IN THE MATTER OF

THE KROGER COMPANY AND FRED MEYER, INC.

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

Docket C-3917; File No. 991 0024
Complaint, January 10, 2000--Decision, January 10, 2000

This consent order addresses the merger of respondent Jobsite Holdings, Inc., a wholly-owned subsidiary of Kroger, with and into Fred Meyer, through which Fred Meyer will become a wholly-owned subsidiary of Kroger. The consent order requires, among other things, to divest eight specific supermarkets in relevant markets, five of which were owned by Kroger and three of which were owned by Fred Meyers prior to the merger. From the time of the merger until the completion of the divestitures, respondents must maintain the competitiveness and viability of the assets to be divested.

Participants

For the Commission: *Phillip L. Broyles, Daniel P. Ducore, Alan A. Fisher, Jill M. Frumin, Jonathan Kanter, Richard Liebeskind, Valicia A. Spriggs,* and *Gregory S. Vistnes.*

For the Respondents: *Deborah L. Feinstein, Arnold & Porter*; and *Brian Byrne* and *David I. Gelfand, Cleary, Gottlieb, Steen & Hamilton.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that respondent The Kroger Co.

("Kroger") has entered into an agreement to acquire all of the voting securities of respondent Fred Meyer, Inc. ("Fred Meyer"), all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

DEFINITION

PARAGRAPH ONE: For the purposes of this complaint, the term "Supermarket" means a full-line retail grocery store with annual sales of at least $2 million 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.

THE KROGER CO.

PARAGRAPH TWO: Respondent Kroger is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 1014 Vine Street, Cincinnati, Ohio 45202.

PARAGRAPH THREE: Respondent Kroger, directly and through Dillon Companies, Inc., its wholly-owned domestic subsidiary, is, and at all times relevant herein has been, engaged in the operation of supermarkets in Alabama, Arizona, Arkansas, Colorado, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. Kroger and its wholly-owned domestic subsidiaries operate approximately 1,410 supermarkets in these states under the Kroger, Fry's, Dillons, King Soopers, City Markets, and Gerbes trade names. Kroger had approximately $26.57 billion in total United States sales for the fiscal year that ended on December 27, 1997.

PARAGRAPH FOUR: Respondent Kroger 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.

FRED MEYER, INC.

PARAGRAPH FIVE: Respondent Fred Meyer is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3800 S.E. 22nd Avenue, Portland, Oregon 97202.

PARAGRAPH SIX: Respondent Fred Meyer is, and at all times relevant herein has been, engaged in the operation of supermarkets in Alaska, Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Texas, Utah, Washington, and Wyoming. Fred Meyer operates approximately 800 supermarkets under the Fred Meyer, Smith's Food & Drug Centers, Ralph's, Quality Food Centers, Price Rite, Food 4 Less, Cala, Bell, and FoodsCo. trade names. Fred Meyer had $14.88 billion in total sales for the fiscal year that ended on January 31, 1999.

PARAGRAPH SEVEN: Respondent Fred Meyer 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.

ACQUISITION

PARAGRAPH EIGHT: On or about October 18, 1998, Kroger, Fred Meyer, and Jobsite Holdings, Inc. ("Jobsite"), a wholly-owned subsidiary of Kroger, entered into an Agreement and Plan of Merger pursuant to which Jobsite will merge with and into Fred Meyer and Fred Meyer will become a wholly-owned subsidiary of Kroger. The total value of the proposed merger is approximately $15 billion.

TRADE AND COMMERCE

PARAGRAPH NINE: The relevant line of commerce (*i.e.*, the product market) in which to analyze the acquisition described herein is the retail sale of food and grocery products in supermarkets.

PARAGRAPH TEN: Supermarkets provide a distinct set of products and services for consumers who desire to one-stop shop for food and grocery products. Supermarkets carry a full line and wide selection of both food and nonfood products (typically more than 10,000 different stock-keeping units ("SKUs")) as well as a deep inventory of those SKUs. In order to accommodate the large number of food and nonfood products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

PARAGRAPH ELEVEN: Supermarkets compete primarily with other supermarkets that provide one-stop shopping for food and grocery products. Supermarkets primarily base their food and grocery prices on the prices of food and grocery products sold at nearby supermarkets. Supermarkets do not regularly price-check food and grocery products sold at other types of stores and do not significantly change their food and grocery prices in response to prices at other types of stores. Most consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

PARAGRAPH TWELVE: Retail stores other than supermarkets that sell food and grocery products, such as neighborhood "mom & pop" grocery stores, convenience stores, specialty food stores *(e.g.*, seafood markets, bakeries, etc.), club stores, military commissaries, and mass merchants, do not effectively constrain prices at supermarkets. None of these stores offers a supermarket's distinct set of products and services that enable consumers to one-stop shop for food and grocery products.

PARAGRAPH THIRTEEN: The relevant sections of the country (i.e., the geographic markets) in which to analyze the acquisition described herein are the areas in and near the following cities and towns:

a Prescott, Arizona;
b. Sierra Vista, Arizona;
c. Yuma, Arizona;
d. Cheyenne, Wyoming;
e. Green River, Wyoming;
f. Rock Springs, Wyoming; and
g. Price, Utah.

MARKET STRUCTURE

PARAGRAPH FOURTEEN: The Prescott, Arizona; Sierra Vista, Arizona; Yuma, Arizona; Green River, Wyoming; Rock Springs, Wyoming; and Price, Utah relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschman

Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios. The acquisition would substantially increase concentration in each market. Kroger and Fred Meyer would have a combined market share of near or greater than 35% in each geographic market. The post-acquisition HHIs in the geographic markets range from 2,793 to 10,000.

PARAGRAPH FIFTEEN: The Cheyenne, Wyoming, relevant market is highly concentrated. The market will remain highly concentrated as a result of this acquisition, and will be significantly more concentrated than it would have been but for this acquisition.

ENTRY CONDITIONS

PARAGRAPH SIXTEEN: Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant markets.

ACTUAL COMPETITION

PARAGRAPH SEVENTEEN: Kroger and Fred Meyer are actual and direct competitors in and near Prescott, Arizona; Sierra Vista, Arizona; Yuma, Arizona; Green River, Wyoming; Rock Springs, Wyoming; and Price, Utah.

ACTUAL POTENTIAL COMPETITION

PARAGRAPH EIGHTEEN: Kroger is an actual potential competitor against Fred Meyer in and near Cheyenne, Wyoming. But for the acquisition, Kroger and Fred Meyer would have become direct competitors in the Cheyenne, Wyoming, relevant market. The acquisition will eliminate that competition.

EFFECTS

PARAGRAPH NINETEEN: The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant line 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 Kroger and supermarkets owned or controlled by Fred Meyer;

b. by eliminating actual potential competition between supermarkets owned or controlled by Kroger and supermarkets owned or controlled by Fred Meyer;

c. by increasing the likelihood that Kroger will unilaterally exercise market power; and

d. 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

PARAGRAPH TWENTY: The Agreement and Plan of Merger between Kroger and Fred Meyer, pursuant to which Jobsite will merge with and into Fred Meyer and Fred Meyer will become a wholly-owned subsidiary of Kroger, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the proposed acquisition would, if consummated, violate

Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this tenth day of January, 2000, issues its complaint against said respondents.

By the Commission, Commissioner Leary not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by The Kroger Co. ("Kroger") of Fred Meyer, Inc. ("Fred Meyer"), and it now appearing that Kroger and Fred Meyer, hereinafter sometimes referred to as "Respondents," having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

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

Fleming Companies, Inc. ("Fleming"), having purchased some of the assets to be divested under the terms of the Consent Agreement, Fleming having expressed an intention to resell some of those assets to another purchaser, and Fleming having executed the Consent Agreement; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments received, and having modified the Decision & Order in certain respects, 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 Kroger is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 1014 Vine Street, Cincinnati, Ohio 45202.

2. Respondent Fred Meyer is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3800 Southeast 22nd Avenue, Portland, Oregon 97202.

3. Fleming is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oklahoma, with its principal place of business located at 6301 Waterford Boulevard, Oklahoma City, Oklahoma 73126.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding, of the Respondents, and of Fleming, 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. "Kroger" means The Kroger Co., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by The Kroger Co., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Kroger, after consummation of the Acquisition, includes Fred Meyer.

B. "Fred Meyer" means Fred Meyer, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Fred Meyer, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Respondents" means Kroger and Fred Meyer, individually and collectively.

D. "Fleming" means Fleming Companies, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Fleming Companies, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

E. “Commission” means the Federal Trade Commission.

F. “Acquisition” means Kroger's proposed acquisition of Fred Meyer pursuant to the Agreement dated October 18, 1998.

G. “Assets To Be Divested” means the Schedule A Assets, the Schedule B Assets, and the Schedule C Assets.

H. “Schedule A Assets” means the Supermarkets identified in Schedule A of this Order and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

I. “Schedule B Assets” means the Supermarkets identified in Schedule B of this Order and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

J. “Schedule B Wyoming Assets” means the Supermarkets identified in Schedule B of this Order that are located in Green River, Wyoming, and Rock

Springs, Wyoming, and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

K. "Schedule C Assets" means the Supermarkets identified in Schedule C of this Order and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

L. "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; frozen and refrigerated 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.

M. "Supermarkets To Be Divested" means the Supermarkets identified in Schedule A, Schedule B, and Schedule C of this Order.

N. “Albertson’s” means Albertson’s, Inc., 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 East Parkcenter Boulevard, Boise, Idaho 83726.

O. “Nash-Finch” means Nash-Finch Company, 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 7600 France Avenue South, P.O. Box 355, Minneapolis, Minnesota 55440.

P. “Albertson’s Agreement” means the Purchase Agreement between Albertson’s and Kroger executed on March 31, 1999, for the divestiture by Respondents to Albertson’s of the Schedule A Assets.

