

## IN THE MATTER OF

## SAFE BRANDS CORPORATION, ET AL.

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

*Docket C-3647. Complaint, March 26, 1996--Decision, March 26, 1996*

This consent order requires the respondents, among other things, to have reliable scientific evidence to substantiate certain claims regarding the environmental benefits, the level of engine protection and the safety of any antifreeze, coolant or deicer. The consent order also requires the respondents to provide a disclosure statement cautioning consumers that Sierra antifreeze may be harmful if swallowed. In addition, the consent order prohibits the respondents from misrepresenting the recyclability of such products and their packages.

*Appearances*

For the Commission: *Joel Winston, Michael Dershowitz, C. Lee Peeler and Michael Ostheimer.*

For the respondents: *Robert Magielnicki, Kutak & Rock, Washington, D.C. V. Peter Wynne, in-house counsel for ARCO Chemical Co., Newton Square, PA.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that Safe Brands Corporation, a corporation, Warren Distribution, Inc., a corporation, and ARCO Chemical Company, a corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Safe Brands Corporation ("Safe Brands") is a Nebraska corporation which is a wholly owned subsidiary of respondent Warren Distribution, Inc. ("Warren Distribution"), a Nebraska corporation. Respondents Safe Brands and Warren Distribution have their principal offices or places of business at 727 South 13th Street, Omaha, Nebraska.

Respondent ARCO Chemical Company ("ARCO Chemical") is a Delaware corporation with its principal office or place of business at 3801 West Chester Pike, Newtown Square, Pennsylvania.

PAR. 2. Respondents Safe Brands and Warren Distribution have advertised, labeled, offered for sale, sold, and distributed a propylene glycol-based automobile antifreeze, under the trade name "Sierra Antifreeze-Coolant" (hereinafter "Sierra antifreeze"), and other products to the public. Respondent ARCO Chemical sold the propylene glycol used in the manufacture of Sierra antifreeze.

PAR. 3. Respondent ARCO Chemical has furnished the means and instrumentalities to respondents Safe Brands and Warren Distribution to engage in the acts and practices alleged in paragraphs five through twenty-one herein by providing information for, participating in the preparation of, paying for, and reviewing and/or approving Sierra antifreeze advertising and promotional materials, including but not limited to the attached Exhibits A through G. In addition, respondent ARCO Chemical has itself disseminated advertisements under its own name for propylene glycol-based antifreeze generally, including but not limited to the attached Exhibit H. Respondents Safe Brands and Warren Distribution have also disseminated ARCO Chemical advertisements for propylene glycol-based antifreeze generally, including but not limited to the attached Exhibit H.

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

PAR. 5. Respondents have disseminated or have caused to be disseminated advertisements, including television advertisements, product labeling, and other promotional materials, for Sierra antifreeze, and propylene glycol-based antifreeze generally, including but not necessarily limited to the attached Exhibits A through H. These advertisements contain the following statements and depictions:

- A. If you care about this big beautiful world, show me.  
Depiction of clouds, sky, trees.  
Don't give me another toxic antifreeze.  
Give me something different. Depiction of containers of Sierra antifreeze.  
Don't just tell me it protects to seventy below. And guards against rust.  
Any antifreeze can do that. Depiction of sunlight through the trees.  
Tell me it's safer. For my dog. Depiction of dog and car.

379

Complaint

My family. Depiction of father with child and mother in background.  
 The kids. Depiction of family walking together holding hands.  
 Tell me nothing protects better.  
 And it's biodegradable. Depiction of a field with flowers.  
 That's what I want to know. Depiction of body of water with green plants in foreground.  
 That's what I want to hear.  
 New Sierra. It's not just antifreeze. Super: It's not just Antifreeze.  
 It's safety freeze. Depiction of adult holding little girl.  
 Super: It's Safety Freeze.™  
 (Exhibit A, television advertisement).

B. Depiction of house with sky and trees in background. They care about the world these days. They just don't want me to put another toxic antifreeze in their car. I mean, who needs toxic. Depiction of girl on tire swing. So what if it protects to seventy below. Depiction of tree branches. Any antifreeze can do that. Tell me it's different. Depiction of container of Sierra antifreeze. Safer. Depiction of little girl with dog.  
 Tell me nothing protects better. Depiction of boy looking under car hood as man pours Sierra into car radiator. Depiction of woman with girl and dog. And it's biodegradable. Depiction of lake and trees. I mean, what if their dog gets into it? Depiction of dog with man by garage. Or their kids? Depiction of little girl with a barrel. This is serious. Depiction of little girl looking into barrel. It's a changing world. Poison's out.  
 New Sierra. It's not just antifreeze. Super: It's not just Antifreeze. It's safety freeze. Depiction of little girl with cat. Super: It's Safety Freeze.™  
 (Exhibit B, television advertisement).

