as "adult Td";

(2) The manufacture and sale of combined diphtheria and tetanus vaccine approved by the FDA for sale in the United States for children between the ages of two months and seven years, known as "pediatric DT";

(3) The manufacture and sale of tetanus vaccine approved by the FDA for sale in the United States, known as "tetanus toxoid";

(4) The research and development of a vaccine against Rotavirus infection in humans; and

(5) The research, development, production and sale of cytokines for white blood cell and platelet restoration.

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

#### VI. STRUCTURES OF THE MARKETS

7. The market for the manufacture and sale of combined tetanus and diphtheria vaccine approved by the FDA for use for adults and children seven years old or older, known as "adult Td," is highly concentrated as measured by the Herfindahl-Hirschmann Index.

8. AHP and Cyanamid are actual competitors in the relevant market for the manufacture and sale of adult Td in the United States.

9. The market for the manufacture and sale of combined diphtheria and tetanus vaccine for children between the ages of two months and seven years, known as "pediatric DT," is highly concentrated as measured by the Herfindahl-Hirschmann Index.

10. AHP and Cyanamid are actual competitors in the relevant market for the manufacture and sale of pediatric DT in the United States.

11. The market for the manufacture and sale of tetanus vaccine, known as "tetanus toxoid," is highly concentrated as measured by the Herfindahl-Hirschmann Index.

12. AHP and Cyanamid are actual competitors in the relevant market for the manufacture and sale of tetanus toxoid in the United States.

13. The research and development market for a Rotavirus vaccine is highly concentrated as measured by the Herfindahl-Hirschmann

Index. As of the date of this complaint, there are only three producers of vaccines with research projects either in clinical development or near clinical development aimed at developing a vaccine against Rotavirus infection in humans.

14. AHP and Cyanamid are actual competitors in the relevant market for the research and development of a Rotavirus vaccine for sale in the United States.

15. The market for research, development, production and marketing of cytokines for white blood cell and platelet restoration is highly concentrated as measured by the Herfindahl-Hirschmann Index. As of the date of this complaint, the only cytokines for the restoration of white blood cells and platelets approved by the FDA for sale in the U.S. are: Granulocyte-Macrophage colony stimulating factor ("GM-CSF") manufactured and sold by Cyanamid and Granulocyte colony stimulating factor ("G-CSF") manufactured and sold by Amgen. Three cytokines for the restoration of white blood cells and platelets are pending FDA approval for sale in the U.S. These are: GM-CSF manufactured by Sandoz, under license from AHP; Interleukin-3 manufactured by Sandoz, under license from AHP; and Pixy321, also identified as rhIL-3/rhGM-CSF *S. cerevisiae* fusion protein, manufactured by Cyanamid.

16. AHP is a potential competitor of Cyanamid in the market for cytokines for white blood cell and platelet restoration.

#### VII. BARRIERS TO ENTRY

17. Entry into the adult Td, pediatric DT, and tetanus toxoid vaccine markets is difficult and time consuming. Entry into the manufacture and sale of tetanus and diphtheria vaccines is governed by the requirements of the FDA. The minimum time that it would take for a firm to complete FDA requirements to enter into the tetanus and diphtheria vaccine markets would be several years.

18. Entry into the relevant Rotavirus vaccine research and development market is difficult and time consuming, requiring the expenditure of significant resources over a period of many years with no assurance that a viable commercial vaccine will result.

19. Entry into the cytokines for white blood cell and platelet restoration market is difficult and time consuming. FDA regulations create long lead times for the introduction of new drugs; patents create large and often insurmountable barriers to entry.

## VIII. EFFECTS OF THE ACQUISITION

20. The effects of the Acquisition if consummated 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, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, by, among others:

a. Eliminating actual, direct and substantial competition between AHP and Cyanamid in the relevant adult Td, pediatric DT, and tetanus toxoid vaccine markets;

b. Increasing the likelihood that AHP will unilaterally exercise market power in the relevant cytokines for white blood cell and platelet restoration market and the relevant adult Td, pediatric DT, and tetanus toxoid vaccine markets;

c. Creating a dominant firm in the relevant adult Td, pediatric DT, and tetanus toxoid vaccine markets;

d. Eliminating actual, direct competition for research and development between AHP and Cyanamid in the Rotavirus vaccine research and development market and in the cytokines for white blood cell and platelet restoration market;

e. Enhancing the likelihood of collusion or coordinated interaction between or among the remaining firms in each of the relevant markets; and

f. Eliminating potential competition in the relevant Rotavirus vaccine research and development market and cytokines for white blood cell and platelet restoration market.

## IX. VIOLATIONS CHARGED

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

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

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of respondent's proposed acquisition of certain stock of American Cyanamid Company ("Cyanamid") 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 American Home Products Corporation ("AHP") is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal place of business located at Five Giralda Farms, Madison, New Jersey.

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

## ORDER

## I. DEFINITIONS

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

A. "*AHP*" means American Home Products Corporation, its predecessors, subsidiaries, divisions, groups and affiliates controlled by AHP, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. "*Cyanamid*" means American Cyanamid Company.

C. "*Acquirer*" means the entity to whom AHP shall divest AHP's Tetanus and Diphtheria Vaccine Assets pursuant to paragraph II of this order.

D. "*New Acquirer*" means the entity to whom the trustee shall divest AHP's Tetanus and Diphtheria Vaccine Assets pursuant to paragraph IV of this order.

E. "*Rotavirus Licensee*" means the entity to whom AHP shall license Cyanamid's Rotavirus Vaccine Research pursuant to paragraph V of this order.

F. "*Respondent*" means AHP.

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

H. "*Acquisition*" means the acquisition by AHP of the common stock of Cyanamid pursuant to a tender offer commenced on August 10, 1994.

I. "*AHP's Tetanus and Diphtheria Vaccine Assets*" means AHP's assets relating to the manufacture and sale of AHP's Tetanus and Diphtheria Vaccines that are not part of AHP's physical facilities or other tangible assets. "AHP's Tetanus and Diphtheria Vaccine Assets" include but are not limited to all formulations, patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, distribution information, customer lists, information stored on management information systems and specifications sufficient for the Acquirer or the New Acquirer, as applicable, to use such information, software used solely in connection with AHP's Tetanus and Diphtheria Vaccines and all data, materials and information relating to United States Food and Drug Administration

("FDA") approvals for Tetanus and Diphtheria Vaccines. "AHP's Tetanus and Diphtheria Vaccine Assets" do not include any manufacturing assets of AHP or any assets acquired by AHP from American Cyanamid as a result of the Acquisition or AHP's Vaccine Filling and Packaging Assets.

J. "*AHP's Vaccine Filling and Packaging Assets*" means a non-exclusive license to all patents, trade secrets, technology and know-how relating to filling vials, syringes or other forms of filling or packaging used by AHP for Tetanus and Diphtheria Vaccines at any time up to and including the date of the Acquisition, including but not limited to the Tubex® filling system. "AHP's Vaccine Filling and Packaging Assets" do not include any manufacturing assets of AHP or any assets acquired by AHP from American Cyanamid as a result of the Acquisition.

K. "*Tetanus and Diphtheria Vaccines*" means vaccines used to create and maintain antitoxin levels in human beings to prevent tetanus and/or diphtheria, including tetanus toxoid vaccine, tetanus-diphtheria toxoids vaccine (adult) and diphtheria-tetanus toxoids vaccine (pediatric), approved by the FDA for sale in the United States.

L. "*Contract Manufacture*" means the manufacture of Tetanus and Diphtheria Vaccines by AHP for sale to the Acquirer or the New Acquirer, as applicable, in Finished Packaged Form, in annual volumes not to exceed: Tetanus Toxoid (fluid) 1,000,000 doses; Tetanus Toxoid (adsorbed) 3,000,000 doses; diphtheria-tetanus toxoids vaccine (pediatric) 1,000,000 doses; and tetanus-diphtheria toxoids vaccine (adult) 13,000,000 doses.

M. "*Finished Packaged Form*" means packaged in a form acceptable for commercial sale in the United States, in each form of packaging, or substantially similar thereto (including Tubex® & prefilled syringes) as that used by AHP (any time up to and including the date of the Acquisition) in the distribution and sale of AHP's Tetanus and Diphtheria Vaccines, with information including but not limited to the name and identification codes of the Acquirer or the New Acquirer, as applicable, inscribed on the packaging of the Tetanus and Diphtheria Vaccines, and packaged in units specified by the Acquirer or the New Acquirer, as applicable, as permitted by AHP's existing FDA approvals.

N. "*Cost*" means AHP's actual per unit cost of manufacturing AHP's Tetanus and Diphtheria Vaccines, which may be adjusted once



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

O. "*Formulation*" means any and all information, including both patent and trade secret information, technical assistance and advice, relating to the manufacture of Tetanus and Diphtheria Vaccines that meet United States Food and Drug Administration approved specifications therefor.

P. "*Cyanamid's Rotavirus Vaccine Research*" means:

(1) All of the patents and patent applications that Cyanamid holds, has an option to hold or is licensed to practice under and that are directed to the development of a vaccine to protect humans against rotavirus disease;

(2) All of the know-how that Cyanamid received from licensors or developed itself that is directed to the development of a vaccine to protect humans against rotavirus disease;

(3) All of the biochemical materials, including, but not limited to, reagents, cell lines, monoclonal antibodies, baculovirus stocks and rotavirus stocks that are directed to the development of a vaccine to protect humans against rotavirus disease; and

(4) All documentation, written materials, and other relevant data that are directed to the development of a vaccine to protect humans against rotavirus disease;

As of the date of the licensing pursuant to paragraph V or VI of this order, which can be licensed to the Rotavirus Licensee including, but not limited to, those items enumerated in the Confidential Appendix A.

## II. TETANUS AND DIPHTHERIA VACCINES DIVESTITURE PROVISIONS

*It is further ordered, That:*

A. Within four (4) months of the date this order becomes final, AHP shall divest, absolutely and in good faith, AHP's Tetanus and Diphtheria Vaccine Assets and consummate an agreement that

includes the provisions required by paragraph II.C of this order, with an Acquirer or a New Acquirer, as applicable, (hereinafter "Divestiture Agreement").

B. Respondent shall divest AHP's Tetanus and Diphtheria Vaccine Assets only to and consummate a Divestiture Agreement only with an Acquirer or New Acquirer, as applicable, 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 AHP's Tetanus and Diphtheria Vaccine Assets and the Divestiture Agreement is to ensure the continuation of AHP's Tetanus and Diphtheria Vaccine Assets as an ongoing, independent operation, engaged in the same business in which AHP's Tetanus and Diphtheria Vaccine Assets are presently engaged, and to remedy the lessening of competition resulting from the proposed Acquisition as alleged in the Commission's complaint.

C. The Divestiture Agreement shall include the following and AHP shall commit to satisfy the following:

1. AHP shall Contract Manufacture and deliver to the Acquirer or the New Acquirer, as applicable, in a timely manner the requirements of the Acquirer or the New Acquirer, as applicable, for Tetanus and Diphtheria Vaccines at AHP's Cost for a period not to exceed five (5) years from the date the Divestiture Agreement (or the New Acquirer's Divestiture Agreement, as applicable) is approved, or six (6) months after the date the Acquirer or the New Acquirer, as applicable, obtains all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States, whichever is earlier; provided, however, that the five (5) year period shall be extended for a period not to exceed twenty-four (24) months if the trustee submits to the Commission the certification provided for in subparagraph II.C.10 of this order.

2. AHP shall commence delivery of Tetanus and Diphtheria Vaccines to the Acquirer or the New Acquirer, as applicable, within two (2) months from the date the Commission approves the Acquirer and the Divestiture Agreement (or the New Acquirer and its Divestiture Agreement).

3. After AHP commences delivery of Tetanus and Diphtheria Vaccine to the Acquirer or the New Acquirer, as applicable, pursuant to subparagraph II.C.2 of this order, all inventory of Tetanus and Diphtheria Vaccines produced by AHP at its facility located at

Marietta, Pennsylvania, regardless of the date of its production, may be sold by AHP only to the Acquirer or the New Acquirer, as applicable.

4. AHP shall make representations and warranties to the Acquirer or the New Acquirer, as applicable, that the Tetanus and Diphtheria Vaccines contract manufactured by AHP for the Acquirer or the New Acquirer, as applicable, meet the United States Food and Drug Administration approved specifications therefor and are not adulterated or misbranded within the meaning of the Food, Drug and Cosmetic Act, 21 U.S.C. 321, *et seq.* AHP shall agree to indemnify, defend and hold the Acquirer or the New Acquirer, as applicable, harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Tetanus and Diphtheria Vaccines contract manufactured by AHP to meet FDA specifications. This obligation shall be contingent upon the Acquirer or the New Acquirer, as applicable, giving AHP prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting AHP to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel. This obligation shall not require AHP to be liable for any negligent act or omission of the Acquirer or the New Acquirer, as applicable, or for any representations and warranties, express or implied, made by the Acquirer or the New Acquirer, as applicable, that exceed the representations and warranties made by AHP to the Acquirer or the New Acquirer, as applicable.

5. During the term of contract manufacturing, upon reasonable request by the Acquirer or the New Acquirer, as applicable, AHP shall make available to the Acquirer or the New Acquirer, as applicable, all records kept in the normal course of business that relate to the cost of manufacturing Tetanus and Diphtheria Vaccines at its Marietta, Pennsylvania facility.

6. Upon reasonable notice and request from the Acquirer or the New Acquirer, as applicable, AHP shall provide information, technical assistance and advice sufficient to assist the Acquirer or the New Acquirer, as applicable, in obtaining all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States. Upon reasonable notice and request from the Acquirer or the New Acquirer, as applicable, AHP shall also provide consultation with knowledgeable employees of AHP and training at the Acquirer's facility or the New Acquirer's facility, as applicable,

for a period of time, not to exceed one (1) year, sufficient to satisfy the Acquirer's management or the New Acquirer's management, as applicable, that its personnel are adequately trained in the manufacture of Tetanus and Diphtheria Vaccines for sale in the United States. Respondent may require reimbursement from the Acquirer or the New Acquirer, as applicable, for all its direct out-of-pocket expenses incurred in providing the services required by this subparagraph II.C.6.

7. AHP shall offer an option for a non-exclusive license of AHP's Vaccine Filling and Packaging Assets to the Acquirer or the New Acquirer, as applicable, which option shall be exercisable within one (1) year from the date the Commission approves the Divestiture Agreement and the Acquirer or New Acquirer, as applicable. The license granted pursuant to this subparagraph: (a) may prohibit any sublicensing by the Acquirer or New Acquirer, as applicable, except as part of a sale of all of the Tetanus and Diphtheria Vaccines assets of the Acquirer or New Acquirer, as applicable, if such sale occurs after the Acquirer or the New Acquirer, as applicable, has obtained all necessary FDA approvals to manufacture tetanus and diphtheria vaccines for sale in the United States; (b) shall terminate if the Acquirer or New Acquirer, as applicable, ceases to produce or sell Tetanus and Diphtheria Vaccines in the United States, unless the license is transferred to a new entity pursuant to paragraph II.C.7 (a); and (c) may prohibit the Acquirer or the New Acquirer, as applicable, from using AHP's Vaccine Filling and Packaging Assets for any purpose other than for filling and packaging products manufactured or sold by the Acquirer or the New Acquirer, as applicable.

8. The Divestiture Agreement shall require the Acquirer or the New Acquirer, as applicable, to submit to the Commission within sixty (60) days of the approval by the Commission of the Divestiture Agreement with the Acquirer or the New Acquirer, as applicable, a certification attesting to the good faith intention of the Acquirer or the New Acquirer, as applicable, and including an actual plan by the Acquirer or the New Acquirer, as applicable, to obtain in an expeditious manner all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States.

9. The Divestiture Agreement shall require the Acquirer or the New Acquirer, as applicable, to submit to the trustee appointed pursuant to paragraph III of this order, periodic verified written reports setting forth in detail the efforts of the Acquirer or the New

Acquirer, as applicable, to sell contract manufactured Tetanus and Diphtheria Vaccines in the United States and to obtain all FDA approvals necessary to manufacture its own Tetanus and Diphtheria Vaccines for sale in the United States. The Divestiture Agreement shall require the first such report to be submitted 60 days from the date the Divestiture Agreement is approved by the Commission and every 90 days thereafter until all necessary FDA approvals are obtained by the Acquirer or the New Acquirer, as applicable, to manufacture Tetanus and Diphtheria Vaccines for sale in the United States. The Divestiture Agreement shall also require the Acquirer or the New Acquirer, as applicable, to report to the Commission and the trustee at least thirty (30) days prior to its ceasing the sale of contract manufactured Tetanus and Diphtheria Vaccines in the United States for any time period exceeding sixty (60) days or abandoning its efforts to obtain all necessary FDA approvals to manufacture its own Tetanus and Diphtheria Vaccines for sale in the United States.