Q. “Fleming Agreement” means the Purchase Agreements between Fleming Companies, Inc. and Kroger executed on March 31, 1999, and April 7, 1999, for the divestiture by Respondents to Fleming Companies, Inc. of the Schedule B Assets.

R. “Nash-Finch Agreement” means the Purchase Agreement between Nash-Finch and Smith’s Food & Drug Centers, Inc., a wholly-owned subsidiary of Fred Meyer, executed on March 31, 1999, for the divestiture by Respondents to Nash-Finch of the Schedule C Assets.

S. “Acquirer(s)” means Albertson’s, Fleming Companies, Inc., Nash-Finch, and/or any other entity or entities approved by the Commission to acquire the Assets To Be Divested pursuant to this Order, individually and collectively.

T. “Third Party Consents” means all consents from any other person, including all landlords, that are necessary to effect the complete transfer to the Acquirer(s) of the Assets To Be Divested.

II.

IT IS FURTHER ORDERED that:

A. Respondents shall divest, absolutely and in good faith, the Schedule A Assets to Albertson’s, in accordance with the Albertson’s Agreement (which agreement shall not be construed to vary or contradict the terms of this Order), no later than:

1. twenty (20) days after the date on which the Acquisition is consummated, or

2. four (4) months after the date on which Respondents sign the Agreement Containing Consent Order,

whichever is earlier.

Provided, however, that if Respondents have divested the Schedule A Assets to Albertson’s pursuant to the Albertson’s Agreement prior to the date the Order becomes final, and if, at the time the Commission determines to make the Order final, the Commission notifies Respondents that Albertson’s is not an acceptable acquirer or that the Albertson’s Agreement is not an acceptable manner of divestiture, then Respondents shall immediately rescind the transaction with Albertson’s and shall divest the Schedule A Assets within three (3) months of the date the Order becomes final, absolutely and in good faith, at no minimum price, 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. Respondents shall divest, absolutely and in good faith, the Schedule B Assets to Fleming in accordance with the Fleming Agreement (which agreement shall not be construed to vary or contradict the terms of this Order), no later than

1. twenty (20) days after the date on which the Acquisition is consummated, or

2. four (4) months after the date on which Respondents sign the Agreement Containing Consent Order,

whichever is earlier.

Provided, however, that if Respondents have divested the Schedule B Assets to Fleming pursuant to the Fleming Agreement prior to the date the Order becomes final, and if, at the time the Commission determines to make the Order final, the Commission notifies Respondents that Fleming is not an acceptable acquirer or that the Fleming Agreement is not an acceptable manner of divestiture, then Respondents shall immediately rescind the transaction with Fleming, and shall divest the Schedule B Assets within three (3) months of the date the Order becomes final, absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

C. Respondents shall divest, absolutely and in good faith, the Schedule C Assets to Nash-Finch, in accordance with the Nash-Finch Agreement (which agreement shall not be construed to vary or contradict the terms of this Order), no later than

1. twenty (20) days after the date on which the Acquisition is consummated, or

2. four (4) months after the date on which Respondents sign the Agreement Containing Consent Order,

whichever is earlier.

Provided, however, that if Respondents have divested the Schedule C Assets to Nash-Finch pursuant to the Nash-Finch Agreement prior to the date the Order becomes final, and if, at the time the Commission determines to make the Order final, the Commission notifies Respondents that Nash-Finch is not an acceptable acquirer or that the Nash-Finch Agreement is not an acceptable manner of divestiture, then Respondents shall immediately rescind the transaction with Nash-Finch and shall divest the Schedule C Assets within three (3) months of the date the Order becomes final, absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

D. Respondents shall obtain all required Third Party Consents prior to the closing of the Albertson's Agreement, the Fleming Agreement, the Nash-Finch Agreement, or any other agreement pursuant to which the Assets To Be Divested are divested to an Acquirer.

E. The purpose of the divestitures 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 Acquisition alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that, if Fleming purchases any Schedule B Wyoming Assets, Fleming shall sell or otherwise convey, directly or indirectly, any such Schedule B Wyoming Assets, only to an Acquirer approved by the Commission and only in a manner that receives the prior approval of the Commission. Fleming shall comply with this Paragraph until three (3) years after the date this Order becomes final.

IV.

IT IS FURTHER ORDERED that:

A. If Respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested within the time required by Paragraph II of this Order, the Commission may appoint a trustee to divest the Assets To Be Divested. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, 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 IV.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 receipt of 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 the Assets To Be Divested.

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 each divestiture required by this Order.

4. The trustee shall have twelve (12) months from the date the Commission or court approves the trust agreement described in Paragraph IV.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 the period for no more than two (2) additional periods.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Assets To Be Divested or to any other relevant information, as the trustee may request. 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 expeditiously 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 an asset to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest such asset to the acquiring

entity or entities selected by Kroger 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 divestitures 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 Kroger, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.

8. 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 IV.A. of this Order.

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

11. In the event that the trustee determines that he or she is unable to divest the Assets To Be Divested in a manner consistent with the Commission's purpose as described in Paragraph II, the trustee may divest additional ancillary assets of Respondents and effect such arrangements as are necessary to satisfy the requirements of this Order.

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

13. The trustee shall report in writing to Respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish each divestiture required by this Order.

V.

IT IS FURTHER ORDERED that Respondents shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested, and shall not cause the wasting or deterioration of the Assets To Be Divested, nor shall they cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber or otherwise impair the viability, marketability or competitiveness of the Assets To Be Divested. Respondents shall comply with the terms of this Paragraph until such time as Respondents have divested the Assets To Be Divested pursuant to the terms of this order. Respondents shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the Assets To Be Divested in the ordinary course of business and in accordance with past practice. Respondents shall not terminate the operation of any Supermarket To Be Divested. Respondents shall continue to maintain the inventory of each Supermarket To Be Divested at levels and selections (*e.g.*, stock-keeping units) consistent with those maintained by such Respondent(s) at such Supermarket in the ordinary course of business consistent with past practice. Respondents shall use best efforts to keep the organization and properties of each Supermarket To Be Divested intact, including current business operations, physical facilities, working conditions, and a work force of equivalent size, training, and expertise associated with the Supermarket. Included in the above obligations, Respondents shall, without limitation:

A. maintain operations and departments and not reduce hours at each Supermarket To Be Divested;

B. not transfer inventory from any Supermarket To Be Divested other than in the ordinary course of business consistent with past practice;

C. make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations associated with any Supermarket To Be Divested, in each case in a manner consistent with past practice;

D. maintain the books and records of each Supermarket To Be Divested;

E. not display any signs or conduct any advertising (*e.g.*, direct mailing, point-of-purchase coupons) that indicates that any Respondent is moving its operations at a Supermarket To Be Divested to another location, or that indicates a Supermarket To Be Divested will close;

F. not conduct any "going out of business," "close-out," "liquidation" or similar sales or promotions at or relating to any Supermarket To Be Divested; and

G. not change or modify in any material respect the existing advertising practices, programs and policies for any Supermarket To Be Divested, other than changes in the ordinary course of business consistent with past practice for Supermarkets of the Respondents not being closed or relocated.

VI.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this order becomes final, Kroger shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without providing advance written notification to the Commission:

A. Acquire any ownership or leasehold interest in any facility that has operated as a Supermarket within six (6) months prior to the date of such proposed acquisition in Yavapai, Cochise, or Yuma counties in Arizona; Laramie or Sweetwater counties in Wyoming; or Carbon County in Utah.

B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket or owned any interest in or operated any Supermarket within six (6) months prior to such proposed acquisition in Yavapai, Cochise, or Yuma counties in Arizona; Laramie or Sweetwater counties in Wyoming; or Carbon County in Utah.

Provided, however, that advance written notification shall not apply to the construction of new facilities by Kroger or the acquisition of or leasing of a facility that has not operated as a Supermarket within six (6) months prior to Kroger's offer to purchase or lease.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Kroger and not of any other party to the transaction. Kroger shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Kroger shall not consummate the transaction until twenty days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

VII.

IT IS FURTHER ORDERED that, for a period of ten (10) years commencing on the date this Order becomes final:

A. Kroger 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)) that acquires any Supermarket, any leasehold interest in any Supermarket, or any interest in any retail location used as a Supermarket on or after January 1, 1998, in Yavapai, Cochise, or Yuma counties in Arizona; Laramie or Sweetwater counties in Wyoming; or Carbon County in Utah, to operate a Supermarket at that site if such Supermarket was formerly owned or operated by Kroger.

B. Kroger shall not remove any fixtures or equipment from a property owned or leased by Kroger in Yavapai, Cochise, or Yuma counties in Arizona; Laramie or Sweetwater counties in Wyoming; or Carbon County in Utah, that is no longer in operation as a Supermarket, except (1) prior to and as part of a sale, sublease, assignment, or change in occupancy of such Supermarket; or (2) to relocate such fixtures or equipment in the ordinary course of business to any other Supermarket owned or operated by Kroger.

VIII.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date Respondents signed the Agreement Containing Consent Order and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs

II, IV, and V 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, IV, and V 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, IV, and V of the Order, including a description of all substantive contacts or negotiations for divestitures 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 (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Kroger shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

IX.

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 Respondents that may affect compliance obligations arising out of the Order.

X.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, upon written request with five (5) days' notice, Respondents and Fleming shall permit any duly authorized representative of the Commission:

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

B. Without restraint or interference from Respondents and Fleming, to interview Respondents, Fleming, or officers, directors, or employees of Respondents or Fleming in the presence of counsel.

By the Commission, Commissioner Leary not participating.

SCHEDULE A

All Supermarkets in Price, Utah, in which Kroger had a financial interest prior to the consummation of the Acquisition, including, but not limited to, the Supermarket operated under the name "City Market" at 760 Price River Drive, Price, Utah 84501.

SCHEDULE B

1. All Supermarkets in Rock Springs, Wyoming, in which Kroger had a financial interest prior to the consummation of the Acquisition, including, but not limited to, the Supermarket operated under the name "City Market" at 401 N. Center, Rock Springs, Wyoming 82901.