C. Depiction of man and boy working on car. People care these days. They just don't want me to put another toxic antifreeze in their car. I mean, who needs something that toxic. Depiction of girl on tire swing. So what if it protects to seventy below. Depiction of man and boy working on car. Any antifreeze can do that. Give me something different. Depiction of container of Sierra antifreeze. Something safer. Depiction of little girl with dog. That's essentially non-toxic. Depiction of dog with bucket of clear liquid.  
 I mean, what if their dog gets into it? Depiction of dog with man by garage.  
 Or their kids? Depiction of girl and woman with dog. This is serious. Depiction of family with dog. Sierra. Its not just antifreeze. Super: Parents: Store safely. Not for drinking. It's safety freeze. Depiction of girl with cat. Super: It's Safety Freeze.™ Parents: Store safely. Not for drinking.  
 (Exhibit C, television advertisement).

D. I. S I E R R A  
 Antifreeze \* Coolant  
 \* Essentially Non Toxic  
 \* Safer For People & Pets  
 \* Superior Engine Protection

B I O D E G R A D A B L E  
 (Exhibit D.1, former product label - front).

Exhibit D.1 also included on the front a product logo that included the statement "ENVIRONMENTALLY SAFER" and depicted trees, mountains, water, and sky.

**D.2. THE ULTIMATE IN AUTOMOTIVE PROTECTION AND ENVIRONMENTAL SAFETY**

**ULTIMATE AUTOMOTIVE PROTECTION:**

SIERRA protects cars from freeze-ups during the harshest winter conditions and from boil-overs in extreme summer temperatures....

**ESSENTIALLY NON-TOXIC**

**ENVIRONMENTALLY SAFER**

SIERRA's essentially non-toxic formula guards against poisonings of children and pets. All other leading brands of antifreeze contain ethylene glycol which is highly toxic.

SIERRA is naturally biodegradable and is converted to harmless components in activated treatment systems.

... However, mixing SIERRA

with ethylene glycol antifreeze eliminates the toxicity and performance advantages of SIERRA.

SIERRA contains propylene glycol and although it is not "toxic" as defined by the regulations of the Consumer Product Safety Commission at 16 CFR 1500.3(c)(2), it is not for human consumption and should be kept out of reach of children.

(Exhibit D.2., former product label - back).

Exhibit D.2 also included on the back the statement "Recyclable Plastic Container" below a depiction of a three chasing arrow symbol.

**E.1. SIERRA**

Antifreeze \* Coolant

\* Essentially Non Toxic

To People & Pets

**S A F E T Y F R E E Z E**

(Exhibit E.I., subsequent product label - front).

Exhibit E.1. also includes on the front a product logo that includes the statement "SAFER PROTECTION" and depicts a man, a girl, a dog, and a bird.

**E.2. SAFER AND PHOSPHATE FREE - SIERRA PROTECTS YOUR FAMILY ...**

**ENVIRONMENTAL BENEFITS**

\* Toxicity -- Because it is essentially non toxic, SIERRA is safer for people, pets, and wildlife in the environment than other leading brands. Many poisonings of animals are caused by their drinking conventional antifreeze that has spilled or leaked from cars. SIERRA greatly reduces this risk.

\* Biodegradability -- Sierra biodegrades readily in the natural environment and in activated sewage treatment systems as may other brands. All antifreeze can become contaminated with trace amounts of lead or other metals and should be disposed of properly and in accordance with local regulations. Even if contaminated with trace metals, used SIERRA is far less poisonous to animal life than conventional antifreeze.

\* Recyclability -- Used SIERRA can be mixed with conventional antifreeze in collection systems and recycling processes. This SIERRA container ... can be further recycled. Recycling may not be available in all areas.

**CAUTIONARY INFORMATION**

SIERRA contains propylene glycol and although it is not "toxic" as defined by the regulations of the Consumer Product Safety Commission, SIERRA is NOT INTENDED FOR HUMAN OR ANIMAL CONSUMPTION so:

KEEP OUT OF REACH OF CHILDREN.