10. The Divestiture Agreement shall provide that the Commission may terminate the Divestiture Agreement if the Acquirer or the New Acquirer, as applicable: (1) voluntarily ceases for sixty (60) days or more the sale of Tetanus and Diphtheria Vaccines in the United States prior to obtaining all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States; (2) abandons its efforts to obtain all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States; or (3) fails to obtain all necessary FDA approvals of its own to manufacture Tetanus and Diphtheria Vaccines for sale in the United States within five (5) years from the date the Commission approves the Divestiture Agreement with the Acquirer or the New Acquirer, as applicable; provided, however, that the five (5) year period may be extended for a period not to exceed twenty-four (24) months if the trustee certifies to the Commission that the Acquirer or the New Acquirer, as applicable, made good faith efforts to obtain all necessary FDA approvals for manufacturing Tetanus and Diphtheria Vaccines for sale in the United States and that such FDA approvals appear likely to be obtained within such extended time period.

11. The Divestiture Agreement shall provide that, if the Divestiture Agreement is terminated, the AHP Tetanus and Diphtheria Vaccine Assets shall be divested by the trustee to a New Acquirer pursuant to the provisions of paragraph IV of this order.

D. While the obligations imposed by paragraphs II, III or IV of this order are in effect, respondent shall take such actions as are necessary: (1) to maintain all necessary FDA approvals to manufacture AHP's Tetanus and Diphtheria Vaccines for sale in the United States; (2) to maintain the viability and marketability of AHP's Tetanus and Diphtheria Vaccine Assets as well as all tangible assets, including manufacturing facilities, needed to contract manufacture and sell Tetanus and Diphtheria Vaccines; and (3) to prevent the destruction, removal, wasting, deterioration or impairment of any of AHP's Tetanus and Diphtheria Vaccine Assets or tangible assets including manufacturing facilities needed to contract manufacture and sell Tetanus and Diphtheria Vaccines except for ordinary wear and tear.

III. TETANUS AND DIPHTHERIA VACCINES  
TRUSTEE AUDITOR PROVISIONS

*It is further ordered, That:*

A. Within thirty (30) days of the date this order becomes final, the Commission shall appoint a trustee to ensure that AHP and the Acquirer or the New Acquirer, as applicable, expeditiously perform their respective responsibilities as required by the Divestiture Agreement approved by the Commission and by paragraph II of this order. AHP shall consent to the following terms and conditions regarding the trustee's powers, duties, authorities, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of AHP, which consent shall not be unreasonably withheld. If AHP 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 AHP of the identity of any proposed trustee, AHP shall be deemed to have consented to the selection of the proposed trustee.

2. The trustee shall have the power and authority to assure respondent's compliance with the terms of paragraph II of this order and with the Divestiture Agreement with the Acquirer or the New Acquirer, as applicable.

3. Within ten (10) days after appointment of the trustee, AHP shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the trustee all the rights and powers necessary to permit the trustee to assure respondent's compliance with the terms of paragraph II of this order and with the Divestiture Agreement with the Acquirer or the New Acquirer, as applicable.

4. The trustee shall serve until such time as the Acquirer or the New Acquirer, as applicable, has received all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States, or for fifteen years, whichever is shorter.

5. The trustee shall have full and complete access to the personnel, books, records, facilities and technical information related to the manufacture of AHP's Tetanus and Diphtheria Vaccines, or to any other relevant information, as the trustee may reasonably request, including but not limited to all records kept in the normal course of business that relate to the cost of manufacturing Tetanus and Diphtheria Vaccines. Respondent shall cooperate with any reasonable request of the trustee. Respondent shall take no action to interfere with or impede the trustee's ability to assure respondent's compliance with paragraph II of this order and the Divestiture Agreement with the Acquirer or the New Acquirer, as applicable.

6. The trustee shall serve, without bond or other security, at the cost and expense of AHP, on such reasonable and customary terms and conditions as the Commission may set. The trustee shall have authority to employ, at the cost and expense of AHP, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all expenses incurred. The Commission shall approve the account of the trustee, including fees for his or her services.

7. 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 preparations for, or defense of any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from the misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

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

9. The Commission 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 assure compliance with the requirements of paragraph II of this order and the Divestiture Agreement with the Acquirer or the New Acquirer, as applicable.

10. The trustee shall evaluate reports submitted to it by the Acquirer or the New Acquirer, as applicable, with respect to the efforts of the Acquirer or the New Acquirer, as applicable, to obtain all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States and shall report in writing to the Commission every six months concerning compliance by the respondent and the Acquirer or the New Acquirer, as applicable, with the provisions of paragraph II of this order and the efforts of the Acquirer or the New Acquirer, as applicable, to receive all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States.

B. Respondent shall comply with all reasonable directives of the trustee regarding:

1. Respondent's obligations to contract manufacture and deliver the Acquirer's requirements or the New Acquirer's requirements, as applicable, for Tetanus and Diphtheria Vaccines, pursuant to paragraphs II.C.1 and II.C.2 of this order;

2. Respondent's obligations to provide representations and warranties regarding Tetanus and Diphtheria Vaccines, pursuant to paragraph II.C.4 of this order; and

3. Respondent's obligations to provide information, technical assistance and advice, pursuant to paragraph II.C.6 of this order.

C. If the Commission terminates the Divestiture Agreement pursuant to paragraph II.C.10, the Commission may direct the trustee to seek a New Acquirer, as provided for in paragraph IV of this order.



IV. TETANUS AND DIPHTHERIA VACCINES  
TRUSTEE DIVESTITURE PROVISIONS

*It is further ordered, That:*

A. (1) If AHP fails to divest absolutely and in good faith AHP's Tetanus and Diphtheria Vaccine Assets and to consummate a Divestiture Agreement with an Acquirer within four (4) months from the date this order becomes final, then any executed Divestiture Agreement with the Acquirer shall be terminated and the Commission may direct the trustee appointed pursuant to paragraph II of this order (a) to divest AHP's Tetanus and Diphtheria Vaccine Assets and (b) to enter into a Divestiture Agreement that satisfies the requirements of paragraph II of this order with a New Acquirer. The trustee shall have the same authority and responsibilities pursuant to paragraph III of this order with respect to the New Acquirer.

(2) If the Commission terminates the Divestiture Agreement pursuant to paragraph II.C.10, the Commission may direct the trustee appointed under paragraph III of this order (a) to divest AHP's Tetanus and Diphtheria Vaccine Assets to a New Acquirer and (b) to enter into a new Divestiture Agreement with such New Acquirer. In any case under this subparagraph IV.A(2), the trustee shall have the same authority and responsibilities with respect to the New Acquirer as those described in paragraph III of this order.

Neither the decision of the Commission to direct the trustee nor the decision of the Commission not to direct the trustee to divest AHP's Tetanus and Diphtheria Vaccine Assets under subparagraph IV.A(1) of this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

B. If the trustee is directed under subparagraph A of this paragraph to divest the AHP Tetanus and Diphtheria Vaccine Assets to a New Acquirer and to enter into a Divestiture Agreement with the New Acquirer, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall extend the authority and responsibilities of the trustee appointed under paragraph III of this order to include divesting AHP's Tetanus and Diphtheria Vaccine Assets and directing AHP to enter into a Divestiture Agreement with the New Acquirer, subject to the consent of respondent, which consent shall not be unreasonably withheld. If respondent has not opposed, in writing, including the reasons for opposing, the extension of the authority and responsibilities of the trustee selected under paragraph III of this order within ten (10) days after notice by the staff of the Commission to respondent that the trustee's authority and responsibilities are to be extended pursuant to this paragraph, respondent shall be deemed to have consented to the extension of the trustee's authority and responsibilities.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest AHP's Tetanus and Diphtheria Vaccine Assets to a New Acquirer pursuant to the terms of paragraph II of this order and to enter into a Divestiture Agreement with the New Acquirer pursuant to the terms of paragraph II of this order, which Divestiture Agreement shall be subject to the prior approval of the Commission. The trustee will have the authorities and responsibilities as described in paragraph III with respect to the New Acquirer.

3. Within ten (10) days after extension of the trustee's authority and responsibilities, respondent shall amend the existing 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 divest AHP's Tetanus and Diphtheria Vaccine Assets to a New Acquirer and to enter into a Divestiture Agreement with the New Acquirer.

4. The trustee shall have six (6) months from the date the Commission extends his or her authority and responsibilities under paragraph IV A.(1) of this order to divest AHP's Tetanus and Diphtheria Vaccines Assets and to enter into a Divestiture Agreement with the New Acquirer that satisfies the requirements of paragraph II of this order.

5. The trustee shall have full and complete access to the personnel, books, records and facilities of AHP related to the manufacture, distribution, or sale of Tetanus and Diphtheria Vaccines or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such

trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of his or her responsibilities.

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; to assure that AHP enters into a Divestiture Agreement that complies with the provisions of paragraph II.A; to assure that AHP complies with the remaining provisions of paragraph II of this order; and to assure that the New Acquirer obtains all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States. The divestiture and the Divestiture Agreement shall be made to the New Acquirer in the manner set forth 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 respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondent. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's locating a New Acquirer and assuring compliance with this order.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any

claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

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

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

11. The trustee shall have no obligation or authority to operate or maintain AHP's Tetanus and Diphtheria Vaccine Assets.

12. The trustee shall report in writing to respondent and the Commission every sixty (60) days concerning his or her efforts to divest AHP's Tetanus and Diphtheria Vaccine Assets, AHP's compliance with the terms of this order, and the New Acquirer's efforts to obtain all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States.

13. If, within five (5) years from the date on which the Commission approves the New Acquirer, the New Acquirer has not obtained all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States, then the Divestiture Agreement between AHP and the New Acquirer shall terminate.

#### V. ROTAVIRUS VACCINE RESEARCH LICENSING PROVISIONS

*It is further ordered, That:*

A. Within twelve (12) months after the date this order becomes final, respondent shall: (1) grant a non-exclusive license, in perpetuity, and in good faith, of any technical information and patent rights included in Cyanamid's Rotavirus Vaccine Research (see paragraphs A & C of Confidential Appendix A); and (2) provide samples for research, adequate to satisfy the needs of the Rotavirus Licensee, of any physical assets included in Cyanamid's Rotavirus Vaccine Research (*see* paragraph B of Confidential Appendix A) that are owned by AHP; provided, however, that such license shall be limited: (i) to use solely in developing, producing and selling a vaccine to protect humans against rotavirus disease; and (ii) to

preclude its use to develop a vector for a vaccine intended to protect against a disease other than rotavirus.

B. Respondent shall license Cyanamid's Rotavirus Vaccine Research only to a Rotavirus Licensee 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 licensing of Cyanamid's Rotavirus Vaccine Research is to ensure the continuation of Cyanamid's Rotavirus Vaccine Research as an ongoing research project for a rotavirus vaccine to be approved by the FDA for sale in the United States and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. Upon reasonable notice and request from the Rotavirus Licensee, respondent shall provide reasonable assistance to the Rotavirus Licensee regarding the Cyanamid Rotavirus Vaccine Research. Such assistance shall include reasonable consultation with knowledgeable employees of AHP and training at the Rotavirus Licensee's facilities or at such other place as is mutually satisfactory to respondent and the Rotavirus Licensee for a period of time sufficient to satisfy the Rotavirus Licensee's management that its personnel are appropriately trained to proceed with the Cyanamid Rotavirus Vaccine Research. However, AHP shall not be required to continue providing such assistance for more than six (6) months from the date the licensing is finally approved by the Commission. AHP may require reimbursement from the Rotavirus Licensee for all its direct out-of-pocket expenses incurred in providing the assistance to the Rotavirus Licensee.

D. Pending licensing of Cyanamid's Rotavirus Vaccine Research, respondent shall take such actions as are necessary to maintain the viability and marketability of Cyanamid's Rotavirus Vaccine Research and to prevent the destruction, removal, wasting, deterioration, or impairment of Cyanamid's Rotavirus Vaccine Research except for ordinary wear and tear.

VI. ROTAVIRUS VACCINE RESEARCH TRUSTEE  
EXCLUSIVE LICENSING PROVISIONS

*It is further ordered, That:*

A. If AHP has not, within twelve (12) months of the date this order becomes final, complied with the requirements of paragraph V of this order, the Commission may appoint a trustee to (1) grant an exclusive license, in perpetuity, and in good faith, of any technical information and patent rights included in Cyanamid's Rotavirus Vaccine Research (*see* paragraphs A & C of Confidential Appendix A); and (2) provide samples for research, adequate to satisfy the needs of the Rotavirus Licensee, of any physical assets included in Cyanamid's Rotavirus Vaccine Research (*see* paragraph B of Confidential Appendix A) that are owned by AHP; provided, however, that: (i) such exclusive license shall be limited to use solely in developing, producing and selling a vaccine to protect humans against rotavirus disease; (ii) such license shall be limited to preclude its use to develop a vector for a vaccine intended to protect against a disease other than rotavirus; and (iii) AHP shall have the right to retain and use all of the Cyanamid Rotavirus Vaccine Research assets, including samples of the assets in paragraph B of Confidential Appendix A, for the purpose of using them to develop a vector for a vaccine intended to protect against a disease other than rotavirus and for any other purpose other than developing and producing a vaccine to protect humans against rotavirus disease. In the event the Commission or the Attorney General brings an action against respondent pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, AHP shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court appointed trustee, pursuant to Section 5(1) of the FTC 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 VI.A of this order, AHP shall consent to the following

terms and conditions regarding the trustee's powers, duties, authorities, and responsibilities.

1. The Commission shall select the trustee, subject to the consent of AHP, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in licensing technology. If AHP 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 AHP of the identity of any proposed trustee, AHP 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 grant an exclusive license of Cyanamid's Rotavirus Vaccine Research as described in paragraph VI.A. ("the Rotavirus Exclusive License").

3. Within ten (10) days after appointment of the trustee, AHP 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 enter into the Rotavirus Exclusive License as required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph VI.C.3 to accomplish the Rotavirus Exclusive License required by paragraph VI of this order, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan of licensing or believes that exclusive licensing can be achieved within a reasonable time, the twelve (12) month 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 the twelve (12) month period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records, data, facilities, and technical information related to the Rotavirus Vaccine Research, or to any other relevant information, as the trustee may reasonably request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's ability to accomplish the exclusive licensing of Cyanamid's Rotavirus Vaccine

Research required by this order. Any delays in exclusively licensing Cyanamid's Rotavirus Vaccine Research required by this order caused by respondent shall extend the time under paragraph VI.C.4 for accomplishing the exclusive licensing of Cyanamid's Rotavirus Vaccine Research required by this order in an amount equal to the delay, as determined by the Commission or, for the 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 AHP's absolute and unconditional obligation to grant an exclusive license to Cyanamid's Rotavirus Vaccine Research as required by this order at no minimum price. The exclusive license shall be made in the manner and to the Rotavirus Licensee as set out in 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 grant an exclusive license 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 AHP, 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 AHP, 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. 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 AHP 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 ability to grant an exclusive license of Cyanamid's Rotavirus Vaccine Research.

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 preparations for, or defense of any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from



the 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 VI.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 enter into the Rotavirus Exclusive License required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Cyanamid Rotavirus Vaccine Research.

12. The trustee shall report in writing to AHP and to the Commission every sixty (60) days concerning the trustee's efforts to grant an exclusive license of Cyanamid's Rotavirus Vaccine Research as required by this order.

#### VII. GM-CSF AND IL-3 ROYALTIES

*It is further ordered, That:*

A. Within thirty (30) days of the date on which the FDA approves any product that includes in whole or in part GM-CSF, as identified in the October 9, 1987 Technology Transfer and GM-CSF Supply Agreement between AHP and Sandoz, Ltd. ("GM-CSF Agreement"), AHP shall take such action as may be necessary to ensure that the royalty payments made pursuant to Section 10.2(b) of the GM-CSF Agreement and any reports of such payments are made on a worldwide aggregated basis.

B. Within thirty (30) days of the date on which the FDA has approved both (1) any product that includes in whole or in part IL-3, as identified in the August 17, 1987 License Agreement for IL-3 between AHP and Sandoz, Ltd. ("IL-3 Agreement"); and (2) any product that includes in whole or in part Pixy321, also identified as rhIL-3/rhGM-CSF *S. cerevisiae* fusion protein, AHP shall take such action as may be necessary to ensure that the royalty payments made pursuant to Section 3.2 of the IL-3 Agreement and any reports of such payments are made on a worldwide aggregated basis.