2. All Supermarkets in Green River, Wyoming, in which Kroger had a financial interest prior to the consummation of the Acquisition, including, but not limited to, the Supermarket operated under the name "City Market" at 400 Uinta Avenue, Green River, Wyoming 82935.

3. All Supermarkets in Prescott, Arizona, in which Kroger had a financial interest prior to the consummation of the Acquisition, including, but not limited to, the Supermarket operated under the name "Fry's" at 1519 W. Gurley Road, Prescott, Arizona 86301.

4. All Supermarkets in Yuma, Arizona, in which Kroger had a financial interest prior to the consummation of the Acquisition, including, but not limited to, the Supermarket operated under the name "Fry's" at 2600 West 16th Street, Yuma, Arizona 85364.

5. All Supermarkets in Sierra Vista, Arizona, in which Fred Meyer had a financial interest prior to the consummation of the Acquisition, including, but not limited to, the Supermarket operated under the name "Smith's" at 85 South Highway 92, Sierra Vista, Arizona 85635.

SCHEDULE C

All Supermarkets in Cheyenne, Wyoming, in which Fred Meyer had a financial interest prior to the consummation of the Acquisition, including, but not limited to:

1. the Supermarket operated under the name "Smith's" at 1600 East Pershing Boulevard, Cheyenne, Wyoming 82001; and

2. the Supermarket operated under the name "Smith's" at 3745 East Lincoln Way, Cheyenne, Wyoming 82001.

ANALYSIS OF THE PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment from The Kroger Co. ("Kroger") and Fred Meyer Stores, Inc. ("Fred Meyer") (collectively "the Proposed Respondents") an Agreement Containing Consent Order ("the proposed consent order"). The Proposed Respondents have also reviewed a draft complaint contemplated by the Commission. The proposed consent order is designed to remedy likely anticompetitive effects arising from the merger of Jobsite Holdings, Inc. ("Jobsite"), a wholly-owned subsidiary of Kroger, with and into Fred Meyer (the "Merger"), through which Fred Meyer will become a wholly-owned subsidiary of Kroger.

II. Description of the Parties and the Proposed Acquisition

Kroger, an Ohio corporation headquartered in Cincinnati, Ohio, operates over 1,400 supermarkets in 23 states. Kroger's supermarkets operate under the “Kroger,” “Fry's,” “Dillons,”“King Soopers,” “City Markets,” and “Gerbes” trade names. In the states where Kroger competes with Fred Meyer, Kroger operates supermarkets in Arizona under the “Fry's” trade name and in Utah and Wyoming under the “City Market” and “King Sooper” trade names. Kroger has plans to open a supermarket in Cheyenne, Wyoming, under the “King Sooper” trade name. Kroger had $26.57 billion in United States revenues for the fiscal year that ended on December 27, 1997. Following the merger, Kroger will remain the largest supermarket firm in the United States.

Fred Meyer, a Delaware corporation headquartered in Portland, Oregon, operates approximately 800 supermarkets in 12 western states. Fred Meyer's supermarkets operate under the “Smith's Food & Drug Centers” trade name in Arizona, Utah, and Wyoming, as well as the “Fred Meyer” trade name in Arizona and Utah, and the “Price Rite” trade name in Arizona. Fred Meyer had $14.88 billion in total sales for the fiscal year that ended on January 31, 1999.

Pursuant to the Merger proposed by Kroger and Fred Meyer, Jobsite will merge with and into Fred Meyer and Fred Meyer will become a wholly-owned subsidiary of Kroger. As a result of the Merger, Fred Meyer's outstanding shares of common stock will be extinguished and the holder of each such share will be entitled to receive one newly-issued share of common stock of Kroger in exchange for each extinguished share of Fred Meyer common stock. The total equity value of the proposed merger is approximately $15 billion.

III. The Draft Complaint

The draft complaint alleges that the relevant line of commerce (*i.e.*, the product market) is the retail sale of food and grocery items in supermarkets. Supermarkets provide a distinct set of products and services for consumers who desire to one-stop shop for food and grocery products. Supermarkets carry a full line and wide selection of both food and nonfood products (typically more than 10,000 different stock-keeping units ("SKUs")), as well as a deep inventory of those SKUs. In order to accommodate the large number of food and nonfood products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

Supermarkets compete primarily with other supermarkets that provide one-stop shopping for food and grocery products. Supermarkets primarily base their food and grocery prices on the prices of food and grocery products sold at other nearby supermarkets. Supermarkets do not regularly price-check food and grocery products sold at other types of stores, and do not significantly change their food and grocery prices in response to prices at other types of stores. Most consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

Retail stores other than supermarkets that sell food and grocery products, such as neighborhood "mom & pop" grocery stores, convenience stores, specialty food stores *(e.g.*, seafood markets, bakeries, etc.), club stores, military commissaries, and mass merchants, do not effectively constrain prices at supermarkets. These other stores operate significantly different retail formats. None of these stores offers a supermarket's distinct set of products and services that enable consumers to one-stop shop for food and grocery products.

According to the draft complaint, the relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition are the areas in and near the following cities and towns: (a) Prescott, Arizona; (b) Sierra Vista, Arizona; (c) Yuma, Arizona; (d) Cheyenne, Wyoming; (e) Green River, Wyoming; (f) Rock Springs, Wyoming; and (g) Price, Utah.

Kroger and Fred Meyer are actual and direct competitors in and near Prescott, Sierra Vista, Yuma, Green River, Rock Springs, and Price. Kroger is an actual potential competitor against Fred Meyer in and near the Cheyenne relevant market. But for the acquisition, Kroger and Fred Meyer would become direct competitors in the Cheyenne relevant market. The acquisition will eliminate that competition.

According to the draft complaint, the Prescott, Sierra Vista, Yuma, Arizona; Green River, Rock Springs, Wyoming; and Price, Utah, relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as "HHI")[1] or by two-firm and four-firm concentration ratios. The acquisition would substantially increase concentration in each market. Kroger and Fred Meyer would have a combined market share of near or greater than 35% in each geographic market. The post-acquisition HHIs in the geographic markets range from 2,793 to 10,000.

The draft complaint further alleges that the Cheyenne, Wyoming, relevant market is also highly concentrated. The market will remain highly concentrated as a result of this acquisition, and will be significantly more concentrated than it would have been but for the acquisition.

According to the draft complaint, entry is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant geographic markets.

[1] The HHI is a measurement of market concentration calculated by summing the squares of the individual market shares of all the participants.

According to the draft complaint, the Agreement and Plan of Merger between Kroger and Fred Meyer, pursuant to which Jobsite will merge with and into Fred Meyer and Fred Meyer will become a wholly-owned subsidiary of Kroger, may substantially lessen competition 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 Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by eliminating direct competition between supermarkets owned or controlled by Kroger and supermarkets owned or controlled by Fred Meyer; by eliminating actual potential competition between supermarkets owned or controlled by Kroger and supermarkets owned or controlled by Fred Meyer; by increasing the likelihood that Kroger will unilaterally exercise market power; and by increasing the likelihood of, or facilitating, collusion or coordinated interaction among the remaining supermarket firms. Each of these effects 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.

IV. Terms of the Proposed Consent Order

The proposed consent order will remedy the Commission's competitive concerns about the proposed acquisition. Under the terms of the proposed consent order, the Proposed Respondents must divest eight specific supermarkets in the relevant markets. Five of the supermarkets that the Proposed Respondents must divest are currently owned and operated by Kroger (of which two operate under the “Fry's” banner and three operate under the “City Market” banner), and three of the supermarkets are currently owned and operated by Fred Meyer (all of which operate under the “Smith's” banner). The Proposed Respondents must divest: (1) two Fred Meyer “Smith's” in Cheyenne, Wyoming, to Nash-Finch Company (“Nash-Finch”), one of the largest food wholesalers in the United States and an operator of many company-owned supermarkets; (2) one Kroger "City Market" in Price, Utah, to Albertson's, Inc., one of the largest retail food and drug chains operating in the United States; and (3) two Kroger "Fry's," two Kroger "City Markets," and one Fred Meyer "Smith's" in various locations to Fleming Companies, Inc. ("Fleming"), the second-largest supermarket wholesaler in the United States and an operator of many company-owned supermarkets. These divestitures include every Kroger supermarket or every Fred Meyer supermarket in each relevant market. Each upfront buyer owns no supermarkets in the same market where it is acquiring one or more divested supermarkets from the Proposed Respondents. The specific supermarkets that the Proposed Respondents must divest to Nash-Finch, Albertson's, and Fleming are listed below.

The two supermarkets that the Proposed Respondents must divest to Nash-Finch in accordance with the agreement between Kroger and Nash-Finch dated March 31, 1999, are:

1. Smith's store no. 175 operating under the "Smith's Food & Drug Centers" trade name, located at 1600 E. Pershing Blvd., Cheyenne, Wyoming 82001 (Laramie County); and

2. Smith's store no. 176 operating under the "Smith's Food & Drug Centers" trade name, located at 3745 East Lincoln Way, Cheyenne, Wyoming 82001 (Laramie County).

The one supermarket that the Proposed Respondents must divest to Albertson's in accordance with the agreement between Kroger and Albertson's dated March 31, 1999, is:

1. Kroger store no. 27 operating under the "City Market" trade name, located at 760 Price River Dr., Price, Utah 84501 (Carbon County).