(Exhibit E.2., subsequent product label - back).

F. Safety & Environmental Advantages

ANTIFREEZE - A TOXIC PROBLEM

SIERRA - THE SAFER ANTIFREEZE

With its mission being to develop effective but environmentally safer products for the automotive market, Safe Brands Corporation initiated research to find a non-toxic, environmentally safer alternative to existing EG based antifreeze brands. We discovered that it was possible to formulate a highly effective, heavy duty antifreeze from essentially non-toxic components -- completely omitting ethylene glycol. The results of this research is SIERRA -The Safer Antifreeze.

Sierra is formulated with propylene glycol. Unlike EG, propylene glycol (PG) is safe. It is so safe that it is used in the formulation of many consumer products such as cosmetics including lipstick and medicines such as Children's Tylenol. It is also a key moisturizing ingredient used in . . . pet foods. Pharmaceutical grade PG has received a "generally recognized as safe" designation from the Food and Drug Administration. . . .

SIERRA IS BIODEGRADABLE

PG does not persist in the environment. It is readily consumed by microorganisms. In addition to its natural biodegradability, it is fully degraded within 24 hours in activated sludge treatment plants operating at 65°F.

Performance Advantages

COOLING SYSTEM

PERFORMANCE ADVANTAGES

OF SIERRA

SUPERIOR FREEZE PROTECTION

. . . Unlike EG based antifreeze solutions which begin expanding soon after their initial freezing point is reached, SIERRA solutions do not begin to expand until the temperature becomes considerably lower than the initial freezing point. This characteristic of SIERRA adds a margin of safety against the expansion breakage of engines and cooling systems components.

SUPERIOR CORROSION PROTECTION

. . . In a paper presented at the 1990 Society of Automotive Engineers (SAE) Convention in Detroit, representatives of Cummins Engine Fleetguard Division and Arco Chemical Company presented data which demonstrated the superior corrosion protection characteristics of propylene glycol over ethylene glycol based coolants. (Exhibit F, former neck tag pamphlet).

G. Depiction of products including Dolly Madison Bakery Zingers, Wyler's Bouillon Cubes, Vicks Children's NyQuil, Infant's Tylenol, Chubs Baby Wipes, Maybelline Great Lash Mascara, ALPO Beef Jerky Bits, and Ken-L Ration Kibbles 'n Bits.

In addition to consumer safety, these trusted products have one thing in common... They all contain propylene glycol.

So does ...

Depiction of the front of a Sierra antifreeze container including the statements, "Essentially Non Toxic," "Safer For People & Pets," "Superior Engine Protection," "BIODEGRADABLE," and "ENVIRONMENTALLY SAFER" and the depiction of trees, mountains, water, and sky.

It's Not Just Antifreeze.

It's Safety Freeze.

(Exhibit G, promotional material).

#### H. PG Antifreeze Safety and Environmental Advantages

Although EG is effective as a car and truck antifreeze, it is toxic to humans and animals if ingested. EG is metabolized to oxalic acid, which crystallizes in the kidney, causing death.

There Is A Safer Alternative...

PG has received a "generally recognized as safe" designation from the Food and Drug Administration. PG has been used safely for many years as an ingredient in foods, cosmetics, and medicinal products.

Pet and Animal Exposure

Dogs and cats are naturally attracted to EG because of its sweet taste and smell, but EG-based antifreeze can be lethal to pets and other animals if ingested. . . . By contrast, PG is harmless. In fact, it is used as a moisturizing ingredient in many pet foods.

EG also can be toxic to poultry. PG on the other hand is used in many animal feed formulations to keep the feed moist and palatable.

Biodegradability

PG does not persist in the environment. It is readily consumed by microorganisms. In an activated sludge treatment plant operating at 65 degrees Fahrenheit, PG is fully degraded within 24 hours.

(Exhibit H, promotional material).

PAR. 6. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits A, B, D, E, F, G, and H, respondents have represented, directly or by implication, that:

a. Compared to conventional, ethylene glycol-based antifreeze, Sierra antifreeze, and other propylene glycol-based antifreezes, are safer for the environment generally;

b. Sierra antifreeze, and other propylene glycol-based antifreezes, are absolutely safe for the environment after ordinary use; and

c. Because Sierra antifreeze, and other propylene glycol-based antifreezes, are biodegradable, they are absolutely safe for the environment after ordinary use.