## VIII. PRIOR APPROVAL

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

A. Acquire more than 1% of the stock, share capital, equity, or other interest in any concern, corporate or non-corporate, presently engaged in, or within the two years preceding such acquisition engaged in, the (1) clinical development or (2) manufacture and sale of tetanus or diphtheria vaccines in the United States;

B. Acquire any assets currently used for or previously used for (and still suitable for use for) the (1) clinical development or (2) manufacture and sale of tetanus or diphtheria vaccines in the United States;

C. Acquire more than 1% of the stock, share capital, equity, or other interest in any concern, corporate or non-corporate, presently engaged in, or within the two years preceding such acquisition engaged in, the (1) clinical development or (2) manufacture and sale in the United States of a vaccine to protect humans against rotavirus disease; or

D. Acquire any assets currently used for or previously used for (and still suitable for use for) the (1) clinical development or (2) manufacture and sale in the United States of a vaccine to protect humans against rotavirus disease.

## IX. REPORTS

*It is further ordered,* That:

A. Within sixty (60) days after the date this order becomes final and every six (6) months after the date this order becomes final until AHP has fully complied with the provisions of paragraphs II, IV, V and VI of this order, AHP 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 these paragraphs of this order. AHP 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 these paragraphs of this order, including a description of all substantive contacts or negotiations for accomplishing the divestitures and entering into the Divestiture Agreement required by this order, including the identity of all parties contacted. AHP 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 the Divestiture Agreement required by paragraph II of this order.

B. One (1) year from the date this order becomes final and annually for the next nine (9) years on the anniversary of the date this order becomes final or until the Acquirer or New Acquirer, as applicable, has obtained all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States, whichever is later, 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 this order.

#### X. ACCESS

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

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

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 such matters.

#### XI. CORPORATE CHANGE

*It is further ordered,* That respondent shall notify the Commission at least thirty (30) days prior to any change in respondent such as

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

## XII. SUNSET

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

### CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today, the Commission accepts a consent agreement settling charges that American Home Products' proposed acquisition of American Cyanamid Company is likely substantially to lessen competition in the markets for three existing diphtheria and tetanus vaccines and substantially to lessen competition to develop a new rotavirus vaccine and to develop and produce cytokines. This appears to be a strong antitrust case, but I seriously question whether the remedy in the markets for the existing vaccines is sufficient.

Under the order, the divestiture of tetanus and diphtheria vaccine assets is limited to certain intellectual property, including formulations, patents, trade secrets, technology, and know-how. The divestiture is structured so that, as a practical matter, the only firms that could acquire these assets are firms that in my opinion already would qualify under the law as potential entrants. In short, the order will not restore the competition in the relevant tetanus and diphtheria markets lost as a result of the acquisition. Instead, the Commission should require the divestiture of a viable business unit, even if that business unit produces and sells products other than the vaccines in question.

## IN THE MATTER OF

## CHARTER MEDICAL CORPORATION

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

*Docket C-3558. Complaint, Feb. 14, 1995--Decision, Feb. 14, 1995*

This consent order requires, among other things, Charter Medical Corporation (Charter), a Georgia-based chain of psychiatric hospitals, to modify its agreement to purchase certain National Medical Enterprises (NME) facilities by rescinding Charter's acquisitions of NME psychiatric facilities in four specified localities. In addition, the consent order requires Charter, for ten years, to secure Commission approval before acquiring or divesting psychiatric facilities in those localities.

*Appearances*

For the Commission: *Robert W. Doyle, Jr., Ronald B. Rowe and John C. Weber.*

For the respondent: *Robert C. Jones, Jones, Day, Reavis & Pogue, Washington, D.C.*

## COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Charter Medical Corporation ("Charter"), a corporation subject to the jurisdiction of the Commission, proposes to acquire some of the assets of National Medical Enterprises, Inc. ("NME"), 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"), 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 pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, and Section 5(b) of the FTC Act, as amended, 15 U.S.C. 45(b), stating its charges as follows:

## I. DEFINITIONS

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

a. "*Psychiatric hospital*" means a hospital licensed or certified as a psychiatric hospital (except for a license or certificate that limits service to residential treatment facility services only), other than a federal, state, or county psychiatric hospital that primarily provides long-term, *i.e.*, thirty days or more, treatment of chronic mental illness or short term court ordered detention or involuntary treatment, that provides 24-hour in-patient psychiatric services for psychiatric diagnosis, treatment, and care of persons suffering from acute mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

b. "*Psychiatric unit*" means a department, unit, or other organizational subdivision of a general acute care hospital licensed or certified as a provider of in-patient psychiatric care (except for a license or certificate that limits service to residential treatment facility services only), other than a federal, state or county psychiatric unit that primarily provides long-term, *i.e.*, thirty days or more, treatment of chronic mental illness or short term court ordered detention or involuntary treatment, that provides 24-hour in-patient psychiatric services for psychiatric diagnosis, treatment and care of persons suffering from acute mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

## II. CHARTER

2. Respondent Charter is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal executive offices located at 577 Mulberry Street, Macon, Georgia.

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

## III. NME

4. NME is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Nevada, with its offices and principal place of business at 2700 Colorado Avenue, Santa Monica, California.

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

## IV. THE ACQUISITION

6. On or about March 29, 1994, Charter and NME signed an Asset Sales Agreement; under the terms of that agreement, as subsequently amended, Charter would acquire 17 psychiatric hospitals, chemical dependency facilities and residential treatment centers from NME for approximately \$53 million ("the Acquisition").

## V. THE RELEVANT MARKETS

7. Relevant lines of commerce in which to analyze the effects of the Acquisition include the provision of all in-patient services by psychiatric hospitals and psychiatric units of general acute care hospitals, as well as narrower lines of commerce, such as in-patient psychiatric services for children and adolescents.

8. For purposes of this complaint, the relevant geographic areas in which to analyze the effects of the Acquisition are:

a. The "Orlando area," consisting of the Florida counties of Orange, Osceola and Seminole;

b. The "Atlanta area," consisting of the Georgia counties of Fulton, Paulding, Fayette, Clayton, Henry, Rockdale, De Kalb, Gwinnett, Cobb, Cherokee, Forsyth, and Douglas;

c. The "Memphis area," consisting of the Tennessee counties of Shelby, Tipton, and Fayette, the Arkansas county of Crittenden, and the Mississippi county of De Soto, and;

d. The "Richmond area," consisting of the Virginia city of Richmond and the Virginia counties of Henrico, Hanover, Goochland, Powhatan, Chesterfield, Charles City, and New Kent.

9. The relevant markets set forth in paragraphs seven through eight are concentrated, whether measured by Herfindahl-Hirschmann Indices or two-firm and four-firm concentration ratios.

10. Entry into the relevant markets is difficult due to certificate-of-need regulation of entry by the States of Florida, Georgia, Tennessee, and Virginia, substantial lead times required to establish a new hospital, and other factors.

11. Charter is an actual competitor of NME in the relevant markets. Charter is the largest chain of psychiatric hospitals in the United States.

#### VI. EFFECTS OF THE ACQUISITION

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

- a. Eliminating actual competition between Charter and NME;
- b. Increasing the likelihood that Charter will unilaterally exercise market power in the relevant markets;
- c. Eliminating the NME hospitals as substantial independent competitive forces in the relevant markets;
- d. Enhancing the likelihood of collusion or coordinated interaction between or among the firms in the relevant markets; and
- e. Denying patients, physicians, third-party payors, and other consumers of hospital services in the relevant market the benefits of free and open competition based on price, quality, and service.

#### VII. VIOLATIONS CHARGED

13. The Asset Sales Agreement described in paragraph six constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.



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

#### DECISION AND ORDER

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

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

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

1. Respondent Charter 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 577 Mulberry Street, Macon, Georgia.

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

### ORDER

#### I.

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

A. "*Respondent*" or "*Charter*" means Charter Medical Corporation, 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. "*NME*" means National Medical Enterprises, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada with its office and principal place of business at 2700 Colorado Avenue, Santa Monica, California.

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

D. "*Hospital*" means a health care facility, licensed as a hospital, other than a federally-owned facility (such as a military or Veterans Administration hospital), having a duly organized governing body with overall administrative and professional responsibility, and an organized professional staff that provides 24-hour inpatient care, and that may also provide outpatient services.

E. "*General acute care hospital*" means a health care facility licensed as a hospital, 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.

F. "*Psychiatric hospital*" means a hospital licensed or certified as a psychiatric hospital (except for a license or certificate that limits service to residential treatment facility services only), other than a federal, state or county psychiatric hospital that primarily provides long-term, *i.e.*, 30 days or more, treatment of chronic mental illness or short term court ordered detentions and involuntary treatment, that provides 24-hour inpatient services for psychiatric diagnosis,

treatment, and care of persons suffering from acute mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

G. "*Psychiatric unit*" means a department, unit, or other organizational subdivision of a general acute care hospital licensed or certified as a provider of inpatient psychiatric care (except for a license or certificate that limits service to residential treatment facility services only), other than a federal, state or county psychiatric unit that primarily provides long-term, *i.e.*, 30 days or more, treatment of chronic mental illness or short term court ordered detentions and involuntary treatment, that provides 24-hour inpatient services for psychiatric diagnosis, treatment and care of persons suffering from acute mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

H. "*Psychiatric facility*" means either a psychiatric hospital, a general acute care hospital with a psychiatric unit, or a psychiatric unit.

I. "*Psychiatric service*" means the provision of inpatient services for psychiatric diagnosis, treatment and care of persons suffering from mental illness, emotional disturbance, or alcohol or drug abuse at a psychiatric facility.

J. To "*operate*" a psychiatric facility means to own, lease, manage, or otherwise control or direct the operations of a psychiatric facility, directly or indirectly.

K. To "*acquire*" a psychiatric facility means to directly or indirectly, through subsidiaries, partnerships, or otherwise:

(1) Acquire the whole or any part of assets used or previously used within the last two years (and still suitable for use) for operating a psychiatric facility from any person presently engaged in, or within the two years preceding such acquisition engaged in, operating a psychiatric facility;

(2) Acquire the whole or any part of the stock, share capital, equity, or other interest in any person engaged in, or within the two years preceding such acquisition engaged in, operating a psychiatric facility;

(3) Acquire or otherwise obtain the right to designate directly or indirectly directors or trustees of a psychiatric facility; or

(4) Enter into any other arrangement to obtain direct or indirect ownership, management or control of a psychiatric facility or any part

thereof, including but not limited to, a lease of or management contract for a psychiatric facility.

L. "*Residential treatment center*" means a treatment center that provides long-term (length of stay of 30 days or more) care in a non-psychiatric facility setting to patients that require long term care for psychiatric diagnosis and treatment for mental illness, emotional disturbance, or alcohol or drug abuse.

M. "*Outpatient facility*" means a facility that is not licensed as a psychiatric facility and has a primary function of providing outpatient treatment for psychiatric diagnosis, treatment and care of persons suffering from mental illness, emotional disturbance, or alcohol or drug abuse, for patients that do not require inpatient psychiatric services.

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

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

P. "*Relevant area(s)*" means:

(1) The "Orlando area," consisting of the Florida counties of Orange, Osceola and Seminole;

(2) The "Atlanta area," consisting of the Georgia counties of Fulton, Paulding, Fayette, Clayton, Henry, Rockdale, De Kalb, Gwinnett, Cobb, Cherokee, Forsyth and Douglas;

(3) The "Memphis area," consisting of the Tennessee counties of Shelby, Tipton and Fayette, the Arkansas county of Crittenden, and the Mississippi county of De Soto;

(4) The "Richmond area," consisting of the Virginia city of Richmond and the Virginia counties of Henrico, Hanover, Goochland, Powhatan, Chesterfield, Charles City, and New Kent.

Q. "*Relevant facilities*" means the following NME psychiatric hospitals, including, without limitation, all related assets and businesses, successors and assigns and all improvements, additions and enhancements made to such assets: MidSouth Hospital, Memphis, Tennessee; Psychiatric Institute of Richmond, Richmond, Virginia; Brawner North Medical Health System, Smyrna, Georgia;

Crescent Pines Hospital, Stockbridge, Georgia; Laurel Oaks Hospital and Residential Treatment Center, Orlando, Florida.

## II.

*It is further ordered*, That respondent forthwith modify its Asset Sale Agreement with NME, dated March 29, 1994, to rescind respondent's agreement to acquire the relevant facilities.

## III.

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

A. Acquire any psychiatric facility in any of the relevant areas, including the relevant facilities;

B. Permit any psychiatric facility it operates in the relevant areas to be acquired by any person that operates, or will operate immediately following such acquisition, any other psychiatric facility in the relevant areas, including the relevant facilities.

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

1. The acquisition of a facility that is (a) solely licensed as a residential treatment center and not licensed as a psychiatric facility, or (b) solely operated as an outpatient facility and not licensed as a psychiatric facility;

2. Any acquisition that does not involve psychiatric services; or

3. Any acquisition otherwise subject to this paragraph III of this order if the fair market value of (or, in case of an asset acquisition, the consideration to be paid for) the psychiatric facility or part thereof to be acquired, including assumption by respondent of any liabilities, does not exceed five hundred thousand dollars (\$500,000).

## IV.

*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 psychiatric facility in the relevant areas, for the joint establishment or operation of any new psychiatric facility, psychiatric service or part thereof, in the relevant areas, including the relevant facilities. 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 IV 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 IV.

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

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

1. The fair market value of the assets to be contributed to the joint venture or other arrangement by the psychiatric facility not operated by respondent does not exceed five hundred thousand dollars (\$500,000);
2. The transaction does not involve psychiatric services; 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 III of this order.

#### V.

*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 psychiatric facility it operates in the relevant areas to be acquired by any other person 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.

VI.

*It is further ordered,* That, within sixty (60) days after the date this order becomes final, and annually thereafter for a period of ten (10) 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 the requirements of this 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 order; and

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

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.

Set Aside Order

119 F.T.C.

IN THE MATTER OF

THE H.D. LEE CO., INC.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF  
SEC. 2(d) OF THE CLAYTON ACT*Docket C-411. Consent Order, May 1, 1963\* -- Set Aside Order, Feb. 14, 1995*

The Federal Trade Commission has set aside a 1965 consent order with The H.D. Lee Co., Inc., (62 FTC 1248), pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING  
AND SETTING ASIDE ORDER

On October 26, 1994, The Lee Apparel Company, Inc., formerly The H.D. Lee Co., Inc. ("Lee") filed its Petition To Reopen and Set Aside Consent Order ("Petition") in this matter. Lee requests that the Commission set aside the 1965 consent order in this matter pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued July 22, 1994, published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, Lee affirmatively states that it has not engaged in any conduct violating the terms of the order. The Petition was placed on the public record, and the thirty-day comment period expired on December 15, 1994. No comments were received.

The Commission in its July 22, 1994, Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."<sup>1</sup> The Commission's order in Docket No. C-411 became final on August 9, 1965, and has been in effect for more than twenty-nine years. Consistent with the Commission's July 22, 1994, Sunset Policy Statement, the presumption is that the order should be terminated. Nothing to

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\* The consent order was made effective on August 9, 1965.

<sup>1</sup> See Sunset Policy Statement, 59 Fed. Reg. at 45, 289.



overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order in Docket No. C-411.

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

*It is furthered ordered*, That the Commission's order in Docket No. C-411 be, and it hereby is, set aside, as of the effective date of this order.

Complaint

119 F.T.C.

IN THE MATTER OF

SULZER LIMITED

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-3559. Complaint, Feb. 23, 1995--Decision, Feb. 23, 1995*

This consent order requires, among other things, Sulzer, a Swiss firm to divest, within six months, a copy of all the information necessary to purchase ingredients for, to manufacture and to sell aluminum polyester powder -- equivalent to Sulzer's Amdry 2010 -- to a Commission-approved acquirer. If the divestiture is not completed on time, the consent order permits the Commission to appoint a trustee to divest copies of both the Amdry 2010 information and all product information relating to the acquired firms aluminum polyester powder. In addition, the consent order requires the respondent, for ten years, to obtain Commission approval before acquiring any assets in the aluminum polyester powder market.

#### *Appearances*

For the Commission: *Ann B. Malester, Claudia Higgins and Mary Lou Steptoe.*

For the respondent: *Joel Mitnick and Neal Stoll, Skadden, Arps, Slate, Meagher & Flom, New York, N.Y. Sutton Keaney, Winthrop, Stimson, Puntham & Roberts, New York, N.Y.*

#### COMPLAINT

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

## I. DEFINITIONS

1. "*Aluminum Polyester Powder*" means a thermal spray material consisting of wholly aromatic polyester and aluminum silicon that is applied via thermal spray equipment to aircraft turbine engines.

2. "*Wholly Aromatic Polyester*" means wholly aromatic polyester that is used as an input in Aluminum Polyester Powder.

## II. RESPONDENT

3. Respondent Sulzer is a corporation organized and existing under the laws of the Country of Switzerland, with its headquarters located at CH-8401, Winterthur, Switzerland.