The five supermarkets that the Proposed Respondents must divest to Fleming in accordance with the agreements between Kroger and Fleming dated March 31, 1999, and April 7, 1999, are:

1. Kroger store no. 24 operating under the “City Market” trade name, located at 401 N. Center, Rock Springs, Wyoming 82901 (Sweetwater County);

2. Kroger store no. 23 operating under the “City Market” trade name, located at 400 Uinta Drive, Green River, Wyoming 82935 (Sweetwater County);

3. Kroger store no. 9 operating under the “Fry's” trade name, located at 1519 W. Gurley Street, Prescott, Arizona 86305 (Yavapai County);

4. Smith's store no. 305 operating under the “Smith's Food & Drug Centers” trade name, located at #85 South Hwy. 92, Sierra Vista, Arizona 85635 (Cochise County); and

5. Kroger store no. 47 operating under the “Fry's” trade name, located at 2600 W. 16th Street, Yuma, Arizona 85364 (Yuma County).

From the time Jobsite merges with and into Fred Meyer until the divestitures have been completed, the Proposed Respondents are required to maintain the viability, competitiveness, and marketability of the assets to be divested, must not cause their wasting or deterioration, and cannot sell, transfer, or otherwise impair their marketability or viability.

The proposed consent order specifically requires that the divestitures occur no later than twenty days after Jobsite merges with and into Fred Meyer and Fred Meyer becomes a wholly-owned subsidiary of Kroger or four months after the Proposed Respondents signed the proposed consent order (April 29, 1999), whichever is earlier. The proposed consent agreement also requires Kroger to include rescission provisions in its upfront buyer agreements that allow it to rescind the transaction(s) if the Commission, after the comment period, decides to reject any of the upfront buyers. If Kroger divests the supermarkets to be divested prior to the date the proposed consent order becomes final, and if, at the time the Commission decides to make the proposed consent order final, the Commission notifies Kroger that any of the upfront buyers is not an acceptable acquirer or that any of the upfront buyer agreements is not an acceptable manner of divestiture, then Kroger must immediately rescind the transaction in question and divest those assets within three months after the proposed consent order becomes final. At that time, Kroger must divest those assets only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. In the event that any Commission-approved buyer is unable to take or keep possession of any of the supermarkets identified for divestiture, a trustee that the Commission may appoint has the power to divest any of the supermarkets or properties in the markets alleged in Paragraph 13 of the complaint that the Proposed Respondents own to remedy the anticompetitive effects alleged in the complaint.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. When divestiture is an appropriate remedy for a supermarket merger, the Commission requires the merging parties to find a buyer for the divested stores. A proposed buyer must not itself present competitive problems. For example, the Commission is less likely to approve a buyer that already has a large retail presence in the relevant geographic area than a buyer without such a presence. The Commission is satisfied that the purchasers presented by the parties are well qualified to run the divested stores and that divestiture to these purchasers poses no separate competitive issues.

For a period of ten years from the date the proposed consent order becomes final, Kroger is required to provide notice to the Commission prior to acquiring supermarket assets located in, or any interest (such as stock) in any entity that owns or operates a supermarket located in, Cochise, Yavapai, or Yuma counties, Arizona; Laramie or Sweetwater counties, Wyoming; or Carbon County, Utah. Kroger may not complete such an acquisition until it has provided information requested by the Commission. This provision does not restrict Kroger from constructing new supermarket facilities on its own; nor does it restrict Kroger from leasing facilities not operated as supermarkets within the previous six months.

For a period of ten years, the proposed consent order also prohibits Kroger from entering into or enforcing any agreement that restricts the ability of any person that acquires any supermarket, any leasehold interest in any supermarket, or any interest in any retail location used as a supermarket on or after January 1, 1998, to operate a supermarket at that site if such supermarket was formerly owned or operated by Kroger in Cochise, Yavapai, or Yuma counties, Arizona; Laramie or Sweetwater counties, Wyoming; or Carbon County, Utah. In addition, Kroger may not remove fixtures or equipment from a store or property owned or leased in Cochise, Yavapai, or Yuma counties, Arizona; Laramie or Sweetwater counties, Wyoming; or Carbon County, Utah, that is no longer in operation as a supermarket, except (1) prior to a sale, sublease, assignment, or change in occupancy or (2) to relocate such fixtures or equipment in the ordinary course of business to any other supermarket owned or operated by Kroger.

The Proposed Respondents are required to provide to the Commission a report of compliance with the proposed consent order within thirty days following the date on which they signed the proposed consent and every thirty days thereafter until the divestitures are completed. Kroger is required to provide to the Commission a report of compliance annually for a period of ten years. The obligations of Jobsite under the proposed consent order will terminate upon consummation of the proposed acquisition.

V. Opportunity for Public Comment

The proposed consent order has been placed on the public record for 60 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 60 days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make the proposed consent order final.

By accepting the proposed consent order subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed consent order, including the proposed sale of supermarkets to Nash-Finch, Albertson's, and Fleming, in order to aid the Commission in its determination of whether to make the proposed consent order final. This analysis is not intended to constitute an official interpretation of the proposed consent order nor is it intended to modify the terms of the proposed consent order in any way.

IN THE MATTER OF

HOECHST AG AND RHÔNE POULENC S.A.

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

Docket C-3919; File No. 9910071
Complaint, January 18, 2000--Decision, January 18, 2000

This consent order addresses the merger of Respondent Glaxo Wellcome plc ("Glaxo") and Respondent SmithKline Beecham plc ("SB"). The order, among other things, requires the respondents (1) to divest all of SB's worldwide rights and intellectual property relating to its antiemetic drug, Kytril, to F. Hoffman LaRoche; (2) to divest SB's intellectual property rights to manufacture and market ceftazidime (an injectable antibiotic used to treat serious hospital-borne infections) to Abbott Laboratories; (3) to divest SB's worldwide rights and intellectual property relating to its antiviral drugs, Famvir and Denavir, to Novartis Pharm AG and Novartis Pharmaceuticals Corporation; and (4) to return to Cantab Pharmaceuticals plc all rights to use Cantab's DISC technology for the development of a prophylactic herpes vaccine. The order also requires the respondents (5) to divest Glaxo's United States and Canadian Zantac trademark rights to Pfizer; (6) to assign or relinquish all of SB's relevant intellectual property rights and options to the drug renzapride (used to treat irritable bowel syndrome) to Alizyme plc; (7) to assign all of Glaxo's relevant intellectual property rights to GI147211C, a topoisomerase I inhibitor (used to treat certain types of cancer), to Gilead Sciences, Inc.; and (8) to assign all of SB's relevant intellectual property rights and relinquish all options to regain control over frovatriptan (used to treat migraine headaches) to Vernalis Ltd.

Participants

For the Commission: *Molly S. Boast, Laura I. Brem, Linda D. Cunningham, Daniel P. Ducore, Wallace W. Easterling, Elizabeth A. Jex, Roy B. Levy, Ann Malester, Robert R. Pickett, Elizabeth A. Schneirov,* and *Gregory S. Vistnes.*

For the Respondents: *Alec Chang* and *William Pelster, Skadden Arps Slate Meagher & Flom, L.L.P.,* and *Jessica Biggio, Steven Sunshine,* and *David Wales, Shearman & Sterling.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (the "Commission"), having reason to believe that Respondents Hoechst AG ("Hoechst"), a corporation, and Rhône-Poulenc S.A. ("RP"), a corporation, both subject to the jurisdiction of the Commission, have agreed to merge into the new entity Aventis S.A. ("Aventis"), a 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 it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Hoechst is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at D-65926 Frankfurt am Main, Germany. Hoechst is engaged in the discovery, development, manufacture and sale of chemicals, proprietary and generic human pharmaceutical products, and animal health products. In the United States, Hoechst operates its pharmaceutical business through its subsidiary, Hoechst Marion Roussel, Inc. ("HMRI"), based in Kansas City, Missouri.

2. Respondent RP is a corporation organized, existing, and doing business under and by virtue of the laws of France, with its office and principal place of business located at 25 Quai Paul Doumer, F-92408 Courbevoie, France. Rhône-Poulenc is to be renamed Aventis S.A. with its registered office relocated at Strasbourg (Bas-Rhin)-Espace Europeen de L'Entreprise, 67300 Schiltigheim, France after the closing of the Business Combination Agreement between Hoechst and RP dated May 20, 1999. RP is engaged in the discovery, development, manufacture

and sale of chemicals, and proprietary and generic human pharmaceutical products. In the United States, Rhône-Poulenc operates its pharmaceutical business through its subsidiary, RP Rorer, Inc. ("RPR"), located in Collegeville, Pennsylvania.

II. JURISDICTION

3. Hoechst and RP are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose businesses are in or affect commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED MERGER

4. On or about May 20, 1999, Hoechst and RP signed a merger agreement, providing that each company will contribute most of its respective businesses into a newly formed entity, Aventis ("the merger"). The merger will be accomplished via an exchange offer by RP for all of Hoechst's outstanding shares, with Hoechst shareholders receiving one RP share for each 1.33 outstanding Hoechst share. The estimated value of the exchange of Hoechst shares is $16 billion. The merged entity, Aventis, will control worldwide assets valued at approximately $80 billion.

IV. THE RELEVANT MARKETS

5. One relevant line of commerce in which to analyze the effects of the proposed merger is the research, development, manufacture and sale of direct thrombin inhibitors. Direct thrombin inhibitors are used in the treatment of many blood clotting diseases, because of their unique mechanism of action in the blood clotting cascade of targeting thrombin. There are no acceptable substitutes for direct thrombin inhibitors because of their unique mechanism of action.

6. Another relevant line of commerce in which to analyze the effects of the proposed merger is the manufacture, marketing, and sale of cellulose acetate. Cellulose acetate is a thermoplastic used to produce, among other things, cigarette filters, tool handles, tapes and film.

7. The demand for cellulose acetate is highly inelastic in applications where it is used today, such as cigarette filters, tool handles, and tape and film applications, because its performance properties are superior to those of competing materials. There are no cost effective substitutes for cellulose acetate in these applications.