PAR. 7. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits A, B, D, E, F, G, and H, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph six, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 8. In truth and in fact, at the time respondents made the representations set forth in paragraph six, while they possessed and relied upon a reasonable basis to substantiate that when compared to conventional, ethylene glycol-based antifreeze, Sierra antifreeze, and other propylene glycol antifreezes, are less toxic, and therefore safer for that part of the environment that is composed of humans, pets, and wildlife that may accidentally ingest it, respondents did not possess and rely upon a reasonable basis to substantiate that (a) compared to conventional, ethylene glycol-based antifreeze, Sierra antifreeze, or other propylene glycol-based antifreezes, are safer for the environment generally, *e.g.*, the air, water, soil, plants, or aquatic life; or (b) Sierra antifreeze, or other propylene glycol-based antifreezes, are absolutely safe for the environment after ordinary use; or (c) because Sierra antifreeze, and other propylene glycol-based antifreezes, are biodegradable, they are absolutely safe for the environment after ordinary use. One reason for this is that used antifreeze, whether ethylene glycol-based or propylene glycol-based, may contain lead and/or other substances that are hazardous to the environment. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits A through H, respondents have represented, directly or by implication, that:

a. Sierra antifreeze, and other propylene glycol-based antifreezes, are absolutely safe for people and pets; and

b. Because Sierra antifreeze, and other propylene glycol-based antifreezes, contain the same ingredient designated by the FDA as "generally recognized as safe" and found in foods, drugs, cosmetics, and pet foods, they are absolutely safe for people and pets.

PAR. 10. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits A through H, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph nine, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 11. In truth and in fact, at the time respondents made the representations set forth in paragraph nine, while they possessed and relied upon a reasonable basis to substantiate that when compared to conventional, ethylene glycol-based antifreeze, Sierra antifreeze, and other propylene glycol-based antifreezes, are less toxic and therefore safer for people and pets if accidentally ingested, respondents did not possess and rely upon a reasonable basis to substantiate that Sierra antifreeze, or other propylene glycol-based antifreezes are absolutely safe for people and pets. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

PAR. 12. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits D, F, and G, respondents have represented, directly or by implication, that compared to conventional, ethylene glycol-based antifreeze, Sierra antifreeze provides superior automotive protection from freezing temperatures, boil-overs, and corrosion.

PAR. 13. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits D, F, and G, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph twelve, respondents possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 14. In truth and in fact, at the time they made the representation set forth in paragraph twelve, respondents did not possess and rely upon a reasonable basis that substantiated that when compared to conventional, ethylene glycol-based antifreeze, Sierra antifreeze provides superior automotive protection from freezing temperatures, boil-overs, and corrosion. Therefore, the representation set forth in paragraph thirteen was, and is, false and misleading.

PAR. 15. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not



necessarily limited to the advertisement attached as Exhibit E, respondents have represented, directly or by implication, that Sierra antifreeze is recyclable.

PAR. 16. In truth and in fact, while Sierra antifreeze is capable of being recycled, the vast majority of consumers cannot recycle it because there are few collection facilities nationwide that will accept propylene glycol-based antifreeze for recycling. Therefore, the representation set forth in paragraph fifteen was, and is, false and misleading.

PAR. 17. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits D and E, respondents have represented, directly or by implication, that the container in which Sierra antifreeze is sold is recyclable.

PAR. 18. In truth and in fact, while the plastic container in which Sierra antifreeze is sold is capable of being recycled, the vast majority of consumers cannot recycle it because there are few collection facilities nationwide that will accept high-density polyethylene plastic antifreeze containers for recycling. Therefore, the representation set forth in paragraph seventeen was, and is, false and misleading.

PAR. 19. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits D and E respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs fifteen and seventeen, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 20. In truth and in fact, at the time they made the representations set forth in paragraphs fifteen and seventeen, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph nineteen was, and is, false and misleading.

PAR. 21. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Commissioner Starek recused.

Complaint

121 F.T.C.

EXHIBIT A

RADIO TV REPORTS

41 East 42nd Street, New York, NY 10017 (212) 309-1400

PRODUCT: SIERRA ANTIFREEZE  
TITLE: "ENVIRONMENTALLY SAFE"  
PROGRAM: NOTRE DAME FOOTBALL  
STATION: NBC

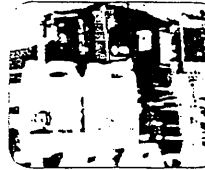
REPLY DATE: 09/19/93  
NEW YORK: 11:50PM



(MUSIC) 1st MAN: If you care about this big beautiful world show me.