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

## III. ACQUIRED COMPANY

5. Metco is a division of The Perkin-Elmer Corporation, which is a corporation organized and existing under the laws of the State of New York, with its headquarters located at 761 Main Avenue, Norwalk, Connecticut.

6. Metco 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. ACQUISITION

7. On or about April 18, 1994, Sulzer and Metco entered into an agreement whereby Sulzer will acquire all of the assets of the Metco Division of The Perkin-Elmer Corporation ("Acquisition").

## V. THE RELEVANT MARKET

8. For purposes of this complaint, the relevant line of commerce in which to analyze the Acquisition is the manufacture and sale of Aluminum Polyester Powder.

9. For purposes of this complaint, the relevant section of the country is the United States.

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

11. Entry into the relevant market would not be timely, likely or sufficient to deter or counteract the adverse competitive effects described in paragraph thirteen of the complaint because of the difficulties in obtaining an adequate source of Wholly Aromatic Polyester and because the original turbine engine manufacturers must conduct tests to verify that the Aluminum Polyester Powder meets their standards before approving its use.

12. Sulzer and Metco are actual competitors in the relevant market.

## 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 marketing 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 Sulzer and Metco;
- b. By increasing the likelihood that Sulzer will unilaterally exercise market power; and
- c. By increasing the likelihood that Aluminum Polyester Powder customers will be forced to pay higher prices.

14. All of the above increase the likelihood that firms in the relevant market 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 the proposed acquisition by respondent of certain assets and businesses of the Metco Division of The Perkin-Elmer Corporation, and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

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

1. Respondent Sulzer Limited ("Sulzer") is a corporation organized and existing under the laws of the Country of Switzerland with its offices and principal place of business at CH-8401, Winterthur, Switzerland.

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. "*Sulzer*" means Sulzer Limited, its directors, officers, employees, agents and representatives, its domestic and foreign 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.

B. "*Metco*" means the Metco Division of The Perkin-Elmer Corporation.

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

D. "*Acquisition*" means the acquisition of certain assets of Metco by Sulzer.

E. "*Aluminum polyester powder*" means a thermal spray material consisting of wholly aromatic polyester and aluminum silicon that is applied via thermal spray equipment to aircraft turbine engines.

F. "*Amdry 2010*" means Sulzer's aluminum polyester powder marketed in the United States under the name "Amdry 2010."

G. "*Sumitomo Polyester*" means wholly aromatic polyester (polyoxybenzoyl homopolymer) that Sumitomo Chemical Company Limited produces for Sulzer according to Sulzer's specifications for use as an input in Amdry 2010.

H. "*Sulzer aluminum silicon*" means the particular grade, specification, and type of aluminum silicon used in Amdry 2010.

I. "*Amdry 2010 Ingredients*" means Sumitomo Polyester and Sulzer aluminum silicon.

J. "*Amdry 2010 Information*" means a copy of all information necessary to purchase Amdry 2010 Ingredients and all information necessary for the manufacture and sale of Amdry 2010, including but not limited to:

1. All product information related to Sumitomo Polyester and related know-how, including (without limitation) its morphology, the name(s) of the supplier(s) of Sumitomo Polyester, all particle specifications, formulas, processes, technology, trade secrets, manufacturing information, plans, drawings and data and other tangible embodiments of know-how used to acquire commercially acceptable Sumitomo Polyester for use in Amdry 2010;

2. All product information related to Sulzer aluminum silicon, including (without limitation) its morphology, the name(s) of the supplier(s) of Sulzer aluminum silicon, all product specifications, formulas, processes, technology, trade secrets, manufacturing information, plans, drawings and data and other tangible embodiments of know-how used to acquire commercially acceptable Sulzer aluminum silicon for use in Amdry 2010;

3. All information related to the manufacture of Amdry 2010, including (without limitation) all production manuals, training materials, lists of equipment used in the manufacturing process, formulas, process, all manufacturing standards and procedures, quality control specifications, technology, trade secrets, manufacturing information, plans, drawings and data and other tangible embodiments of know-how used to manufacture commercially acceptable Amdry 2010; and

4. All information related to the sale of Amdry 2010, including (without limitation) product brochures, customer lists, training materials, and other tangible embodiments of know-how used in the sale of Amdry 2010.

- K. "*Amdry 2010 Equivalent*" means an aluminum polyester powder that is chemically equivalent to Amdry 2010 and that is not produced by Sulzer or Metco.

L. "*Original equipment manufacturers*" means General Electric Aircraft Engines Division, Textron Lycoming, and the Garrett Division of Allied Signal, and their successors and assigns.

M. "*Metco 601*" means Metco's aluminum polyester powder marketed in the United States under the name "Metco 601."

N. "*Carborundum Ekonol Polyester*" means wholly aromatic polyester that The Carborundum Company produces for Metco according to Metco's specifications for use as an input in Metco 601.

O. "*Metco aluminum silicon*" means the particular grade, specification, and type of aluminum silicon used in Metco 601.

P. "*Metco 601 Ingredients*" means Carborundum Ekonol Polyester and Metco aluminum silicon.

Q. "*Metco 601 Information*" means a copy of all information necessary to purchase Metco 601 Ingredients and all information necessary for the manufacture and sale of Metco 601, including but not limited to:

1. All product information related to Carborundum Ekonol Polyester and related know-how, including (without limitation) its morphology, the name(s) of the supplier(s) of Carborundum Ekonol Polyester, all particle specifications, formulas, processes, technology, trade secrets, manufacturing information, plans, drawings and data and other tangible embodiments of know-how used to acquire commercially acceptable Carborundum Ekonol Polyester for use in Metco 601;

2. All product information related to Metco aluminum silicon, including (without limitation) its morphology, the name(s) of the supplier(s) of Metco aluminum silicon, all product specifications, formulas, processes, technology, trade secrets, manufacturing information, plans, drawings and data and other tangible embodiments of know-how used to acquire commercially acceptable Metco aluminum silicon for use in Metco 601;

3. All information related to the manufacture of Metco 601, including (without limitation) production manuals, training materials, lists of equipment used in the manufacturing process, formulas, process, all manufacturing standards and procedures, quality control specifications, technology, trade secrets, manufacturing information, plans, drawings and data and other tangible embodiments of know-how used to manufacture commercially acceptable Metco 601; and

4. All information related to the sale of Metco 601, including (without limitation) product brochures, customer lists, training materials, and other tangible embodiments of know-how used in the sale of Metco 601.



R. "Metco 601 Equivalent" means an aluminum polyester powder that is chemically equivalent to Metco 601 and that is not produced by Metco or Sulzer.

## II.

*It is ordered, That:*

A. Sulzer shall, absolutely and in good faith, divest the Amdry 2010 Information within six (6) months of the date this order becomes final to an acquirer that will develop, manufacture, sell, and seek original equipment manufacturers' approvals for an Amdry 2010 Equivalent. Sulzer shall divest 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.

B. Sulzer shall provide all additional assistance, information and know-how reasonably necessary to the acquirer of the Amdry 2010 Information to help such acquirer receive all product approvals from the original equipment manufacturers necessary for the purchase of an Amdry 2010 Equivalent by such original equipment manufacturers or by any other person pursuant to standards and qualifications established by such manufacturer. Such assistance shall include but not be limited to the following:

1. Paying all costs of testing by or for the original equipment manufacturers for product approvals of an Amdry 2010 Equivalent;
2. Providing any training relevant to the production of an Amdry 2010 Equivalent to the acquirer;
3. Offering any technical assistance necessary to assist the acquirer in its development of an Amdry 2010 Equivalent; and
4. Any additional information or know-how reasonably necessary to the acquirer.

C. Sulzer shall submit to the Commission, within nine (9) months of the date the Commission approves the divestiture of the Amdry 2010 Information, an affidavit from each of the original equipment manufacturers certifying that each such manufacturer has either (1) individually approved an Amdry 2010 Equivalent manufactured by the Commission-approved acquirer of the Amdry 2010 Information for all uses for which Amdry 2010 is approved by such original

equipment manufacturer, or (2) individually approved any other person's aluminum polyester powder for all uses for which Amdry 2010 is approved by such original equipment manufacturer and that such manufacturer is not interested in approving an Amdry 2010 Equivalent manufactured by the Commission-approved acquirer of the Amdry 2010 Information for all uses for which Amdry 2010 is approved by such original equipment manufacturer.

D. The purpose of the divestiture of the Amdry 2010 Information is to enable the acquirer to become a viable competitor in the aluminum polyester powder market and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

### III.

*It is further ordered, That:*

A. If Sulzer has (1) not divested the Amdry 2010 Information within six (6) months of the date this order becomes final, or (2) not submitted affidavits as required by paragraph II.C. of this order, within nine (9) months of the date the Commission approves the divestiture of the Amdry 2010 Information, then the Commission may appoint a trustee to divest both the Amdry 2010 Information and the Metco 601 Information 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 Amdry 2010 Information and the Metco 601 Information is to enable the acquirer to become a viable competitor in the aluminum polyester powder market, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint. 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, Sulzer shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or

any other statute enforced by the Commission, for any failure by 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 Sulzer, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in the marketing or manufacturing of chemicals. 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 both the Amdry 2010 Information and the Metco 601 Information and to take all such steps as may be feasible and necessary to assist the acquirer of the Amdry 2010 Information and the Metco 601 Information to receive all product approvals from the original equipment manufacturers necessary for the purchase of an Amdry 2010 Equivalent or a Metco 601 Equivalent by such manufacturer or by any other person pursuant to standards and qualifications established by such manufacturer. Such assistance shall include but not be limited to the following:

a. Requiring respondent to pay all costs of testing by or for the original equipment manufacturers for product approvals of an Amdry 2010 Equivalent or a Metco 601 Equivalent;

b. Requiring respondent to provide any training relevant to the production of an Amdry 2010 Equivalent or a Metco 601 Equivalent to the acquirer;

c. Requiring respondent to offer any technical assistance necessary to assist the acquirer in its development of an Amdry 2010 Equivalent or a Metco 601 Equivalent; and

d. Requiring respondent to provide any additional information or know-how reasonably necessary to the acquirer.

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 of both the Amdry 2010 Information and the Metco 601 Information and to provide the additional assistance as required by paragraph III.B.2. of this order.

4. From the date of appointment, the trustee shall have twelve (12) months to divest both the Amdry 2010 Information and the Metco 601 Information, to provide all additional assistance reasonably necessary to the acquirer, and to submit affidavits to the Commission from each of the original equipment manufacturers certifying that each has individually approved the Amdry 2010 Equivalent or the Metco 601 Equivalent manufactured by the Commission-approved acquirer of the Amdry 2010 Information and the Metco 601 Information for all uses for which Amdry 2010 or Metco 601 is approved by such original equipment manufacturer, and if such affidavits are not submitted, the trustee shall have an additional six (6) months thereafter to accomplish the divestiture of both the Amdry 2010 Information and the Metco 601 Information, to provide the additional assistance, and to submit the affidavits. If, however, at the end of the additional six (6) month period, the trustee believes that the original equipment manufacturers will approve the Amdry 2010 Equivalent or the Metco 601 Equivalent manufactured by the Commission-approved acquirer of the Amdry 2010 Information and the Metco 601 Information for all uses for which Amdry 2010 or Metco 601 is approved by such original equipment manufacturer, and will submit said affidavits to the Commission within a reasonable time, the time period for said approvals and submission of affidavits 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 Amdry 2010 Information and the Metco 601 Information, or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the

divestiture of the Amdry 2010 Information and the Metco 601 Information, the provision of additional assistance to the acquirer, and the approval of the Amdry 2010 Equivalent or the Metco 601 Equivalent by the original equipment manufacturers. Any delays caused by the respondent shall extend the time for the divestiture of the Amdry 2010 Information and the Metco 601 Information, the additional assistance to the acquirer, and the approvals by the original equipment manufacturers, 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. If the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or such entities selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Sulzer 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 divestiture of the Amdry 2010 Information and the Metco 601 Information and submission of the required affidavits from the original equipment manufacturers.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities 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 this paragraph of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture of the Amdry 2010 Information and the Metco 601 Information, the provision of all additional assistance reasonably necessary to the acquirer, and the submission of affidavits by each of the original equipment manufacturers as required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Amdry 2010 Information and the Metco 601 Information.

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

#### IV.

*It is further ordered, That:*

A. For a ten (10) year period commencing on the date this order becomes final, Sulzer shall not enter into, obtain, make, carry out or enforce any exclusive agreements with Sumitomo Chemical Company Limited or otherwise take any action whatsoever, directly or indirectly, that would prevent Sumitomo Chemical Company Limited from selling Sumitomo Polyester to any other person. Within thirty (30) days after the order becomes final, respondent shall provide a copy of the order to each person at Sumitomo Chemical Company Limited with whom respondent has contact in connection with the purchase of Sumitomo Polyester.

B. If a trustee is appointed and the Metco 601 Information is divested pursuant to paragraph III.A. of this order, then for a ten (10)

year period commencing on the date the Metco 601 Information is divested, Sulzer shall not enter into, obtain, make, carry out or enforce any exclusive agreements with The Carborundum Company or otherwise take any action whatsoever, directly or indirectly, that would prevent The Carborundum Company from selling Carborundum Ekonol Polyester to any other person. Within thirty (30) days after the trustee is appointed, respondent shall provide a copy of this order to each person at The Carborundum Company with whom respondent or Metco has contact in connection with the purchase of Carborundum Ekonol Polyester.

V.

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

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, at the time of such acquisition engaged in, or within the six months preceding such acquisition engaged in, the manufacture, sale, or distribution of aluminum polyester powder in the United States; or

B. Acquire any assets used for or previously used for (and still suitable for use for) the manufacture, sale, or distribution of aluminum polyester powder in the United States.

VI.

*It is further ordered*, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs II. and III. of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with paragraphs II. and III of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II. and III. of the

order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture.

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

## VII.

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

## VIII.

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

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

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



## IN THE MATTER OF

## RED APPLE COMPANIES, INC., ET AL.

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

*Docket 9266. Complaint, May 27, 1994--Decision, Feb. 28, 1995*

This consent order requires, among other things, three New York-based companies and their officer to divest six supermarkets, within 12 months, to a Commission-approved acquirer or acquirers. If the respondents fail to satisfy the divestiture requirements, the consent order permits the Commission to appoint a trustee to divest supermarkets to satisfy the terms of the order. The consent order also prohibits the respondents, for ten years, from acquiring, without prior Commission approval, any supermarket or any interest in an entity that owns or operates a supermarket in New York County south of 116th Street. In addition, the respondents, for ten years, are prohibited from entering into or enforcing any restrictions that would prevent any person acquiring any supermarket owned or operated by any respondent in New York County south of 116th Street from operating the stores as supermarkets.

*Appearances*

For the Commission: *Ronald Rowe, James Fishkin and Mary Lou Steptoe.*

For the respondents: *Jonathan Honig and Martin Bring, Lowenthal, Laudau, Fishcher & Bring, New York, N.Y.*

## 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 respondents Red Apple Companies, Inc., a corporation, John A. Catsimatidis, an individual, Supermarket Acquisition Corp., a corporation, and Designcraft Industries, Inc. (d/b/a Sloan's Supermarkets, Inc.), a corporation, all subject to the jurisdiction of the Commission, have acquired certain assets of Sloan's Supermarkets, Inc. (a/k/a CKMR Corporation), in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45,

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

#### DEFINITIONS

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

a. "*Supermarket*" means a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; other grocery products, including nonfood items such as soaps, detergents, paper goods; other household products; and health and beauty aids.

b. "*Red Apple*" means Red Apple Companies, Inc., its parents, predecessors, subsidiaries, divisions, groups and affiliates (including Red Apple Supermarkets, Inc., Gristede's Supermarkets, Inc., and Supermarket Acquisition Corp.), and their directors, officers, employees, agents, partners, and representatives (including John A. Catsimatidis), and their respective successors or assigns.

c. "*Sloan's*" means Sloan's Supermarkets, Inc. (a/k/a CKMR Corporation), its parents, predecessors, subsidiaries, divisions, groups and affiliates, and their directors, officers, employees, agents, partners, and representatives, and their respective successors or assigns.

d. "*John A. Catsimatidis*" means John A. Catsimatidis, an individual and Chairman and Chief Executive Officer of Red Apple Companies, Inc., and Chairman, Chief Executive Officer, and Treasurer of Designcraft Industries, Inc.

e. "*SAC*" means Supermarket Acquisition Corp., its parents, predecessors, subsidiaries, divisions, groups and affiliates, and their directors, officers, employees, agents, partners, and representatives, and their respective successors or assigns.

f. "*Designcraft*" means Designcraft Industries, Inc. (d/b/a Sloan's Supermarkets, Inc.), its parents, predecessors, subsidiaries, divisions, groups and affiliates, and their directors, officers, employees, agents,

partners, and representatives, and their respective successors or assigns.