8. The United States is a relevant geographic area in which to analyze the effects of the merger.

V. STRUCTURE OF THE MARKETS

Direct Thrombin Inhibitors

9. The market for the research, development, manufacture and sale of direct thrombin inhibitors is highly concentrated. Hoechst and RP are the two leading companies developing direct thrombin inhibitor products. Hoechst and RP (based on its license from Novartis AG) control the substantial proprietary rights necessary to commercialize direct thrombin inhibitor products and possess the technological, manufacturing, clinical and regulatory expertise and manufacturing capability to commercially develop direct thrombin inhibitor products. Hoechst's direct thrombin inhibitor, Refludan, has already obtained FDA approval for treatment of the blood clotting disease Heparin-Induced Thrombocytopenia. RP is in late stage development of its direct thrombin inhibitor, Revasc, for Deep Vein Thrombosis. Both Hoechst and RP are either in or near clinical development for the treatment of other blood clotting diseases.

10. The direct thrombin inhibitor market is highly concentrated. Only Hoechst has successfully commercially developed a direct thrombin inhibitor product, Refludan, and only RP is in the final stages of clinical development to obtain FDA approval for its direct thrombin inhibitor product, Revasc.

Cellulose Acetate

11. The market for the manufacture, marketing, and sale of cellulose acetate is highly concentrated. There are three producers of cellulose acetate in the United States: Eastman Chemical Company ("Eastman"); RP, through Primester, a 50-50 joint venture with Eastman and Rhodia, a RP subsidiary; and Celanese AG ("Celanese"). Celanese and Eastman, through each of their wholly-owned facilities, control approximately 45 percent of U.S. cellulose acetate capacity. The Primester joint venture between Rhodia and Eastman accounts for approximately 10 percent of U.S. production capacity.

12. One Celanese shareholder, the Kuwait Petroleum Company ("KPC"), holds 25 percent of Celanese, and pursuant to the merger will hold between 12.5 and 15 percent of Aventis. Therefore, because the remaining shares of both entities are widely held, KPC will gain significant control of Rhodia, through Aventis, and will also control Celanese. The merged entity will also succeed to Rhodia's interest in the Primester joint venture with Eastman, the only other producer of cellulose acetate in the market in the U.S.

VI. ENTRY CONDITIONS

Direct Thrombin Inhibitors

13. Entry into the direct thrombin inhibitor market would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract the anticompetitive effects of the

merger. FDA regulations covering direct thrombin inhibitor products create long lead times for the introduction of new products. Additionally, patents and other intellectual property create large and potentially insurmountable barriers to entry.

14. Entry into the direct thrombin inhibitor market requires lengthy clinical trials, data collection and analysis, and expenditures of significant resources over many years to qualify manufacturing facilities with the FDA. FDA approval of each blood clotting indication can extend up to and beyond 10 years. The FDA must approve all phases of development, including extensive preclinical and clinical work. The most significant barriers to entry include technical, regulatory, patent, clinical and production barriers. No company can reach advanced stages of development in the relevant market without: (1) clinical expertise; (2) scientific research that requires years to complete; (3) patent rights to all the necessary inputs into the direct thrombin inhibitor product sufficient to provide the company with reasonable assurances of freedom to operate; and (4) clinical grade product manufacturing expertise, regulatory approvals and capacity to complete clinical development. The necessary proprietary inputs include methods of using direct thrombin inhibitors for the treatment of various blood clotting diseases and methods of manufacturing direct thrombin inhibitor products.

Cellulose Acetate

15. Entry into the cellulose acetate market would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract the anticompetitive effects of the merger. The demand for cellulose acetate is declining. Cellulose acetate was one of the first thermoplastics developed. Consequently, it has been displaced in many applications by newer materials. Given the reduction in demand and the high costs associated with developing the capability to manufacture, market, and sell these products, entry is unattractive because it is doubtful that the entry investment could be recovered in a reasonable time period, if at all.

VII. EFFECTS OF THE PROPOSED MERGER

16. The effects of the merger, if consummated, may be substantially to lessen competition or tend to create a monopoly in the direct thrombin inhibitor market and the cellulose acetate market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. Specifically the merger will:

Direct Thrombin Inhibitors

a. eliminate Hoechst and RP as substantial, independent competitors;

b. eliminate actual, direct, and substantial competition between Hoechst and RP;

c. reduce innovation competition among researchers and developers of direct thrombin inhibitor products, including the reduction in, delay of or redirection of research and development projects;

d. increase the level of concentration in the relevant market;

e. eliminate actual potential and perceived potential competition in the relevant market;

f. increase barriers to entry into the relevant market, in part by combining portfolios of patents and patent applications;

g. increase the merged firm's ability to exercise market power unilaterally.

Cellulose Acetate

h. eliminate Hoechst and RP as substantial, independent competitors;

i. eliminate actual, direct, and substantial competition between Hoechst and RP;

j. increase the level of concentration in the relevant market;

k. eliminate actual potential and perceived potential competition in the relevant market;

l. increase barriers to entry into the relevant products; and

m. increase the likelihood of coordinated interaction.

VIII. VIOLATIONS CHARGED

17. The merger agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

18. The merger described in Paragraph 4, if consummated, would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighteenth day of January, 2000, issues its Complaint against said Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed merger between Respondent Hoechst AG and Respondent Rhône-Poulenc S.A. into Respondent Aventis S.A., a new entity, and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon accepted the executed Agreement Containing Consent Order and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and enters the following Order:

A. Respondent Hoechst is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at D-65926 Frankfurt am Main, Germany.

B. Respondent RP is a corporation organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 25 Quai Paul Doumer, F-92408 Courbevoie, France, that is to be renamed Aventis S.A. with its registered office relocated at Strasbourg (Bas-Rhin)-Espace Europeen de L'Entreprise, 67300 Schiltigheim, France pursuant to the Business Combination Agreement between Hoechst and RP dated May 20, 1999, after consummation of that Agreement.

C. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of 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. "Hoechst" means Hoechst AG, its directors, officers, employees, agents, and representatives, predecessors, successors, and assigns; the subsidiaries, divisions, groups and affiliates controlled by Hoechst, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "RP" means Rhône-Poulenc S.A., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; the subsidiaries, divisions, groups and affiliates controlled by RP, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Aventis" means Aventis S.A., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; the subsidiaries, divisions, groups and affiliates controlled by Aventis, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. “Respondents” means Hoechst, RP and Aventis.

E. “Commission” means the Federal Trade Commission.

F. “Revasc” means any pharmaceutical preparation containing the drug substance desirudin (chemical name: desulfatohirudin) that is the subject of the Agreement dated June 25, 1998 by and between Novartis Pharma AG and Rhône-Poulenc Rorer Inc., any of its constituent elements, active ingredients or intermediaries, including, but not limited to, vials containing the lyophilized desirudin and solvent ampules needed for reconstitution, and all rights relating to the research, development, manufacture and sale of Revasc, including without limitation Revasc Patent Rights and Know-how granted in the Agreement dated June 25, 1998 by and between Novartis Pharma AG and Rhône-Poulenc Rorer Inc.

G. “Revasc License” means the rights that RP licensed from Novartis pursuant to the Agreement dated June 25, 1998 by and between Novartis Pharma AG and Rhône-Poulenc Rorer Inc., attached hereto as non-public Appendix I.

H. “Revasc Divestiture Assets” means all rights granted to RP pursuant to the Revasc License and all assets and contracts that are related to the research, development, marketing, sale or use of Revasc.

I. “Novartis” means Novartis Pharma AG, a Swiss corporation, with its office and principal place of business located at Lichstrasse 35, CH-4002 Basel, Switzerland, and includes its directors, officers, employees, agents and representatives, licensees, predecessors, successors, and assigns; the subsidiaries, divisions, groups and affiliates controlled by Novartis, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

J. “Dr. Madaus GmbH” means Dr. Madaus GmbH, a German corporation, with its offices and principal place of business located at Herderstraße 2, D-83512, Wasserburg am Inn, Germany, and includes its directors, officers, employees, agents, representatives, licensees, predecessors, successors, and assigns; the subsidiaries, divisions, groups and affiliates controlled by Dr. Madaus GmbH, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

K. “FDA” means the United States Food and Drug Administration.

L. “DVT” means deep vein thrombosis.

M. “Know-how” means all technological, technical, scientific, chemical, biological, pharmacological, toxicological, regulatory, marketing and other information, including without limitation all formulae, trade secrets, inventions, techniques, patents, patent applications, discoveries, compounds, compositions of matter, assays, reagents, and biological materials, trademarks, research data, technical data and information, testing data, preclinical and clinical data, toxicological and pharmacological data, statistical analysis, analytical data, clinical protocols, specifications, designs, drawings, processes, testing and quality assurance/quality control data, manufacturing data and information, regulatory submissions, and any other information and experience.

N. "Revasc Know-how" means all confidential business information and Know-how presently owned by RP that relates in whole or in part to Revasc, including without limitation information stored on management information systems (and specifications sufficient for Novartis or the sublicensee specified in Paragraph II to use such information); proprietary software used in connection with Respondent RP's Revasc; all data, contractual rights, materials and information relating to obtaining FDA approvals and other government or regulatory approvals for RP's Revasc; and any other information and experience relating to Revasc.

O. "Confidential Business Information" means all information concerning the research, development, marketing, distribution, cost, pricing, sale and commercialization of a product or product in development.

P. "NDA" means a New Drug Application, any preparatory work, drafts and data necessary for the preparation thereof, and Know-how, and includes without limitation both supplemental and abbreviated NDAs.

Q. "New Indications" means any indication other than DVT, and includes, but is not limited to, Heparin-Induced Thrombocytopenia and arterial indications.

R. "Revasc Patent Rights" means any and all patents and patent applications owned, licensed or controlled by Respondents related to Revasc, including, but not limited to, the patents listed in or issuing on applications listed in the Annex attached to the Revasc License attached hereto as non-public Appendix I, and any and all reissues, extensions (including supplementary protection certificates), substitutions, confirmations, registrations, revalidations, additions, continuations or divisions of or to any of the aforesaid patents.