## RED APPLE COMPANIES, INC.

2. Respondent Red Apple is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive offices located at 823 Eleventh Avenue, New York, New York.

3. Respondent Red Apple is, and at all times relevant herein has been, engaged in the operation of supermarkets in New York County, New York.

4. Respondent Red Apple 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 Federal Trade Commission Act, as amended, 15 U.S.C. 44.

## JOHN A. CATSIMATIDIS

5. Respondent John A. Catsimatidis is the Chairman, Chief Executive Officer, and sole shareholder of Red Apple Companies, Inc., and Chairman, Chief Executive Officer, Treasurer, and principal shareholder of Designcraft Industries, Inc., with his office and principal place of business at 823 Eleventh Avenue, New York, New York.

6. Respondent John A. Catsimatidis controls, directs, or influences the operations of Red Apple Companies, Inc., Supermarket Acquisition Corp., and Designcraft Industries, Inc.

7. Respondent John A. Catsimatidis 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 an individual whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

## SUPERMARKET ACQUISITION CORP.

8. Respondent SAC is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive offices located at 823 Eleventh Avenue, New York, New York.

9. Respondent SAC is an entity owned by John A. Catsimatidis and used by him to acquire assets from Sloan's.

10. Respondent SAC 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 Federal Trade Commission Act, as amended, 15 U.S.C. 44.

## DESIGNCRAFT INDUSTRIES, INC.

11. Respondent Designcraft (d/b/a Sloan's Supermarkets, Inc.) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 823 Eleventh Avenue, New York, New York.

12. Respondent Designcraft 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 Federal Trade Commission Act, as amended, 15 U.S.C. 44.

## ACQUISITIONS

13. On or about April 16, 1991, Red Apple entered into an agreement with Sloan's identifying for acquisition 20 Sloan's supermarkets located in New York County, New York. Subsequently, Red Apple acquired 18 of these supermarkets and three additional supermarkets from Sloan's in New York County, New York. Sloan's Supermarkets, Inc. subsequently changed its name to CKMR Corporation.

14. On or about December 24, 1992, Designcraft entered into an agreement with CKMR Corporation (formerly Sloan's Supermarkets, Inc.) for the acquisition of the 11 remaining Sloan's supermarkets.

On or about March 23, 1993, Designcraft acquired these supermarkets from CKMR Corporation. Designcraft subsequently changed its name to Sloan's Supermarkets, Inc.

#### TRADE AND COMMERCE

15. Relevant lines of commerce in which to analyze the acquisitions described herein are the retail sale of food and grocery products in supermarkets, and narrower markets contained therein.

16. Relevant sections of the country in which to analyze the acquisitions described herein are residential neighborhoods in New York County, New York, located within the Upper East Side, the Upper West Side, Chelsea, and Greenwich Village.

#### MARKET STRUCTURE

17. The retail sale of food and grocery products in supermarkets in the relevant sections of the country is concentrated, whether measured by the Herfindahl-Hirschmann Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios.

#### ENTRY CONDITIONS

18. Entry into the retail sale of food and grocery products in supermarkets in the relevant sections of the country is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant sections of the country.

#### ACTUAL COMPETITION

19. Prior to the acquisitions described herein, Red Apple and Sloan's were actual competitors in the relevant lines of commerce and sections of the country.

#### EFFECTS

20. The effect of the acquisitions may be substantially to lessen competition in the relevant lines of commerce in the relevant sections of the country in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade

Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

- a. By eliminating direct competition between supermarkets owned or controlled by Red Apple or John A. Catsimatidis and supermarkets owned or controlled by Sloan's;
- b. By increasing the likelihood that Red Apple or John A. Catsimatidis will unilaterally exercise market power; or
- c. By increasing the likelihood of, or facilitating, collusion or coordinated interaction,

Each of which increases the likelihood that the prices of food, groceries or services will increase, and the quality and selection of food, groceries or services will decrease, in the relevant sections of the country.

#### VIOLATIONS CHARGED

21. The acquisitions by Red Apple and Designcraft of assets of Sloan's 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 Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of the Commission's Rules; and

The Commission having considered the matter 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 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Red Apple Companies, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive offices located at 823 Eleventh Avenue, New York, New York.

2. Respondent John A. Catsimatidis is the Chairman, Chief Executive Officer, and sole shareholder of Red Apple Companies, Inc., and Chairman, Chief Executive Officer, Treasurer, and the largest shareholder of Sloan's Supermarkets, Inc., with his office and principal place of business at 823 Eleventh Avenue, New York, New York.

3. Respondent Supermarket Acquisition Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive offices located at 823 Eleventh Avenue, New York, New York.

4. Respondent Sloan's Supermarkets, Inc. (a/k/a Designcraft Industries, Inc.) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 823 Eleventh Avenue, New York, New York.

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

## ORDER

### I.

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

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

B. "*Red Apple*" means Red Apple Companies, Inc., its parents, predecessors, subsidiaries, divisions, groups and affiliates (including Red Apple Supermarkets, Inc., Gristede's Supermarkets, Inc., and Supermarket Acquisition Corp.), and their directors, officers, employees, agents, partners, and representatives (including John A. Catsimatidis), and their respective successors or assigns.

C. "*John A. Catsimatidis*" means John A. Catsimatidis, an individual and Chairman and Chief Executive Officer of Red Apple Companies, Inc., and Chairman, Chief Executive Officer, and Treasurer of Sloan's Supermarkets, Inc. (a/k/a Designcraft Industries, Inc.).

D. "*SAC*" means Supermarket Acquisition Corp., its parents, predecessors, subsidiaries, divisions, groups and affiliates, and their directors, officers, employees, agents, partners, and representatives, and their respective successors or assigns.

E. "*SSI*" means Sloan's Supermarkets, Inc. (a/k/a Designcraft Industries, Inc.), its parents, predecessors, subsidiaries, divisions, groups and affiliates, and their directors, officers, employees, agents, partners, and representatives, and their respective successors or assigns.

F. "*Respondents*" means Red Apple, John A. Catsimatidis, SAC, and SSI.

G. "*Assets to be divested*" means the assets described in paragraphs II. A. and II. B. of this order.

H. "*Supermarket*" means a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

## II.

*It is further ordered,* That respondents shall divest six supermarkets in the following manner:



A. Respondents shall divest, absolutely and in good faith, within twelve months from the date this order becomes final, four of the following listed supermarkets, with one supermarket located in each of the four areas identified below within New York County, New York:

1. Upper East Side:

- a. Sloan's located at 1407 Lexington Avenue (store no. 425);
- b. Sloan's located at 1343-1347 Lexington Avenue (store no. 437); or
- c. Gristede's located at 1356 Lexington Avenue (store no. 52).

2. Upper West Side:

- a. Sloan's located at 530-34 Amsterdam Avenue (store no. 435);
- or
- b. Gristede's located at 251 West 86th Street/2361 Broadway (store no. 56).

3. Chelsea:

- a. Gristede's located at 188 Ninth Avenue (store no. 441, formerly under the Sloan's trade name) or the nearest alternate supermarket owned or operated by any respondent.

4. Greenwich Village:

- a. Sloan's located at 585 Hudson Street (store no. 410) or the nearest alternate supermarket owned or operated by any respondent;
- or
- b. Gristede's located at 25 University Place (store no. 82) or the nearest alternate supermarket west of Broadway owned or operated by any respondent.

The assets to be divested shall consist of the grocery business operated, and all assets, leases, properties, business and goodwill, tangible and intangible, utilized in the distribution or sale of groceries at the listed locations that are divested.

B. Respondents shall also divest, absolutely and in good faith, within twelve months from the date this order becomes final, two of the following listed supermarkets, with one supermarket from one area identified below within New York County, New York, and the other supermarket from a different area identified below within New York County, New York:

1. Upper East Side:

In addition to one of the three Upper East Side supermarkets listed in paragraph II. A. 1., either one other supermarket listed in paragraph II. A. 1., or one of the following:

- a. Sloan's located at 1245 Park Avenue (store no. 38, formerly under the Red Apple trade name);
- b. Gristede's located at 205 East 96th Street (store no. 98);
- c. Gristede's located at 350 East 86th Street (store no. 50);
- d. Sloan's located at 1668 Second Avenue (store no. 434);
- e. Gristede's located at 1644 York Avenue (store no. 53); or
- f. Sloan's located at 1637 York Avenue (store no. 507).

2. Upper West Side:

In addition to one of the two Upper West Side supermarkets listed in paragraph II.A.2., either one other supermarket listed in paragraph II.A.2., or the following:

- a. A supermarket owned or operated by any respondent and located within four blocks of either of the two supermarkets listed in paragraph II. A. 2.

3. Greenwich Village:

In addition to one of the four Greenwich Village supermarkets listed in paragraph II.A.4., either one other supermarket listed in paragraph II.A.4., or one of the following:

- a. Gristede's located at 77 Seventh Avenue (store no. 37) or the nearest alternate supermarket owned or operated by any respondent;  
or

b. Gristede's located at 311 Bleecker Street (store no. 83) or the nearest alternate supermarket owned or operated by any respondent.

The assets to be divested shall consist of the grocery business operated, and all assets, leases, properties, business and goodwill, tangible and intangible, utilized in the distribution or sale of groceries at the listed locations that are divested.

C. Respondents 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 continuation of the assets to be divested as ongoing, viable enterprises engaged in the supermarket business and to remedy the lessening of competition resulting from the acquisitions as alleged in the Commission's complaint.

D. Pending divestiture of such assets to be divested to comply with paragraphs II. and III. of this order, respondents shall take such actions as are necessary to maintain the viability and marketability of such assets to be divested to comply with paragraphs II. and III. of this order and to prevent the destruction, removal, wasting, deterioration, or impairment of such assets to be divested to comply with paragraphs II. and III. of this order except in the ordinary course of business and except for ordinary wear and tear.

### III.

*It is further ordered, That:*

A. If respondents have not divested, absolutely and in good faith and with the Commission's prior approval, such assets to be divested to comply with paragraph II. of this order within twelve months from the date this order becomes final, the Commission may appoint a trustee to divest any of the supermarkets listed in paragraph II. (and all assets, leases, properties, business and goodwill, tangible and intangible, utilized in the distribution or sale of groceries at the listed locations) that are owned or operated by any respondent at the time of the appointment of the trustee in order to satisfy the requirements of paragraphs II. A. and II. B. of this order. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l),

or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondents 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, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

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

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest any of the supermarkets listed in paragraph II (and all assets, leases, properties, business and goodwill, tangible and intangible, utilized in the distribution or sale of groceries at the listed locations) that are owned or operated by any respondent at the time of the appointment of the trustee in order to comply with paragraph II. of this order.

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

4. The trustee shall have twelve (12) months from the date the Commission or court approves the trust agreement described in paragraph III.B.3. to accomplish the divestitures, 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 12-month period only one (1) time for one (1) year.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to any of the supermarkets listed in paragraph II. (and all assets, leases, properties, business and goodwill, tangible and intangible, utilized in the distribution or sale of groceries at the listed locations) or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by respondents shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest at no minimum price. The divestitures 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, for any particular supermarket to be divested, from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity for such supermarket, the trustee shall divest to the acquiring entity or entities selected by respondents from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondents, 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 respondents, 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 to satisfy paragraph II. of this order.

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

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

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

11. The trustee shall have no obligation or authority to operate or maintain the assets to be divested.

12. The trustee shall report in writing to respondents and the Commission every ninety (90) days concerning the trustee's efforts to accomplish divestiture.

#### IV.

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

A. Acquire any stock, share capital, equity, or other interest in any supermarket or leasehold interest in any supermarket located in New York County, New York, south of 116th Street, including any

facility that has operated as a supermarket in this area within six (6) months of the date of the proposed acquisition; or

B. Acquire any stock, share capital, equity, or other interest in: (1) any entity that owns any interest in or operates any supermarket located in New York County, New York, south of 116th Street, or (2) any entity that owned any interest in or operated any supermarket located in New York County, New York, south of 116th Street within six (6) months of the date of the proposed acquisition.

Provided, however, that an acquisition otherwise covered by the requirements of this paragraph shall be exempt from the requirements of this paragraph if it is an acquisition by John A. Catsimatidis or by a respondent corporation from a respondent corporation or from John A. Catsimatidis.

V.

*It is further ordered,* That, for a period of ten (10) years commencing on the date this order becomes final, respondents shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. 12(a)) acquiring any supermarket owned or operated by any respondent, any leasehold interest in any supermarket, or any interest in any retail location that formerly operated as a supermarket in New York County, New York, south of 116th Street, to operate a supermarket or retail food store.

VI.

*It is further ordered,* That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of paragraphs II. or III. of this order, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II. and III. of this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with 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. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

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

#### VII.

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

#### VIII.

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

A. Upon five days' written notice to respondents, 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 any respondent relating to any matters contained in this order; and

B. Upon five days' written notice to respondents and without restraint or interference from them, to interview respondents or officers, directors, or employees of respondents in the presence of counsel.

Commissioner Varney not participating.



IN THE MATTER OF

AMERICAN INSTITUTE OF SMOKING CESSATION, ET AL.

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

*Docket C-3560. Complaint, March. 3, 1995--Decision, March. 3, 1995*

This consent order prohibits, among other things, an Illinois-based company and its two officers from making any representation about the relative or absolute performance or efficacy of any smoking cessation or weight loss program, unless they possess and rely upon competent and reliable scientific evidence to substantiate the representation, and from representing, through any endorsement or testimonial, the achievements of participants who attend their smoking cessation or weight-loss seminars unless the representation reflects the typical or ordinary experience of participants of such programs. In addition, the consent order prohibits the respondents from misrepresenting the contents, results or validity of any study, test, survey or report.

*Appearances*

For the Commission: *Matthew Daynard.*

For the respondents: *Robert E. Kehoe and Daniel S. Kaplan, Wildman, Harrold, Allen & Dixon, Chicago, IL.*

COMPLAINT

The Federal Trade Commission, having reason to believe that American Institute of Smoking Cessation, Inc. ("AISC"), a corporation, Kenneth C. Grossman, individually and as an officer of said corporation, and Jane A. Grossman, individually and as an officer of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent AISC is an Illinois corporation, with its principal office and place of business at 318 South Garfield, Hinsdale, Illinois.

Respondents Kenneth C. Grossman and Jane A. Grossman are, respectively, the President/Treasurer and Vice-President/Secretary

and sole directors and shareholders of the corporate respondent. Together, they formulate, direct, and control the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. Their principal office or place of business is the same as that of the corporate respondent.

PAR. 2. Respondents have advertised, offered for sale, and sold seminars for smoking cessation and weight loss known as "The Grossman Method," and other stop-smoking and weight-loss seminars, to consumers. The Grossman Method seminar consists of a single group hypnosis session, three hours in length, provided to consumers by Kenneth Grossman at various sites throughout the United States.