S. "Revasc Business Plan" means the development work for Revasc as provided in the Revasc Business Plan of 1999, attached hereto as non-public Appendix II and incorporated by reference herein.

T. "Merger" means the proposed merger of Hoechst and RP by means of an exchange offer by RP for all of Hoechst's outstanding shares, with Hoechst shareholders receiving one RP share for each 1.33 outstanding Hoechst shares pursuant to the Business Combination Agreement between Hoechst and RP dated May 20, 1999.

U. "Direct cost" means the cost of labor and materials associated with preparing, reviewing, modifying and submitting New Drug Applications to the FDA and other worldwide health authorities, and includes the cost of training personnel in accomplishing those duties and in responding to inquiries from the FDA and other worldwide health authorities regarding those applications.

V. “Refludan” means the drug substance lepirudin (chemical name : desulfatohirudin).

W. “Refludan Assets” means all of Respondents’ assets and rights relating to the research, development and manufacture of Refludan for sale in North America, including the regulatory approvals, physical assets necessary to manufacture Refludan (excluding the production assets in Marburg, Germany), and all of its brand names and trade names. Refludan Assets include the New Drug Application Number 20-807 on file with the Food and Drug Administration (“FDA”), and include, but are not limited to:

1. manufacturing operations, machinery, fixtures, equipment, furniture, tools and other tangible personal property necessary to manufacture Refludan;

2. all intellectual property, inventions, technology, know-how, patents, trademarks, brand names, trade names, trade secrets and copyrights;

3. all research materials, formulations, patent rights, trade secrets, specifications, protocols, technical information, management information systems, software, specifications, designs, drawings, processes and quality control data;

4. all customer lists, vendor lists, catalogs, sales promotion literature and advertising materials;

5. inventory and storage capacity;

6. all rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits relating to the assets described in Definition W;

7. all rights, titles and interests in and to contracts relating to the research and development of Refludan;

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

9. all rights under warranties and guarantees, express or implied;

10. all books, records and files; and

11. all items of prepaid expense relating to the assets described in Definition W;

Provided, however, that the Refludan Assets shall also include all research, development and manufacturing assets necessary to produce Refludan in an FDA Good Manufacturing Practice-approved facility if the person acquiring the Refludan Assets requests such assets.

X. "Celanese" means Celanese AG, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; the subsidiaries, divisions, groups and affiliates controlled by Celanese, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

Y. "Rhodia" means Rhodia, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; the subsidiaries, divisions, groups and affiliates controlled by Rhodia, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

Z. "KPC" means the Kuwait Petroleum Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; the subsidiaries, divisions, groups and affiliates controlled by KPC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

AA. "Cellulose Acetate Business" means the production, marketing, distribution, and/or sale of cellulose acetate flake, filament, and tow products.

BB. "Primester" means the cellulose acetate flake manufacturing joint venture between Rhodia and Eastman Chemical Company, located in Tennessee.

II.

IT IS FURTHER ORDERED that:

A. Respondents shall not develop, manufacture, distribute, or sell Revasc or participate in the development, manufacture, distribution or sale of Revasc and shall not assert any rights granted by the Revasc License or any other contract against any person for any activities related to the use of Revasc; *provided, however*, that Respondents shall retain such rights under the Revasc License and other contract(s) as are necessary to fulfill the requirements of Paragraph II of this Order.

B. Respondent RP shall offer to transfer and surrender at no minimum price to Novartis, absolutely and in good faith, within ten (10) days from the date the Agreement Containing Consent Order in this matter is accepted by the Commission for public comment, the Revasc Divestiture Assets.

C. If Novartis, within twenty (20) days from receipt of RP's offer as required by Paragraph II.B. of this Order, fails to accept the return of the Revasc Divestiture Assets, then Respondents shall absolutely and in good faith, within six (6) months from the date the Agreement Containing Consent Order in this matter is accepted by the Commission for public comment, sublicense, at no minimum price, the Revasc Divestiture Assets only to a licensee that receives the approval of Novartis, pursuant to Section 14 of the Revasc License, and that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission; *provided, however*, that Respondents' sublicense shall restrict Respondents' access to Revasc Know-how, except to the extent that such information is specifically required to perform the short-term service contract and Support required by Paragraph II.E. of this Order, and shall restrict Respondents' use of such information solely for those purposes. An Interim Trustee shall be used where appropriate to avoid the necessity of Respondents' gaining access to Revasc Know-how.

D. Respondents shall assign or transfer their rights relating to the manufacturing of Revasc, including, but not limited to, the toll manufacturing agreement and any other agreements between or among RP, Aventis, Novartis and Dr. Madaus GmbH relating to the manufacture or preparation of Revasc, to Novartis within ten (10) days from the date that Novartis accepts the offer described in Paragraph II.B., or to the sublicensee within ten (10) days from the date that the sublicensee is approved pursuant to Paragraph II.C. of this Order.

E. At the option of Novartis or Respondent RP's sublicensee, Respondents shall enter into a short-term service contract with Novartis or the sublicensee to continue to perform the development work for Revasc at a price not to exceed direct cost. The short-term service contract shall terminate no later than one year after the date on which the FDA approves Revasc for the prevention of DVT. Additionally, at the option of Novartis or the sublicensee, Respondents shall provide expertise and grant reasonable support to Novartis or the sublicensee in the transfer of Revasc Know-how, in the handover of data necessary for preparation of any dossier for Revasc, including the NDA for Revasc for the United States, and in assisting Novartis or the sublicensee to address questions from the FDA or other regulatory agencies (all of the foregoing, collectively "Support") at a price not to exceed Respondents' direct cost.

F. Within ten (10) days from the date that Novartis accepts return of the Revasc Divestiture Assets, or within ten (10) days from the date that the Commission approves the sublicensee, Respondent RP shall transfer and surrender to Novartis or the sublicensee, all Revasc Know-how and shall not keep copies of such Revasc Know-how unless otherwise agreed to by Novartis or the sublicensee for the purpose of performing the Support obligations or development work for Revasc as provided in the Revasc Business

Plan; *provided, however*, that Respondents shall keep such information as is required solely for the purpose of performing the short-term service contract and Support required by Paragraph II.E. of this Order, and shall use such information solely for those purposes. In no event shall Respondents keep any copies of Revasc Know-how after the earlier of either: (1) termination of the short-term service contract; or (2) written request by Novartis (if it accepts the Revasc Divestiture Assets), or by the sublicensee for the transfer of the Revasc Know-how.

G. Respondents shall take such actions as are necessary to maintain the development of Revasc and to prevent the destruction, removal, wasting, delay, deterioration, or impairment of the assets used in the research, development, manufacturing or sale of Revasc, including but not limited to the submission of the NDA for Revasc pursuant to RP's Revasc Business Plan, until Respondents have fully complied with the obligations specified in Paragraphs II.B. through II.F. of this Order.

H. The purpose of this Paragraph II is to ensure the continued research, development, manufacture and sale of Revasc in the United States and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. At any time after the Agreement Containing Consent Order in this matter is accepted by the Commission for public comment, the Commission may appoint an individual to serve as a trustee (“the Interim Trustee”) to assure that Respondents expeditiously perform their responsibilities as required by Paragraphs II and V of this Order.

B. If an Interim Trustee is appointed pursuant to Paragraph III. A. of this Order, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Trustee:

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

2. The Interim Trustee shall have the power and authority to monitor Respondents' compliance with the terms of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Trustee in a manner consistent with the purposes of this Order and in consultation with the Commission.

3. Within ten (10) days after appointment of the Interim Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Interim Trustee all the rights and powers necessary to permit the Interim Trustee to monitor Respondents' compliance with the terms of this Order and in a manner consistent with the purposes of this Order.

4. The Interim Trustee shall serve until the later of the divestiture of the Revasc Divestiture Assets or, if any options under Paragraph II.E. are exercised, the date that all agreements entered into pursuant to Paragraph II.E. have terminated; *provided however*, the Commission may extend this period as may be necessary or appropriate to accomplish the purposes of this Order; *provided further, however*, that if the Refludan Assets are divested pursuant to Paragraphs IV. and V. of this Order, then the Interim Trustee shall serve until all agreements entered into pursuant to Paragraphs IV. and V. have terminated.

5. The Interim Trustee shall have full and complete access to Respondents' personnel, books, records, documents, facilities and technical information relating to the research, development, manufacture, importation, distribution and sale of Revasc, or to any other relevant information, as the Interim Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the manufacture of Revasc and all materials and information relating to the FDA and other government or regulatory approvals. Respondents shall cooperate with any reasonable request of the Interim Trustee. Respondents shall take no action to interfere with or impede the Interim Trustee's ability to monitor Respondents' compliance with this Order.

6. The Interim Trustee shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Commission may, among other things, require the

Interim Trustee to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Interim Trustee's duties. The Interim Trustee shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Trustee's duties and responsibilities. The Interim Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

7. Respondents shall indemnify the Interim Trustee and hold the Interim Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Interim 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 losses, claims, damages, liabilities or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Trustee.

8. If the Commission determines that the Interim Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Trustee in the same manner as provided in Paragraph III.B.1. of this Order.

9. The Commission may on its own initiative or at the request of the Interim Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

10. Respondents shall submit reports as required by the Interim Trustee. The Interim Trustee shall obtain and evaluate reports submitted to him or her by Respondents with respect to the performance of Respondents' obligations under the Order. The Interim Trustee shall report in writing to the staff of the Commission every two (2) months for the period that he or she serves as Interim Trustee.

IV.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations specified in Paragraph II.B. through II.G. of this Order, the Commission may appoint an individual to serve as a trustee to divest either: (1) the Revasc Divestiture Assets, Revasc Know-how and all other rights granted to Respondent RP by the Revasc License; or (2) the Refludan Assets. In the event that the Commission or the Attorney General brings an action pursuant to § 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 to divest all of Respondent RP's Revasc Divestiture Assets or the Refludan Assets. 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 § 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 IV. 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 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 all of Respondent RP's Revasc Divestiture Assets.