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

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for The Grossman Method seminar, including but not necessarily limited to the attached Exhibits A-F. These advertisements contain the following statements:

A. "STOP SMOKING IN JUST 3 HOURS FLAT! WITHOUT ANXIETY, IRRITABILITY OR WEIGHT GAIN! . . . The Grossman Method of Hypnosis has helped over 300,000 smokers during the past 15 years. Of those motivated smokers who join us, up to 98% will throw away their cigarettes and stop smoking by seminar's end. I personally guarantee it. . . . This is the ORIGINAL STOP SMOKING IN THREE HOURS FLAT SEMINAR developed and presented by Dr. Kenneth Grossman. Over the years, many others have tried to imitate it, but they simply cannot duplicate it. Kenneth Grossman, Ph.D., developed this seminar during a career of over 15 years as a clinical hypnotherapist helping people to stop smoking and rid themselves of unwanted habits. . . . ELIMINATES YOUR DESIRE FOR CIGARETTES . . . See, hear and experience it for yourself--and then stop smoking completely. You'll be able to do anything you've done before, but you'll do it without smoking. . . . You'll be able to be around others who smoke, and their smoking won't bother or upset you. No matter how much you smoke, or how long you've been smoking, this seminar ELIMINATES THE CRAVING, URGE AND DESIRE TO SMOKE . . . The Grossman method is safe and effective and it has helped tens of thousands of heavily addicted smokers to become non-smokers in one relaxing and enjoyable 3 hour seminar. LOSE WEIGHT FREE. Now you can use the Grossman Method of Hypnosis to help you lose weight. . . . 'The Weight Loss Program is terrific. In two months I've lost 47 pounds. I went from a size 18 to a size 12!! It's been a great summer at the beach.' Gerri Cheek. . . . 'I lost 28 pounds in just six weeks. I lost the weight so fast and easy that my family and friends were astonished.' John Cain" (Exhibit A)

B. "STOP SMOKING IN JUST THREE HOURS FLAT! WITHOUT ANXIETY, IRRITABILITY OR WEIGHT GAIN! . . . The Grossman Method of Hypnosis has helped over 300,000 smokers during the past 15 years. Of those motivated smokers who join us, over 98% will throw away their cigarettes and stop smoking by seminar's end. I personally guarantee it. . . . ELIMINATES YOUR DESIRE FOR CIGARETTES . . . I know you! You've tried to quit smoking many times before--but nothing worked. Not nicorette gum. Not the 'patch.' Not 'cold turkey.' Not willpower. And not even other forms of hypnosis. The Grossman Method of Hypnosis is unique. It is guaranteed to end your smoking habit in just one relaxing and enjoyable three hour seminar. No matter how much you smoke, or how long you've been smoking, this seminar ELIMINATES THE CRAVING, URGE AND DESIRE TO SMOKE. You won't be unconscious. You'll be aware of everything. Yet, you'll be in a pleasant state of hypnosis which will help you overcome your desire for cigarettes once and for all. The Grossman Method of Hypnosis is safe and effective and it has helped thousands permanently become non-smokers. . . .DOCTOR RECOMMENDED. . . . LOSE WEIGHT FREE . . . . Lose weight the quick, safe and healthy way. Eliminate food Cravings, anxiety and guilt . . . ." (Exhibit B)

C. "STOP SMOKING IN JUST 3 HOURS FLAT! . . . ELIMINATES YOUR DESIRE FOR CIGARETTES! . . . THE PAINLESS WAY TO QUIT SMOKING . . . HIGHLY RECOMMENDED BY MEDICAL DOCTORS! Dr. Grossman developed his revolutionary seminar after many years of clinical research with heavy tobacco users. This seminar is so effective that it is highly recommended by medical doctors and other health professionals. . . . LOSE WEIGHT FREE . . . Now you can use the Grossman Method of Hypnosis to help you lose weight... Lose weight the quick, safe and healthy way. . . . 'The Weight Loss Program is terrific. In two months I've lost 47 pounds. I went from a size 18 to a size 12!! It's been a great summer at the beach.' Gerri Cheek Hanover, MD. . . . 'I lost 28 pounds in just six weeks. I lost the weight so fast and easy that my family and friends were astonished.' John Cain Springfield, IL" (Exhibit C)

D. "STOP SMOKING IN THREE (3) HOURS FLAT! . . . See, hear and experience it for yourself--and then throw away your cigarettes and stop smoking completely. . . . Your energy level will increase. You'll feel better about yourself. You will save hundreds of dollars each year. You will reduce your chances of getting heart disease, cancer, or lung disease. Don't miss this--it's the easiest way to quit! . . . Warning: Seminars are not all the same. Don't confuse Dr. Grossman's seminar with others that may sound like his but are quite different. This is the original program that has helped thousands of smokers quit for good without shots, pills, gum or expensive follow-up treatments. LOSE WEIGHT FREE!! If you are concerned about gaining weight when you stop smoking, or want to lose excess pounds, this program can help you lose your desire for fattening foods without dieting and without willpower. . . ." (Exhibit D)

E. "THE GUARANTEED GROSSMAN METHOD Has Helped Thousands to Become Non-Smokers!!

'After attending this session 3 years ago, I never thought of smoking again. It was one of the easiest things I have ever done.' I highly recommend it to anyone who wants to quit smoking.' Gerald Vermeulen, MD Physician Joliet, IL.

'I attended your seminar three years ago and quit smoking after 38 years of killing myself . . . ' Floyd Girvin Memphis, TN.

'This seminar was the beginning of a whole new life for me. I attended your program over a year ago and to this day I have not even touched a cigarette! . . . ' Katy Taylor Dunedin, FL.

'I smoked 2 packs a day for 45 years and quit 9 years ago with this seminar. This was the best investment in time and money I've ever made. I've saved; thousands of dollars! I feel healthy and alive! I've sent dozens of people to this seminar and they are all non-smokers too.' Andy Post Worth, IL.

'I quit smoking at this seminar in 1989 after 34 years of 2-1/2 packs a day... Dortha Thaxton Blytheville, AR.

'Thanks to your program I have been smoke free for almost 4 years! I had smoked 3 packs a day for 15 years.' Hugh Hawkins Salisbury, NC." (Exhibit E)

F. "STOP SMOKING GUARANTEED In Just 3 Hours Flat! Without Anxiety, Irritability or Weight Gain! . . . Proven 97.22% Effective . . . Our method is so effective that at many of our seminars 100% of the participants stop smoking for good. At a seminar we conducted last year for Jefferson Memorial Hospital in Crystal City, Mo, 97.22% of the participants quit smoking! These amazing results were verified by 2 separate follow-up surveys conducted by both the American Institute of Smoking Cessation and Jefferson Memorial Hospital." (Exhibit F)

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

A. Participants who attend respondents' single-session group hypnosis seminar typically are cured of smoking addiction and permanently abstain from smoking cigarettes.

B. Participants who attend respondents' single-session group hypnosis seminar are cured of smoking addiction without experiencing irritability, anxiety or weight gain.

C. Over three hundred thousand consumers have permanently quit smoking as a result of attending respondents' single-session, group hypnosis seminar over the last fifteen years.

D. Up to or over 98% of consumers attending respondents' single-session group hypnosis seminar have quit smoking.

E. Respondents' single-session group hypnosis seminar is more efficacious for smoking cessation than other stop-smoking methods.

PAR. 6. Through the use of the statements in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-E, respondents have

represented, directly or by implication, that at the time they made the representations set forth in paragraph five, respondents possessed and relied upon a reasonable basis that substantiated such representations.

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

PAR. 8. Through the use of statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit F, respondents have represented, directly or by implication, that surveys prove that ninety-seven to one hundred percent of the participants who attend respondents' smoking cessation seminars permanently abstain from smoking after attending those seminars.

PAR. 9. In truth and in fact, follow-up surveys do not prove that ninety-seven to one hundred percent of the participants who attend many of respondents' smoking cessation seminars permanently abstain from smoking after attending those seminars. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. Through the use of the statements in the advertisements referred to in paragraph four, including but not limited to the advertisement attached as Exhibits A and C, respondents have represented, directly or by implication, that participants who attend respondents' single-session group hypnosis seminar typically achieve weight loss quickly.

PAR. 11. Through the use of the statements in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit B, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph ten, respondents possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 12. In truth and in fact, at the time that they made the representation set forth in paragraph ten, respondents did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph eleven was, and is, false and misleading.

PAR. 13. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

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Complaint

EXHIBIT A

**THE GUARANTEED GROSSMAN METHOD**

# STOP SMOKING IN JUST 3 HOURS FLAT!

**Without Anxiety, Irritability or Weight Gain!** **\$ 39<sup>99</sup>**  
**WRITTEN MONEY BACK GUARANTEE** **COMPLETE**

|   |   |  |
|---|---|--|
| <b>NO SHOTS! NO PILLS! NO PATCHES! NO GUM!</b>  |   |  |
| <b>AURORA</b><br>TUESDAY-DECEMBER 1<br>7:00PM<br>HOLIDAY INN-SOUTHEAST DENVER<br>3200 S. Parker Rd.<br>(I-225, Exit Parker Rd.) | <b>NORTHGLENN</b><br>WEDNESDAY-DECEMBER 2<br>7:00PM<br>HOLIDAY INN-NORTHGLENN<br>10 EAST 120TH AVE.<br>(I-25, Exit 223) | <b>LAKWOOD</b><br>THURSDAY-DECEMBER 3<br>7:00PM<br>SHERATON DENVER WEST<br>360 Union Blvd.<br>(8th Ave. Exit South/Utah) |

NOTICE: All programs will be personally presented by Dr. Kenneth Grossman, Registrar at the door at 6:30 PM. Cash, Check, Visa, MasterCard and American Express are all welcome. Bring all your cigarettes. This seminar is fun! Bring your friends and stop smoking together! FOR INFORMATION ON SPECIAL GROUP DISCOUNTS OR ON-SITE CORPORATE PROGRAMS, CALL 1-800-825-4336.



The Grossman Method of Hypnosis has helped over 200,000 smokers during the past 15 years. Of those involved, 99% are still flat and 8% still draw away their cigarettes and stop smoking by themselves. 100% guaranteed by Kenneth Grossman, Ph.D.

"After spending 37 years 3 years ago, I never thought of smoking again. It was one of the easiest things I have ever done. I highly recommend it to anyone who wants to quit smoking."  
Dr. Gerald Vartanian Physician Joliet, IL  
"It helped me quit after 40 years of smoking 2 packs a day. This program is well explained and of great value."  
Dr. Frank White Physician Elgin, IL  
Excellent explanation of hypnosis and the hypnotic process. By the end of the session I was a non-smoker easy and effectively."  
Dr. Steven Taylor Physician Morris, IL  
"I tried to quit before and I almost killed my husband! This time, no problem! My husband came two months later and became a non-smoker too."  
Janelle Murray Aurora, CO  
"Best thing to happen to me. I came to prove it wouldn't work, but it did."  
Barbara Braxell Denver, CO  
"Easy as taking off a log!"  
JoAnn Bonha Golden, CO  
"Being around my smoking friends, does not bother me as I anticipated it would. I feel physically so much better and am quite proud of my accomplishments."  
Diane Ryan Denver, CO  
"I didn't think this session would work for me. I'd been to Smoke Endors twice, Lutheran Hospital Smoking Clinic & Hypnosis (\$20.00). Only this class helped me to quit."  
Bill Gerardo Arvada, CO  
"Quick and easy! Highly recommend this program to others."  
Jerry Osgood Morrison, CO  
"I had tried nearly all the methods to stop smoking to no avail. I was truly amazed at the ease I had in becoming a non-smoker. I am truly thankful I came."  
Gayle Wagner Lakewood, CO

**"This is the best, simplest, most straight forward and convenient program I have ever come across. I highly recommend it!"**  
Dr. Ronald Conden Elgin, Illinois

**ABOUT YOUR SEMINAR LEADER**  
This is the ORIGINAL STOP SMOKING IN THREE HOURS FLAT SEMINAR developed and presented by Dr. Kenneth Grossman. Over the years many others have tried to emulate it, but they simply cannot duplicate it.  
Kenneth Grossman, Ph.D., developed this seminar during a career of over 15 years as a clinical hypnotherapist helping people to stop smoking and rid themselves of unwanted habits. He taught many hypnosis related seminars at the college level including the widely acclaimed "Self-Hypnosis for Self-Improvement Seminar" which empowers the students to focus the power of their mind to accomplish any goal they can conceive.  
He studied at Eastern Michigan University, the University of Nebraska, the University of Chicago and earned his doctorate in Clinical Hypnotherapy from the American Institute of Hypnotherapy. He is listed in Who's Who in Professional Speaking and Who's Who in the Midwest.

**ELIMINATES YOUR DESIRE FOR CIGARETTES**  
See, hear and experience it for yourself --and then stop smoking completely. You'll be able to do anything you've done before, but you'll do it without smoking. You'll be able to finish a meal, have a cup of coffee, have a beer, go to the bathroom, talk on the phone, watch TV, drive an automobile, take a break -- or anything else. But you'll do it without smoking. You'll be able to be around others who smoke, and their smoking won't bother or upset you. No matter how much you smoke, or how long you've been smoking, this seminar ELIMINATES THE CRAVING, URGE AND DESIRE TO SMOKE.

**YOU ARE ALWAYS IN CONTROL**  
You won't be unconscious. You'll be aware of everything. Yet you'll be in a pleasant state of hypnosis which will help to overcome your desire for cigarettes once and for all. The Grossman Method of Hypnosis is safe and effective and it has helped tens of thousands of heavy addicted smokers to become non-smokers in one relaxing and enjoyable 3 hour seminar.

**WRITTEN MONEY BACK GUARANTEE**  
We are so sure that you will stop smoking that WE PERSONALLY GUARANTEE YOUR RESULTS. If for any reason, BEFORE THE END OF THE SEMINAR, you are not satisfied, we will refund your money on the spot, no questions asked. If, for any reason, you ever go back to smoking, you may attend another Grossman Method Stop Smoking Seminar FREE OF CHARGE.

**LOSE WEIGHT FREE**

Now you can use the Grossman Method of Hypnosis to help you lose weight. If you are concerned about gaining weight when you stop smoking, or would like to lose those extra pounds, the WEIGHT LOSS SEMINAR IS ABSOLUTELY FREE WHEN YOU ATTEND THE STOP SMOKING SEMINAR. The Weight Loss Hypnosis will take place immediately following the Stop Smoking Seminar. (Plan on an additional 35 minutes.) If you attend both seminars the Weight Loss Program is FREE! If you are a non-smoker who wishes to lose weight with the Weight Loss Program, you MUST register at 6:30 and attend the program from 7:00PM to 10:30 PM. Your fee is only \$39.99.

"The Weight Loss Program is terrific. In two months I've lost 47 pounds. I went from a size 18 to a size 12! It's been a great summer at the beach!"  
Gerrit Cheek  
"I lost 28 pounds in just six weeks. I lost the weight so fast and easy that my family and friends were astounded!"  
John Galt



**SMOKERS BRING THIS AD FOR AN EXTRA BONUS!**

Presented as a public service by AMERICAN STOP SMOKING SEMINARS, INC. Hypnosis classes © Copyright © Kenneth Grossman, 1987. All Rights Reserved.

Exhibit A

Complaint

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## EXHIBIT B

**THE GUARANTEED GROSSMAN METHOD**


# STOP SMOKING

**IN JUST 3 HOURS FLAT!**

**WITHOUT ANXIETY,  
IRRITABILITY  
OR WEIGHT GAIN!**

**\$ 39<sup>99</sup>**

**NO HIDDEN COSTS**



"The Grossman Method of Hypnosis has helped over 300,000 smokers during the past 15 years. Of those recovered smokers who put us, over 98% will throw away their cigarettes and stop smoking by seminars and I personally guarantee it."

Kenneth Grossman, Ph.D.  
The Stop Smoking Specialist

**OVERLAND, KS**  
**WEDNESDAY - JUNE 23**  
**7:00 PM**  
RAMADA INN - SOUTHWEST  
8787 Reeder Rd.  
(I-35, Exit 87th St. East)

**KANSAS CITY, MO**  
**THURSDAY - JUNE 24**  
**7:00 PM**  
ADAM'S MARK HOTEL  
9103 E. 39th St.  
(I-70 and the Truman Sports Complex)

NOTICE: Register at the door at 6:30 PM. Cash, check, Visa, Mastercard and American Express are all welcome. Bring all your cigarettes. This seminar is fun! Bring your friends and stop smoking together! FOR INFORMATION ON CORPORATE DISCOUNTS, CALL 1-800-225-6580 OR FAX 1-708-325-5485.

**ELIMINATES YOUR DESIRE FOR CIGARETTES**

I know you! You've tried to quit smoking many times before--but nothing worked. Not nicotine gum. Not the "patch". Not "cold turkey". Not willpower. And not even other forms of hypnosis.

The Grossman Method of Hypnosis is unique. It is guaranteed to end your smoking habit in just one relaxing and enjoyable 3 hour seminar. No matter how much you smoke, or how long you've been smoking, this seminar **ELIMINATES THE CRAVING, URGE AND DESIRE TO SMOKE.**

You won't be unconscious. You'll be aware of everything. Yet, you'll be in a pleasant state of hypnosis which will help you to overcome your desire for cigarettes once and for all. The Grossman Method of Hypnosis is safe and effective and it has helped thousands permanently become non-smokers.

**WRITTEN MONEY BACK GUARANTEE**

I am so sure that you will stop smoking that I **PERSONALLY GUARANTEE YOUR RESULTS.** If for any reason, **BEFORE THE END OF THE SEMINAR,** you are not satisfied, I will refund your money on the spot, no questions asked. Also, you will receive a written Guarantee Card. If you ever go back to smoking, it entitles you to attend another Grossman Method Stop Smoking Seminar **FREE OF CHARGE.**

**DOCTOR RECOMMENDED**

"Excellent explanation of hypnosis and the hypnotic process. By the end of the session I was a non-smoker easily and effectively."  
*Steven Teller, MD Physician Morris, IL*

"This is the best, simplest, most straight forward program I have ever come across. I recommend it."  
*Ronald Condon, DDS Dentist Elgin, IL*

"I highly recommend it."  
*Gerald Vermeulen, MD Physician Joliet, IL*

"This program is well explained and of great value."  
*Frank L. Wilkie, MD Physician Elgin, IL*

"I strongly advise it to everyone who smokes."  
*Joel Needleman, DDS Dentist Ingleside, TX*

"I refer my smoking patients to this program."  
*Karl R. Corral, MD Physician Tampa, FL*

"This worked! Before the program I tried patches and everything else without success."  
*James P. O'Dwyer, DDS Dentist Nashville, TN*

## LOSE WEIGHT FREE

Now you can use the Grossman Method of Hypnosis to help you lose weight. The **WEIGHT LOSS SEMINAR IS ABSOLUTELY FREE WHEN YOU ATTEND THE STOP SMOKING SEMINAR.** Lose weight the quick, safe and healthy way. Eliminate food cravings, anxiety and guilt. The Weight Loss Hypnosis will take place immediately following the Stop Smoking Seminar. (Plan on an additional 35 minutes.) If you attend both seminars the Weight Loss Program is **FREE!** If you are a **NON-SMOKER** who wishes to lose weight with the Weight Loss Program, you must register at 6:30 and attend the program from 7:00PM to 10:30PM. Your fee is only \$39.99.