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 divestiture required by Paragraph II. of this Order.

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

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to Revasc or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. 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 divestiture shall be made in the manner and to an acquirer as set out in Paragraph II of this Order; *provided however*, if the trustee receives bona fide offers from more than one acquiring

entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such entity within five (5) business days of receiving notification of the Commission's approval.

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 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 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 all of Respondent RP's Revasc Divestiture Assets.

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 losses, claims, damages, liabilities 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 IV.B. 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 Revasc Divestiture Assets.

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

V.

IT IS FURTHER ORDERED that in the event that the Commission appoints a trustee to divest the Refludan Assets, the trustee shall divest the Refludan Assets on behalf of Respondents in the following manner:

A. The assets shall be divested, absolutely and in good faith, as a competitively viable, ongoing product line in North America, at no minimum price, 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 is to ensure the continued research, development, manufacture and sale of Refludan in North America and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

B. Respondents' agreement with the Acquirer or the New Acquirer (as specified in Paragraph V.B.9-10) (hereinafter the "Divestiture Agreement") shall include the following provisions, and Respondents shall commit to satisfy the following:

1. Respondents shall contract manufacture on behalf of and deliver to the Acquirer or the New Acquirer, in a timely manner and under reasonable terms and conditions ("the Contract Manufacturing Arrangement"), a supply of Refludan, specified in the Divestiture Agreement at cost for a period not to exceed four (4) years from the date the Divestiture Agreement is approved, or three (3) months after the date the Acquirer or the New Acquirer obtains all necessary FDA approvals to manufacture and sell Refludan in the United States, whichever is earlier; *provided however*, that the four (4) year period may be extended by the Commission in twelve (12) month increments for a period not to exceed two (2) years.

2. After Respondents commence delivery of Refludan to the Acquirer or the New Acquirer pursuant to the Divestiture Agreement and for the term of the Contract Manufacturing Arrangement for Refludan, referred to in Paragraph V.B.1. of this Order, Respondents will make inventory of Refludan available for sale or resale in the United States and Canada only to the Acquirer or New Acquirer.

3. Respondents shall make representations and warranties that the Refludan supplied pursuant to the Divestiture Agreement meets the FDA approved specifications**.** Respondents shall agree to indemnify, defend and hold the Acquirer or the New Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Refludan supplied to the Acquirer or New Acquirer pursuant to the Divestiture Agreement by Respondents to meet FDA specifications. This obligation shall be contingent upon the Acquirer or the New Acquirer giving Respondents prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting Respondents to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel; *provided however*, any such defense and/or settlement shall be consistent with the obligations assumed by Respondents under this Order. This obligation shall not require Respondents to be liable for any negligent act or omission of the Acquirer or the New Acquirer or for any representations and warranties, express or implied, made by the Acquirer or the New Acquirer that exceed the representations and warranties made by Respondents to the Acquirer or the New Acquirer.

4. Respondents shall make representations and warranties that Respondents will hold harmless and indemnify the Acquirer or New Acquirer for any liabilities or loss of profits resulting from the failure by Respondents to deliver Refludan in a timely manner as required by the Divestiture Agreement unless Respondents can demonstrate that their failure was entirely beyond the control of Respondents and in no part the result of negligence or willful misconduct on Respondents' part.

5. During the term of the Contract Manufacturing Arrangement between Respondents and the Acquirer or the New Acquirer, upon request by the Acquirer, New Acquirer or the Interim Trustee, Respondents shall make available to the Interim Trustee all records that relate to the manufacture of Refludan.

6. Upon reasonable notice and request from the Acquirer or the New Acquirer to Respondents, Respondents shall provide in a timely manner: (a) assistance and advice to enable the Acquirer or the New Acquirer (or the designees of the Acquirer or New Acquirer) to obtain all necessary FDA approvals to manufacture and sell Refludan; (b) assistance to the Acquirer or New Acquirer (or the designee thereof) as is necessary to enable the Acquirer or New Acquirer (or the designee thereof) to manufacture Refludan in substantially the same manner and quality employed or achieved by Respondents; and (c) consultation with knowledgeable employees of Respondents and training, at the request of and at the facility of the Acquirer's or the New Acquirer's choosing, until

the Acquirer or New Acquirer (or the designee thereof) receives certification from the FDA or abandons its efforts for certification from the FDA, sufficient to satisfy the management of the Acquirer or New Acquirer that its personnel (or the designee's personnel) are adequately trained in the manufacture of Refludan. Such assistance shall include on-site inspections of the manufacturing plants, at the Acquirer's or New Acquirer's request, which is the specified source of supply of the Contract Manufacturing. Respondents may require reimbursement from the Acquirer or New Acquirer for all their direct out-of-pocket expenses incurred in providing the services required by this Paragraph.

7. The Divestiture Agreement shall require the Acquirer or the New Acquirer to submit to the Commission within ten (10) days of signing the Divestiture Agreement a certification attesting to the good faith intention of the Acquirer or the New Acquirer, including a plan by the Acquirer or the New Acquirer, to obtain in an expeditious manner all necessary FDA approvals to manufacture and sell Refludan.

8. The Divestiture Agreement shall require the Acquirer or the New Acquirer to submit to the Commission and Interim Trustee periodic, verified written reports, setting forth in detail the efforts of the Acquirer or the New Acquirer to sell Refludan obtained pursuant to the Divestiture Agreement and to obtain all FDA approvals necessary to manufacture and sell Refludan. The Divestiture Agreement shall require the first such report to be submitted sixty (60) days from the date the Divestiture Agreement is approved by the Commission and every ninety (90) days thereafter

until all necessary FDA approvals are obtained by the Acquirer or the New Acquirer to manufacture and sell Refludan in the United States. The Divestiture Agreement shall also require the Acquirer or the New Acquirer to report to the Commission and the Interim Trustee within ten (10) days of its ceasing the sale in the United States of Refludan obtained pursuant to the Divestiture Agreement for any time period exceeding sixty (60) days or abandoning its efforts to obtain all necessary FDA approvals to manufacture and sell Refludan in the United States. The Acquirer or New Acquirer shall provide the Interim Trustee access to all records and all facilities that relate to its efforts, pursuant to the Divestiture Agreement, to sell or manufacture Refludan or obtain FDA approvals.

9. The Divestiture Agreement shall provide that the Commission may terminate the Divestiture Agreement if the Acquirer or the New Acquirer: (a) voluntarily ceases for sixty (60) days or more the sale of, or otherwise fails to pursue good faith efforts to sell, Refludan in the United States prior to obtaining all necessary FDA approvals to manufacture and sell Refludan in the United States; (b) fails to pursue good faith efforts to obtain all necessary FDA approvals to manufacture and sell Refludan in the United States; or (c) fails to obtain all necessary FDA approvals of its own to manufacture and sell Refludan in the United States within four (4) years from the date the Commission approves the Divestiture Agreement between Respondents and the Acquirer or the New Acquirer; *provided however*, that the four (4) year period may be extended by the Commission in

twelve (12) month increments for a period not to exceed an additional two (2) years if it appears that such FDA approvals are likely to be obtained within such extended time period.

10. The Divestiture Agreement shall provide that if it is terminated, the Refludan Assets shall revert back to Respondents and shall be divested by the trustee to a New Acquirer pursuant to the provisions of Paragraph IV. of this order.

VI.

IT IS FURTHER ORDERED that:

A. Respondents shall not complete the Merger until Hoechst has divested its interest in Celanese as set out in the Form F-1 initially filed by Hoechst with the U.S. Securities and Exchange Commission on September 27, 1999.

B. Respondents shall not participate in any decisions relating to, or receive confidential business information concerning, and shall not directly or indirectly influence or seek to influence the conduct of Rhodia's Cellulose Acetate Business in any way through board membership, shareholdings or otherwise whenever all of the following are true:

1. KPC holds more than five (5) percent of the voting securities in Celanese;

2. KPC holds more than five (5) percent of the voting securities in Aventis;

3. Respondents hold more than five (5) percent of the voting securities in Rhodia or have a seat on Rhodia's board of directors; and

4. Rhodia holds any interest in Primester.

C. Within three (3) months of the date the Agreement Containing Consent Order in this matter is accepted by the Commission for public comment, Respondents shall have reduced their holdings in Rhodia to 5 percent or less of Rhodia's issued and outstanding voting securities. For purposes of this Paragraph VI. C. only, any Rhodia shares held in escrow by RP at that time, to be exchanged with the exchangeable notes issued by RP in a private placement as described in the Prospectus dated October 14, 1999, filed by Rhodia with the Securities and Exchange Commission on October 18, 1999, in connection with Rhodia's Registration Statement on Form F-3 (Reg. No. 333-10832) (the "Form F-3"), shall not be included as shares held by RP for purposes of calculating RP's Rhodia holdings.

D. Within six (6) months of the end of the note exchange period described in the Form F-3, Respondents shall have reduced their holdings in Rhodia to five (5) percent or less of Rhodia's issued and outstanding voting securities.

VII.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations specified in Paragraph VI.C of this Order, the Commission may appoint a trustee to divest any shares of Rhodia held in Respondents' names, excluding those Rhodia shares Respondents are required to hold pursuant to the private placement described in the Form F-3. In the event that the Commission or the Attorney General brings an action pursuant to § 45(*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 to divest any Rhodia shares held in Respondents' names above five (5) percent of Rhodia's issued and outstanding voting securities, excluding those Rhodia shares Respondents are required to hold pursuant to the private placement described in the Form F-3. 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 § 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 VII.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 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 shares of Rhodia held in Respondents' names, excluding those Rhodia shares held in Respondents' names pursuant to the note exchange program described in the Form F-3.

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 divestiture required by Paragraph VI.C of this Order.

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

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to Respondents' holdings in Rhodia or to any other relevant information, as the trustee may request.

Respondents shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. 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 divestiture shall be made in the manner and to an acquirer as directed by the Commission; *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 Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such entity within five (5) business days of receiving notification of the Commission's approval.

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 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 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 all of the shares specified in Paragraph VII.A.

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 losses, claims, damages, liabilities 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 provided in Paragraph VII.B. 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 report in writing to Respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture.

VIII.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations specified in Paragraph VI.D of this Order, the Commission may appoint a trustee to divest any shares of Rhodia held in Respondents' names. In the event that the Commission or the Attorney General brings an action pursuant to § 45(*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 to divest any Rhodia shares held in Respondents' names above five (5) percent of Rhodia's issued and outstanding voting securities. 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 § 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 VIII.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 afer 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 shares of Rhodia held in Respondents' names.

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 divestiture required by Paragraph VI.D of this Order.

4. The trustee shall have twelve (12) months, from the date the Commission approves the trust agreement described in Paragraph VIII.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission, unless accomplished through sales of the shares on the open market. If, however, at the end of the twelve-month period, the trustee has submitted a plan of

divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to Respondents' holdings in Rhodia or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. 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. The divestiture shall be made in the manner and to an acquirer as directed by the Commission; *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 Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such entity within five (5) business days of receiving notification of the Commission's approval.

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 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 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 all of the shares specified in Paragraph VIII.A.

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 losses, claims, damages, liabilities, 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 provided in Paragraph VIII.B. 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 report in writing to Respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture.

IX.

IT IS FURTHER ORDERED that within thirty (30) 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.B. through II.G., or until a trustee has been appointed pursuant to Paragraph IV.A., and Respondents have complied with Paragraphs VI.A. and VI.C. of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall submit at the same time a copy of their report concerning compliance with this Order to any Interim Trustee(s) who has been appointed. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II.B. through II.G. and Paragraphs VI.A. through VI.D. of the Order, including a description of all substantive contacts or negotiations for the divestiture and the identities of all parties contacted. Respondents shall include in their reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations. After completing the obligations required under Paragraphs II.B. through II.G. and Paragraphs VI.A. and VI.C. of this Order, Respondents shall submit reports, setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the Order, every year beginning on the anniversary of the date this Order became final until and including the tenth anniversary date of this Order.

X.

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.

XI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States office, Respondents shall permit any duly authorized representative of the Commission:

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

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

XII.

IT IS FURTHER ORDERED that this order shall terminate at the earlier of (1) January 18, 2010; or (2) after the divestitures required by Paragraphs II.B. through II.F., IV., V., VI., and VII. of this Order have been accomplished.

By the Commission.

APPENDIX I

NON-PUBLIC

COPY OF REVASC LICENSE

[Redacted From the Public Record Version But Incorporated By Reference]

APPENDIX II

NON-PUBLIC

REVASC BUSINESS PLAN

[Redacted From the Public Record Version But Incorporated By Reference]

APPENDIX III

NON-PUBLIC

INTERIM TRUSTEE AGREEMENT

[Redacted From the Public Record Version But Incorporated By Reference]

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted provisionally an agreement containing a proposed consent order from Hoechst AG ("Hoechst") and Rhône-Poulenc S.A. ("RP") under which RP would be required: (1) to divest the assets relating to RP's direct thrombin inhibitor drug Revasc; and (2) to divest its interest in Rhodia, its specialty chemicals subsidiary which produces cellulose acetate, to a level of 5% or less and to sequester that interest pending its divestiture, thereby preserving competition in the manufacture, marketing, and sale of cellulose acetate thermoplastics.

The proposed Consent Order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed Consent Order.

In a proposed merger agreement, Hoechst and RP will combine most of their respective businesses through an exchange offer by RP for all of Hoechst's outstanding shares, with Hoechst shareholders receiving one RP share for each 1.33 outstanding Hoechst shares. Thereafter, the merged entity will be renamed Aventis S.A. ("Aventis"). The proposed complaint alleges that the proposed merger, 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, in the markets for: (1) cellulose acetate; and (2) direct thrombin inhibitors. The proposed Consent Order would remedy the alleged violations by replacing the lost competition that would result from the merger.

Cellulose Acetate

Cellulose acetate is a thermoplastic that is used to produce, among other products, cigarette filters, tool handles, tapes and films. In applications where it is used, there are no cost effective substitutes. U.S. consumers purchase approximately $1 billion worth of cellulose acetate yearly.

The market for cellulose acetate is highly concentrated. Three companies currently produce cellulose acetate in the United States: (1) Eastman Chemical Company ("Eastman"); (2) Primester, a joint venture whose shares are owned 50% by Eastman and 50% by Rhodia (a specialty chemicals company that is itself 67% owned by RP); and (3) Celanese Limited ("Celanese"), until recently a wholly-owned subsidiary of Hoechst. Celanese controls approximately 46% of U.S. production capacity, Eastman owns approximately 44% of U.S. production capacity, and Primester holds the remaining 10%. Eastman and Rhodia are each entitled to one-half of the production of Primester. Rhodia currently sells cellulose acetate only outside the United States; thus, Celanese and Eastman are the only companies currently selling cellulose acetate in the United States.

There are significant barriers to entry into the cellulose acetate market. In order to enter the market, a firm must incur substantial sunk costs to build a dedicated production facility. Moreover, reductions in the demand for this material and its limited growth potential create disincentives to new entry.

The merger of RP and Hoechst will increase the likelihood of coordinated interaction in the market for cellulose acetate. The Kuwait Petroleum Company ("KPC") will hold significant interests in Celanese and Aventis after the merger. Because the remaining shareholders of Celanese and Aventis are (and will remain) widely diversified, KPC currently owns a controlling interest in Celanese, and will acquire working control (defined as 10% or more interest in a corporation whose stock is widely held) of Aventis. These shareholdings could permit KPC to coordinate the activities of Celanese and, through Aventis, Rhodia and Primester after the merger. In addition, Aventis' indirect holding, through Rhodia, of 50% of the Primester joint venture with Eastman may facilitate coordination between the KPC-controlled entities and Eastman following the merger. For these reasons, the proposed transaction could create conditions that increase the likelihood of collusion in the cellulose acetate market.

On September 15, 1999, the parties entered into undertakings with the Antitrust Directorate of the European Commission ("EC") to resolve competitive concerns raised by the proposed merger of Hoechst and RP to form Aventis. Among other conditions, the EC undertakings required Hoechst to spin off Celanese and required RP to divest its holding in Rhodia. Pursuant to those undertakings, Hoechst spun off the Celanese division to Hoechst shareholders on October 26, 1999. To date, RP has not divested Rhodia, and the EC undertakings did not require RP to divest Rhodia prior to the formation of Aventis.

The proposed Consent Order is designed to supplement the EC undertakings by preserving interim competition among Celanese, Rhodia and Eastman in the cellulose acetate market in the United States pending Aventis' divestiture of Rhodia. The proposed Consent Order requires the parties to divest their holding of Rhodia to a level of 5% or less of total outstanding shares within three months of the date the consent agreement is accepted by the Commission for public comment. In the case of shares held in escrow as collateral for RP debt obligations, the shares must be divested within six months of the end of the exchange period for those shares. The proposed Consent Order also requires the parties to refrain from participating in the decisions of, seeking to influence the conduct of, or receiving confidential business information concerning Rhodia's cellulose acetate business.

Direct Thrombin Inhibitors

Direct thrombin inhibitors are used in the treatment of various blood clotting diseases. While certain other products may also be used for the treatment of blood clotting diseases, direct thrombin inhibitors are both more effective and safer than any available alternatives. U.S. sales of direct thrombin inhibitors currently total only approximately $15 million, but have the potential to increase significantly in the future.

Hoechst sells the only direct thrombin inhibitor currently on the U.S. market, Refludan. RP is in the final stages of developing its direct thrombin inhibitor, Revasc, which it licensed from Novartis AG ("Novartis") in 1998. RP plans to submit its New Drug Application for Revasc to the Food and Drug Administration for approval shortly. Available evidence indicates that RP and Hoechst are each other's closest competitors in the direct thrombin inhibitor market. Each party priced its products in relation to those of the other and based its product development strategy on the other's development and position in the market. Other companies currently developing direct thrombin inhibitors are years behind Hoechst and RP.

The planned merger is likely to create anticompetitive effects in the direct thrombin inhibitor market by eliminating the actual, direct, and substantial competition between Hoechst and RP that would otherwise continue to exist. In addition, the proposed transaction reduces potential competition and innovation competition among researchers and developers of direct thrombin inhibitor products by eliminating a significant competitor and increasing the barriers to entry to others by, among other results, combining RP and Hoechst's portfolios of patents and patent applications.

To resolve these anticompetitive concerns, the proposed Consent Order is designed to transfer all of RP's rights in the direct thrombin inhibitor Revasc to Novartis or an independent third party. Novartis (the original licensor) holds a contractual right of prior approval for any transfer of RP's rights in Revasc to any third party. Thus, while other companies have expressed interest in acquiring the rights to Revasc, none may do so without the prior approval of Novartis. The proposed Consent Order requires the parties to return RP's rights in Revasc to Novartis or to sublicense all such rights to another company, subject to Novartis's contractual right of approval. The proposed Consent Order would also require the parties to enter into a short-term service contract with the acquirer of the Revasc rights in order to ensure the continued performance of development work on Revasc. Should RP be unable to divest Revasc during the allotted time period, the proposed Consent Order permits the appointment of a trustee to divest either RP's Revasc assets or the North American rights to Hoechst's own drug, Refludan. Further, in order to prevent any interim harm to assets related to Revasc, the parties have signed a trustee agreement and an Interim Trustee has been approved by the Commission. The proposed Consent Order would provide for the immediate involvement of the Interim Trustee to ensure the continued development and viability of Revasc as an independent competitor to Hoechst's Refludan.

The purpose of this analysis is to facilitate public comment on the propose Consent Order, and it is not intended to constitute an official interpretation of the agreement and proposed Consent Order or to modify their terms in any way.