# \$5.00 COUPON

**ATTENTION SMOKERS!**

Bring in this flyer for \$5.00 off the registration fee. Coupon good only for the Stop Smoking Seminar on the dates listed above. Not redeemable for cash. One coupon per person. Machine made copies are acceptable, so give a copy to a friend!

Exhibit B



EXHIBIT C

**THE GUARANTEED GROSSMAN METHOD**


# STOP SMOKING

**IN JUST 3 HOURS FLAT!**

NO ANXIETY  
NO IRRITABILITY  
NO WEIGHT GAIN

**\$39<sup>99</sup>**  
COMPLETE!

**WRITTEN MONEY BACK GUARANTEE**



Kenneth Grossman, Ph.D.  
The Stop Smoking Specialist

"The Grossman Method of Hypnosis has helped over 200,000 smokers during the past 15 years. Of those nervous smokers who join us, up to 98% will throw away their cigarettes and stop smoking by seminars and 1 personally guarantee it."

**SMOKERS BRING THIS AD FOR AN EXTRA BONUS!!**

|  |  |
|--|--|
| <p><b>TAMPA</b><br/>WEDNESDAY - DEC. 16<br/>7:00 PM<br/>HOLIDAY INN-TAMPA AIRPORT<br/>4500 W. Cypress Street<br/>(I-275, Exit Westshore Blvd.)</p> | <p><b>ST. PETERSBURG BEACH</b><br/>THURSDAY - DEC. 17<br/>7:00 PM<br/>TRADEWINDS HOTEL<br/>5500 Gulf Blvd.<br/>(I-275, Exit 4 Pinellas Bayway)</p> |
|--|--|

NOTICE: All programs will be personally presented by Dr. Kenneth Grossman. Register at the door at 6:30 PM. Cash, check, Visa, MasterCard and American Express are all welcome. Bring all your cigarettes. Great idea! Bring your friends and stop smoking together!

FOR INFORMATION ON SPECIAL GROUP DISCOUNTS ON ON-SITE CORPORATE PROGRAMS CALL 1-800-226-8588

**ELIMINATES YOUR DESIRE FOR CIGARETTES!**  
See, hear and experience it for yourself - - and then stop smoking completely. You'll be able to do anything you've done before, but you'll do it without smoking. You'll be able to finish a meal, have a cup of coffee, have a beer, go to the bathroom, talk on the phone, watch TV, drive an automobile, take a break - - or anything else. But you'll do it without smoking. You'll be able to be around others who smoke, and their smoking won't bother or upset you. No matter how much you smoke, or how long you've been smoking, this seminar **ELIMINATES THE CRAVING, URGE AND DESIRE TO SMOKE.**

**YOU ARE ALWAYS IN CONTROL**  
You won't be unconscious. You'll be aware of everything. Yet, you'll be in a pleasant state of hypnosis which will help you to overcome your desire for cigarettes once and for all. The Grossman Method of Hypnosis is safe and effective and it has helped thousands permanently become non-smokers.

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**THE PAINLESS WAY TO QUIT SMOKING**  
I know you! You've tried to quit smoking many times before—but nothing worked. Not nicotine gum. Not "cold turkey". Not willpower. And not even other forms of hypnosis.  
The Grossman Method of Hypnosis is unique. It is guaranteed to end your smoking habit in just one relaxing and enjoyable 3 hour seminar.

**HIGHLY RECOMMENDED BY MEDICAL DOCTORS!**  
Dr. Grossman developed his revolutionary seminar after many years of clinical research with heavy tobacco users.

This seminar is so effective that it is highly recommended by medical doctors and other health professionals. (See Back Page)

## LOSE WEIGHT FREE

Now you can use the Grossman Method of Hypnosis to help you lose weight. If you are concerned about gaining weight when you stop smoking, or would like to lose those extra pounds, the **WEIGHT LOSS SEMINAR IS ABSOLUTELY FREE WHEN YOU ATTEND THE STOP SMOKING SEMINAR.** Lose weight the quick, safe and healthy way. Eliminate food cravings, anxiety and guilt. The Weight Loss Hypnosis will take place immediately following the Stop Smoking Seminar. (Plan on an additional 35 minutes.) If you attend both, the Weight Loss Program is **FREE!** If you are a **NON-SMOKER** who wishes to lose weight with the Weight Loss Program, you must register at 6:30 and attend the program from 7:00 PM to 10:30 PM. Your fee is only \$39.99.

"The Weight Loss program is terrific. In 2 months I've lost about 47 lbs. I went from a size 18 to size 12!! It's been a great summer at the beach!!"  
Gerrit Cheek, Hanover, MD  
"I lost 28 lbs. in just 6 weeks. I lost the weight so fast and easy that my family & friends were astonished."  
John Cain, Springfield, IL

AMERICAN STOP SMOKING CENTER, INC. DR. KENNETH GROSSMAN, EXECUTIVE DIRECTOR  
©Copyright Dr. Kenneth Grossman, 1991 All Rights Reserved

**SMOKERS BRING THIS AD FOR AN EXTRA BONUS!!**

Complaint

119 F.T.C.

EXHIBIT D

**INTERNATIONAL STUDENTS NEED YOUR HELP!**

Host families are urgently needed by...

English, Indonesian, Latin, South American, Central American, and Spanish speaking students and adults in the Spring of 1991.

Each student is invited to live in an American home, attend high school, and learn more about your country of life. Our students speak English, are well educated, self motivated, have unique speaking talents, and are in the Spring of 1991.

**Choose your student now!**

Call your local Coordinator  
**Leo Nicholson Jr.**  
 217-525-2819  
 or 1-800-225-2330

**Eight Treatment Plan**

**Free Consultation**

**hospital**

1-82769

THE ORIGINAL GROSSMAN METHOD HAS HELPED THOUSANDS!

# STOP SMOKING IN THREE (3) HOURS FLAT!

WITHOUT ANXIETY, IRRITABILITY OR WEIGHT GAIN


WED - JULY 24TH - 7:00 PM  
 Holiday Inn - East  
 3100 S. Dirksen Parkway  
 Springfield  
 (465, East 84)

**ONLY \$38 WITH THIS COUPON SAVE \$10**

REGISTER AT THE DOOR AT 6:30 PM. The fee is only \$48 (cash only) (cash, check, Visa, MasterCard and American Express are all welcome. Bring all your cigarettes - smoking is restricted.)

You must present this coupon at registration.

## Dr. Kenneth Grossman Live and In Person!



See, hear and experience it for yourself -- and then throw away your cigarettes and stop smoking completely. Without anxiety, irritability, or weight gain!

You'll be able to do anything you've done before -- drink coffee or tea, finish a meal, have a beer, go to the bathroom, drive, work, take a break, talk on the phone, or do anything else -- yes, you'll be able to do it without smoking.

Your energy level will increase. You'll feel better about yourself. You will save hundreds of dollars each year. You will reduce your chances of getting heart disease, cancer, or lung disease.

Don't miss this -- it's the easiest way to quit!

**WARNINGS: SEMINARS ARE NOT ALL THE SAME.** Don't confuse Dr. Grossman's seminar with others that may sound like his but are quite different. This is the original program that has helped thousands of smokers quit for good without shots, pills, gum or expensive follow-up treatments.

### SATISFACTION GUARANTEED!

IF, AT ANY TIME BEFORE THE END OF THE PROGRAM, you are not satisfied, your money will be refunded - no questions asked.

**Recommended by Physicians and Community Leaders:**

"After attending this seminar 2 years ago, I never thought of smoking again. It was one of the smart things I have ever done. I highly recommend it to anyone who wants to quit smoking!"  
 Gerald Ventresca, MD, Physician  
 Joliet, IL

"I had quit for over 40 years of smoking 2 packs a day. This program is well documented and of great value."  
 Frank L. Wilson, MD, Physician  
 Elgin, IL

"With your help, many of my patients have achieved an exciting goal."  
 Kent Corral, MD, Physician  
 Tampa, FL

"This helped me quit smoking. I have become a believer in this program and I strongly advise it to anyone who smokes."  
 Joan Woodman, DDS, Dentist  
 Plymouth, TX

"I've changed my life after 23 years. I am now a nonsmoker! I have nothing but praise and gratitude for the seminar."  
 Sharon Roscoe, RN, Nurse  
 Hornsby, IL

"I attended your seminar and walked away a non-smoker with no physical or psychological withdrawal. I believe in the work you are doing and I will pass your information on our church bulletin board for the benefit of others."  
 Rev. Joseph Gonzalez, Catholic Priest, Nashville, TN

"This program worked for me and I highly recommend it to others."  
 William R. Hollings, Chief of Police  
 State Fair Park, Muskegon, MI

"I attended your program over a year ago and to this day I have not even touched a cigarette. I have also lost 27 pounds. Use the new one!"  
 Katy Taylor, Durand, Florida

"I attended 2 packs a day for 45 years and quit 2 years ago with this seminar. The way the best measure in loss and money I've ever made. I've saved thousands of dollars. I feel healthy and alive. I've seen dozens of people in the seminar and all of them are non-smokers too."  
 Andy Paul, Worth, IL

## LOSE WEIGHT FREE!

If you are concerned about gaining weight when you stop smoking, or want to lose excess pounds, this program can help you lose your desire for fattening foods without craving and without willpower. When you register for the Stop Smoking seminar, you are invited to attend the Weight Loss program ABSOLUTELY FREE OF CHARGE. (Plan on an additional 35 minutes.) If you are a non-smoker and would like to attend the Weight Loss program, you too are only \$38 with this coupon in the ad. Register at 6:30 PM.

For information on corporate discounts call: 1-800-225-6580

Exhibit D

EXHIBIT E

**THE GUARANTEED GROSSMAN METHOD**

**Has Helped Thousands to Become Non-Smokers!!**

"I received explanation of hypnotics and the hypnotic process. By the end of the session I was a non-smoker easy and "naturally".  
**Steven Taylor, MD Physician Morris, IL**

"After attending this session 3 years ago, I never thought of smoking again. It was one of the easiest things I have ever done. I highly recommend it to anyone who wants to quit smoking."  
**Gerald Vermeulen, MD Physician Joliet, IL**

"I helped me out after 40 years of smoking 2 packs a day. This program is well explained and of great value."  
**Frank L. Wilkie, MD Physician Elgin, IL**

"With your help, many of my patients have discontinued smoking."  
**Keith Corral, MD Physician Tampa, FL**

"This helped me quit smoking. I have become a believer in this program and I strongly advise it to everyone who smokes."  
**Joel Needleman, DDS Dentist Ingleside, TX**

"You changed my life! After 23 years I am now a non-smoker! I have nothing but praise and gratitude for this seminar."  
**Susan Raposa, RN Nurse Honolulu, HI**

"Since I quit smoking at your seminar, I began to swim one mile per day and have lost the weight that I did not need. At this 61 years old! Thanks for helping me enjoy life again!"  
**Ted Hooper, Richmond, VA**

"I attended your seminar three years ago and quit smoking after 36 years of being myself. I have not experienced any weight gain. I feel so good about myself!"  
**Floyd Gurin, Memphis, TN**

"Thanks for my new life! I now participate in an aerobics class, go bicycling or walk on a daily basis. I even lost 10 pounds! I am becoming more fit than at any time in my life. I am proud to be a non-smoker!"  
**Sandra K. Miller, Champaign, IL**

"Even though I knew I should quit smoking, my conscience told me I loved it. I couldn't believe the results of the seminar! I NEVER picked up another cigarette after the program."  
**Ellen Goggin, Jacksonville, FL**

"The ease and lack of concern I feel about smoking has been great. Since your seminar I've had no hard days -- no craving -- no bad moods. I feel great!"  
**Lucy Clemons, Stone Mountain, GA**

"This program worked for me and I highly recommend it to others."  
**William P. Harrington, Chief of Police State Fair Park, Milwaukee, WI**

"I attended your seminar and walked away a non-smoker with no physical or psychological withdrawal. I believe in the work you are doing and I will post your information on our church bulletin board for the benefit of others."  
**Rev. Joseph Sanchez, Catholic Priest Nashville, TN**

"This seminar was the beginning of a whole new life for me. I attended your program over a year ago and to this day I have not even touched a cigarette! I have also lost 27 pounds! I love the new me!"  
**Katy Taylor, Dunedin, FL**

"I smoked 2 packs a day for 45 years and quit 8 years ago with this seminar. This was the best investment in time and money I've ever made. I've saved thousands of dollars! I feel healthy and alive! I've sent dozens of people to this seminar and they are all non-smokers too."  
**Andy Post, Worth, IL**

"I was a real tough customer as I had been smoking for 30 years. I tried various methods and products on the market, but nothing had worked for me. After attending your program, I have completely stopped smoking and don't even have any desire for a cigarette!"  
**Allen A. Pollack, Orange Hills, MD**

"I have sent 12 family members to your program since I became a non-smoker 4 years ago and ALL of them have also become non-smokers. Two of them were attending for chewing tobacco and neither has had any desire to chew since your seminar."  
**Greg Williams, Marietta, GA**

"I smoked for 30 years. I attended your seminar and have not had a cigarette since. It was almost as if I had NO withdrawal symptoms!"  
**Vilma F. Marquez, El Paso, TX**

"Easy as pie! If I can do it, anyone can!"  
**Joyce Schwoft, Charlotte, NC**

"Great program. Easy as 1-2-3!"  
**Linda Revere, Charlotte, NC**

"My husband and 2 very good friends quit smoking at your seminar. My husband was a hard core smoker. Not only do they have more money out their feet better and I also benefited from your tapes. We could not be happier!"  
**Giselle Harzke, Milwaukee, WI**

"Never thought I could feel this good again!"  
**Madelyn Chees, Cumming, GA**

"I have not had withdrawal symptoms. People smoking in front of me does not bother me. It has been terrific!"  
**Leiland Bush, Walpole, RI**

"The seminar is most helpful and I highly recommend it to all smokers." **Rev. John Atkinson, Catholic Priest Memphis, TN**

"This is a wonderful program! I had quit several times before -- but this is totally different. This time I have had no withdrawal symptoms as I did before."  
**Flo Wheeler, Raleigh, NC**

"I never thought this would work for me. But it did! I feel that it was the best money I EVER spent!"  
**Cathy Barber, Elgin, IL**

"I quit smoking at this seminar in 1989 after 34 years of 2-1/2 packs a day. I also attended the weight loss program and have lost 20 pounds. This worked great for me!"  
**Dorthea Thaxton, Blytheville, AR**

"This is the most sure-fire method of quitting smoking. Before this I had tried every method that I could find. This program has provided positive results for me!"  
**Don Warren, Raleigh, NC**

"I stayed for the Weight Loss and easily lost 36 pounds in 4 months!"  
**Glenn Martin, Centre, AL**


"I found it one of the easiest things I've ever done in my life! This is a powerful seminar which enabled me to step from a 42-year smoking habit into a non-smoking and far more pleasant existence in an instant of time!"  
**Wit Kennedy, Stevens Point, WI**

"Thanks to your program I have been smoke free for almost 4 years! I had smoked 3 packs a day for 15 years."  
**Hugh Hamtine, Salisbury, NC**

"Before I went to this seminar, my life was consumed by cigarettes. Cigarettes were the first thing I thought about in the morning and the last thing every night. Dr. Grossman made quitting easy! My life is actually less stressful without smoking."  
**Jeffery Ryan, Indianapolis, IN**

"I suggest it to everyone. Great stuff!"  
**Thomas Wallace, Woodstock, GA**

"It's so wonderful to be free of the burden of smoking. After anxious attempts, I successfully became a non-smoker with Dr. Grossman. I am so grateful and I highly recommend his program."  
**Rev. James Demmer, Catholic Priest Milwaukee, WI**



**ABOUT YOUR SEMINAR LEADER**  
Kenneth Grossman, Ph.D., developed this seminar after more than 12,000 hours of private practice in clinical hypnotherapy and after teaching many college level courses. Since then, he has presented hundreds of Stop Smoking Seminars to enthusiastic audiences throughout the United States. He studied at Eastern Michigan University, the University of Nebraska, the University of Chicago and earned his doctorate in Clinical Hypnotherapy from the American Institute of Hypnotherapy. He is listed in *Who's Who in Professional Speaking* and *Who's Who in the Midwest*.

AMERICAN STOP SMOKING CLINICS, INC., P.O. BOX 11, HINSDALE, ILLINOIS 60521-0011

EXHIBIT F

# STOP SMOKING

## GUARANTEED

### In Just 3 Hours Flat! Without Anxiety, Irritability or Weight Gain!

#### We Know You

You know you. You are tired of smoking. You have been trying to quit. You need help. You don't want cancer. You don't want heart disease. You don't want empty-ness. You don't want to suffer the debilitating effects of a stroke. You are sick of the nagging of your family and friends. You are sick of spending hundreds of dollars each year on a filthy habit.

#### We Can Help You

You are ready to quit, but you don't know how. We can help you. We have developed the most effective method of smoking cessation available. Best of all, it takes only a few hours of your time and costs what you would pay for a few cartons of cigarettes.

#### 97.22% Effective

Our method is so effective that at a seminar we conducted last year for Jefferson Memorial Hospital in Crystal City, Mo. 97.22% of the participants quit smoking! These amazing results were verified by 2 separate follow-up surveys conducted by both the American Institute of Smoking Cessation and Jefferson Memorial Hospital.

#### Relieve Stress

Stress management is an important part of our seminar. You will

learn how to feel calm, relaxed and in control. Once you learn our relaxation methods, you'll enjoy using them for the rest of your life.

#### The Original and Still the Best

Over the years, our method of smoking cessation has spawned a number of imitators — some good, some not so good. Why take a chance on anyone but the best?



Dr. Kenneth Grossman

Kenneth Grossman, Ph.D., is the Executive Director of the American Institute of Smoking Cessation, the President of the Society of Group Behavioral Hypnotherapists and the originator of this nationally acclaimed Smoking Cessation Seminar. He holds a doctorate in Clinical Hypnotherapy, and has authored numerous programs for personal growth and development. Dr. Grossman is a leading expert in smoking cessation, and has helped thousands of people stop smoking.

**ONLY \$38**

**GUARANTEE:** You will stop smoking at our seminar or return to any of our future seminars throughout the world at no charge.

## Weight Loss Included Free!

You don't have to worry about gaining weight when you stop smoking with our program. Special emphasis is placed on weight control and weight loss. At our seminar, our participants lose an average of 10 to 15 pounds. Some lost even more! So can you.

#### AT THIS LOCATION

Austin

7:00-10:00 P.M. Wednesday, May 2 Doubletree Hotel Exhibit F  
6505 Interstate Hwy. 35 N. (Corner of I-35 & 290)

\* Register at door at 6:30 p.m. — Cash, Check, Visa, MasterCard and American Express are all welcome. Bring your cigarettes — they'll be the last ones you'll ever smoke!

© 1988 American Institute of Smoking Cessation. All Rights Reserved.

## DECISION AND ORDER

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

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

1. Respondent American Institute of Smoking Cessation is a corporation organized, existing and doing business under and by virtue of the laws of the state of Illinois, with its offices and principal place of business at 318 South Garfield, Hinsdale, Illinois.

Respondents Kenneth C. Grossman and Jane A. Grossman are the sole officers and directors of the corporate respondent. Together, they formulate, direct, and control the acts and practices of the corporate respondent, and their principal office and place of business is the same as that of the corporate respondent.

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

## ORDER

## DEFINITION

For the purposes of this order, "*competent and reliable scientific evidence*" shall mean those tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that 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. Survey evidence may be appropriate depending on the representation made.

## I.

*It is ordered*, That respondents American Institute of Smoking Cessation, Inc., a corporation, its successors and assigns, and its officers, Kenneth C. Grossman, individually and as an officer of said corporation, and Jane A. Grossman, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, or sale of any smoking cessation or weight loss program, including any such program that uses hypnosis, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, that participants who attend respondents' single-session group hypnosis seminar are cured of smoking addiction without experiencing irritability, anxiety, weight gain, or other side effects unless, at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

B. Making any representation, directly or by implication, about the relative or absolute performance or efficacy of any smoking cessation program or weight loss program, unless, at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

C. Representing through any endorsement or testimonial that any participant(s) of respondents, smoking cessation program or weight loss program have achieved success in smoking abstinence or weight loss unless:

(1) At the time of making such representation, the success claimed is representative of the typical or ordinary experience of all participants of such program, and respondents possess and rely upon competent and reliable scientific evidence that substantiates such representation, or

(2) Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

(a) What the generally expected results would be for participants in such program, or

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

D. Misrepresenting, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, survey or report.

E. Misrepresenting, directly or by implication, the performance or efficacy of any smoking cessation program or weight loss program.

## II.

*It is further ordered,* That for three (3) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

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

## III.

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

## IV.

*It is further ordered,* That the individual respondents named herein shall promptly notify the Commission of the discontinuance of their present business or of their affiliation with the corporate respondent. In addition, for a period of three (3) years from the date of service of this order, each respondent shall promptly notify the Commission of each affiliation with a new business or employment that involves a smoking cessation program or a weight loss program. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of the respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

## V.

*It is further ordered,* That respondents shall distribute a copy of this order to each of their officers, agents, representatives, independent contractors, and employees who are involved in the preparation and placement of advertisements or promotional materials; and, for a period of three (3) years from the date of entry of this order, distribute same to all future such officers, agents, representatives, independent contractors, and employees.



VI.

*It is further ordered,* That respondents shall, within sixty (60) days after the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Complaint

119 F.T.C.

IN THE MATTER OF

GORAYEB SEMINARS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3561. Complaint, March. 3, 1995--Decision, March. 3, 1995*

This consent order prohibits, among other things, two New Jersey-based companies and their officer from making any representation about the relative or absolute performance or efficacy of any smoking cessation or weight loss program, unless they possess and rely upon competent and reliable scientific evidence to substantiate the representation.

*Appearances*For the Commission: *Matthew Daynard.*For the respondents: *Dan Schwartz, Bryan Cave, Washington, D.C.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that Gorayeb Seminars, Inc. ("GSI"), a corporation, and Gorayeb Learning Systems, Inc. ("GLS"), a corporation, and Ronald Gorayeb, individually and as an officer of said corporations ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Gorayeb Seminars, Inc., is a New Jersey corporation, with its principal office or place of business at 101 Roundhill Drive, Rockaway, New Jersey.

Respondent Gorayeb Learning Systems, Inc., is a New Jersey corporation, with its principal office or place of business at 101 Roundhill Drive, Rockaway, New Jersey.

Respondent Ronald B. Gorayeb is the President, Secretary, and sole Director and Shareholder of the corporate respondents. Individually or in concert with others, he formulates, directs and controls the acts and practices of the corporate respondents, including

the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporate respondents.

PAR. 2. Respondents have advertised, offered for sale, and sold seminars for smoking cessation and weight loss known as "The Gorayeb Method," and other stop-smoking and weight-loss seminars, to consumers. The Gorayeb Method seminar is a single-session, group hypnosis session, two hours in length, provided to consumers by respondent Ronald Gorayeb at various sites throughout the United States.

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

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for The Gorayeb Method seminar for smoking cessation and weight loss, including but not necessarily limited to the attached Exhibits A and B. These advertisements contain the following statements:

A. "THE GORAYEB SEMINARS - NO. 1 IN RESULTS. STOP SMOKING IN TWO HOURS... No cravings, No Irritability, No weight gain...WRITTEN GUARANTEE... That's right, regardless of your past experience with trying to stop, YOU WILL STOP SMOKING TONIGHT PERMANENTLY, Without Cravings and without withdrawal. You will experience two hypnotic sessions this evening, after which any desire or craving for cigarettes will simply be gone. With the Gorayeb Method of Clinical Hypnosis, you enter a deep, focused state of hypnosis where you are relaxed, alert and ALWAYS IN CONTROL. But will it work for me- Whether you are a chronic chain smoker or a casual smoker, you will leave this seminar as a NON-SMOKER. Thousands have before you, and with no withdrawal, no irritability, no weight gain. Our WRITTEN GUARANTEE. If for any reason you ever start smoking again, you'll be admitted to any Gorayeb Stop Smoking Seminar free of charge. Ronald B. Gorayeb, Certified Hypnotherapist. The Gorayeb Method of Hypnosis has worked for thousands. It will work for you too! Try it!" (Exhibit A)

B. "THE GORAYEB SEMINARS - NO. 1 IN RESULTS. LOSE WEIGHT WITH HYPNOSIS QUICKLY SAFELY WITHOUT HUNGER. WRITTEN GUARANTEE. That's right. You can LOSE THE WEIGHT YOU'VE BEEN WANTING TO-and keep it off permanently, without hunger, without dieting, without willpower. Using the power of hypnosis, you will lose unwanted cravings, eliminate the addiction to sweets and break the impulsive/compulsive eating habit-once and for all. With the Gorayeb Method of Clinical Hypnosis, there is NO SLEEP or LOSS OF CONTROL. You are awake and aware. Everyone who attends will be hypnotized. You'll leave refreshed-feeling good. But will it work for me- You can expect results ranging from 30-60 lbs. in 3 months to 120 lbs. in one year. No willpower, no hunger, no dieting - JUST SUCCESS. Thousands have

succeeded before you and you will too! Remember, diets don't work. You diet, lose weight and 6 months later it's all back. The only real answer for true behavior modification is the utilization of the subconscious mind. Our Written Guarantee: You will lose all the weight you've been wanting to. If you don't, or if you ever want a reinforcement, you'll be admitted to any Gorayeb Weight Loss Seminar free of charge. STOP HAVING WEIGHT AS AN ISSUE IN YOUR LIFE - Join us and become the winner you've always wanted to be. Ronald B. Gorayeb Certified Hypnotherapist. The Gorayeb Method of Hypnosis has worked for thousands. It will work for you too! Try it!" (Exhibit B)

PAR. 5. Through the use of statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that:

A. Participants who attend respondents' single-session group hypnosis seminar are cured of smoking addiction and permanently abstain from smoking cigarettes.

B. Participants who attend respondents' single-session group hypnosis seminar are cured of smoking addiction without experiencing withdrawal, anxiety or weight gain.

C. Thousands of consumers have permanently quit smoking as a result of attending respondents' single-session, group hypnosis seminar.

PAR. 6. Through the use of the statements in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five, respondents possessed and relied upon a reasonable basis that substantiated such representations.

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

PAR. 8. Through the use of statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit B, respondents have represented, directly or by implication, that:

A. Participants who attend respondents' single-session group hypnosis seminar achieve and maintain weight loss.

B. Thousands of consumers have achieved and maintained weight loss as a result of attending respondents' single-session group hypnosis seminar.

C. Respondents' single-session group hypnosis seminar is more efficacious for weight loss and weight-loss maintenance than other weight-loss methods.

PAR. 9. Through the use of the statements in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit B, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph eight, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 10. In truth and in fact, at the time that they made the representations set forth in paragraph eight, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

PAR. 11. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Complaint

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EXHIBIT A

**THE GORAYEB SEMINARS - # 1 IN RESULTS**

# STOP SMOKING

**In Two Hours**  
 No Cravings  
 No Irritability  
 No Weight Gain

**Written Guarantee**

That's right, regardless of your past experience with trying to stop, **YOU WILL STOP SMOKING TONIGHT PERMANENTLY** without cravings, and without withdrawal.

You will experience two hypnotic sessions this evening, after which any desire or craving for cigarettes will simply be gone.

With the Gorayeb Method of Clinical Hypnosis, you enter a deep, focused state of ALWAYS IN CONTROL.

But will it work for me - Whether you are a chronic chain smoker or occasional smoker, you will leave this seminar as a **NON-SMOKER**. Thousands have before you, and with no withdrawal, no irritability, no weight gain.

**BONUS** **FOR** **AD** **CLIP**

**\$39.99** COMPLETE ONLY

Register at door 6:00 pm - 7:00 pm  
 Cash, Check, Visa/MC, Amex

**CLIP** **AD** **FOR** **BONUS**

**Written Guarantee:** If for any reason you ever start smoking again, you'll be admitted to any Gorayeb Stop Smoking Seminar free of charge.

**YOU WILL STOP SMOKING TONIGHT GUARANTEED**

**CLIP** **AD** **FOR** **BONUS**

Presented by Gorayeb Seminars, Inc.  
 1-800-785-7123

Ronald B. Gorayeb  
 Certified Hypnotherapist  
 The Gorayeb Method  
 of Hypnosis has  
 worked for thousands.  
 It will work for you too! Try it!

© GORAYEB SEMINARS, INC. 1993

EXHIBIT A

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Complaint

EXHIBIT B

**THE GORAYEB SEMINARS - NO. 1 IN RESULTS**

# LOSE WEIGHT WITH HYPNOSIS

**QUICKLY  
SAFELY  
WITHOUT HUNGER  
WRITTEN GUARANTEE**

**ONLY \$3999<sup>COMPLETE</sup>**

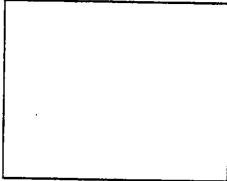
That's right. You can **LOSE THE WEIGHT YOU'VE BEEN WANTING TO** - and keep it off permanently, without hunger, without dieting, without willpower.

Using the power of hypnosis, you will lose unwanted cravings, eliminate the addiction to sweets and break the impulsive/complaisive eating habit - once and for all.

**With the Gorayeb Method of Clinical Hypnosis, there is NO SLEEP or LOSS OF CONTROL.** You are awake and aware. Everyone who attends will be hypnotized. You'll leave refreshed - feeling good.

**But will it work for me?** - You can expect results ranging from 50-60 lbs. in 3 months to 120 lbs. in one year. No willpower, no hunger, no dieting - **JUST SUCCESS.** Thousands have succeeded before you and you will too!

**CLIP**



**AD**

**FOR**

**BONUS**

**Register at door 6:00 pm - 7:00 pm**  
Cash, Check, Visa, MC, AMEX

**Remember, diets don't work.** You diet, lose weight and 6 months later it's all back. The only real answer for true behavior modification is the utilization of the subconscious mind.

**Our WRITTEN GUARANTEE:** You will lose all the weight you've been wanting to, if you don't, or if you ever want a reinforcement, you'll be admitted to any Gorayeb Weight Loss Seminar free of charge.

**CLIP**

**AD**

**FOR**

**BONUS**

**YOU WILL LOSE WEIGHT GUARANTEED**

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**BONUS**

Ronald B. Gorayeb  
Certified Hypnotherapist  
The Gorayeb Method of Hypnosis  
has worked for thousands  
It will work for you too! Try it!

**STOP HAVING WEIGHT AS AN ISSUE IN YOUR LIFE.** Join us and become the winner you've always wanted to be.

Presented by Gorayeb Seminars, Inc.  
1-800-786-7123

**YOU WILL LOSE WEIGHT GUARANTEED**

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## DECISION AND ORDER

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

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does 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 Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments received, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Gorayeb Seminars, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the state of New Jersey, with its offices and principal place of business at 101 Roundhill Drive, Rockaway, New Jersey.

Respondent Gorayeb Learning Systems, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the state of New Jersey, with its offices and principal place of business at 101 Roundhill Drive, Rockaway, New Jersey.

Respondent Ronald B. Gorayeb is the sole director and shareholder of the corporate respondents. He formulates, directs, and controls the acts and practices of the corporate respondents, and his



principal office and place of business is the same as that of the corporate respondents.

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

## ORDER

### DEFINITION

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

### I.

*It is ordered*, That respondents Gorayeb Seminars, Inc., a corporation, Gorayeb Learning Systems, Inc., a corporation, their successors and assigns, and their officers, and Ronald B. Gorayeb, individually and as an officer of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, or sale of any smoking cessation or weight loss program, including any such program that uses hypnosis, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that participants who attend respondents' single-session group hypnosis seminar are cured of smoking addiction without experiencing withdrawal, anxiety, weight gain, or other side effects, unless, at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

B. Making any representation, directly or by implication, about the relative or absolute performance or efficacy of any smoking cessation program or weight loss program, unless, at the time of

making any such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

C. Misrepresenting, directly or by implication, the performance or efficacy of any smoking cessation program or weight loss program.

## II.

*It is further ordered,* That for three (3) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

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

## III.

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

## IV.

*It is further ordered,* That the individual respondent named herein shall promptly notify the Commission of the discontinuance of his present business or of his affiliation with the corporate respondent. In addition, for a period of three (3) years from the date of service of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment that involves a

smoking cessation program or a weight loss program. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of the respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

## V.

*It is further ordered,* That respondents shall distribute a copy of this order to each of their officers, agents, representatives, independent contractors, and employees who are involved in the preparation and placement of advertisements or promotional materials; and, for a period of three (3) years from the date of entry of this order, distribute same to all future such officers, agents, representatives, independent contractors, and employees.

## VI.

*It is further ordered,* That respondents shall, within sixty (60) days after the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.