WOMAN: Don't give me another toxic antifreeze. 2nd MAN: Give me something



different.



3rd MAN: Don't just tell me how it protects to seventy below.  
WOMAN: And guards against rust.



(MUSIC)



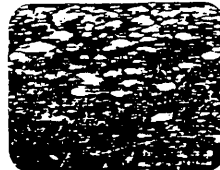
2nd MAN: Any antifreeze can do that.



1st MAN: Tell me it's safer for



my dog, my family, The kids.  
WOMAN: Tell me nothing protects better.



1st MAN: And its biodegradable.



WOMAN: That's what I want to know. 2nd MAN: That's what I want to hear.



MALE ANCHOR: New Sierra-it's not just antifreeze.



It's Sierra antifreeze. (MUSIC OUT)

Exhibit A

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

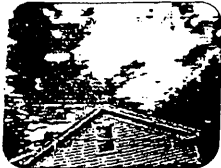
While Sierra is a registered trademark of Sierra Antifreeze, the name "Sierra" is used in this advertisement for the purpose of identifying the product. Sierra Antifreeze is a registered trademark of Sierra Antifreeze.

EXHIBIT B

RADIO TV REPORTS

41 East 42nd Street New York, NY 10017 212 309 1400

STATION: WNBC-TV  
PROGRAM: NEWS  
MECHANIC: SIERRA  
NEW YORK



(MUSIC) MAN: They care about the world these days.



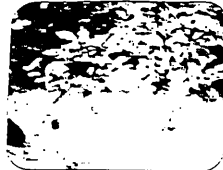
They just don't want me to put another toxic antifreeze



in their car.



I mean, who needs toxic?



So what if it protects to 70 below; any antifreeze can do that.



Tell me that it's different, safer. Tell me nothing protects better



and it's biodegradable.



I mean, what if their dog gets into it.



or their kids? This is serious.



It's a changing world. Poison's out.



ANCHOR: New Sierra. It's not just ant freeze



It's Safety freeze (MUSIC OUT)

Exhibit B

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE  
New Tapes To Be Released: To please the industry of home video supplied by the National Video Rental Association  
Various copies of Radio TV Reports may be used for the same purposes as the original. It is not to be used for any other purpose.

Complaint

121 F.T.C.

EXHIBIT C

**RADIO  
TV REPORTS**

41 East 42nd Street, New York, NY 10017 (212) 309-1400

PRODUCT:	SIERRA ANTIFREEZE	94-12730 B1
TITLE:	"PEOPLE CARE THESE DAYS"	
PROGRAM:	NOTRE DAME FOOTBALL	9/24/94 30
STATION:	NBC (NEW YORK)	11:00PM
	REVISION OF COMMERCIAL 93-10469	



(MUSIC)



LARRY: People care these days.



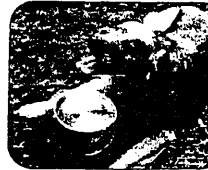
They just don't want me to put another toxic antifreeze in their ca



I mean, who needs something that toxic?



So what if it protects to 70 below?



Any antifreeze can do that.



Give me something different, something safer that's essentially non-toxic.



I mean, what if their dog gets into it?



Or their kids?



This is serious.



ANNCR: Sierra. It's not just antifreeze.



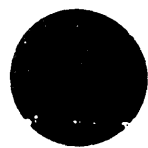
It's safety freeze. (MUSIC OUT)

Exhibit C

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

Complaint

EXHIBIT D.1



# SIERRA

*Antifreeze · Coolant*

▲ *Essentially Non Toxic*

▲ *Safer For People & Pets*

▲ *Superior Engine Protection*

**BIODEGRADABLE**

Exhibit D.1.

EXHIBIT D.2

1256 10-10

THE ULTIMATE IN AUTOMOTIVE PROTECTION AND ENVIRONMENTAL SAFETY

**ULTIMATE AUTOMOTIVE PROTECTION:**  
 SIERRA protects cars from freeze-ups during the harshest winter conditions and from boil-overs in extreme summer temperatures. SIERRA has passed the industry's most demanding corrosion tests including those of ASTM D 3306 and General Motors Specification GM 1899M.  
 • Protects against freeze-ups.  
 • Protects against boil-overs.  
 • Prevents corrosion of all engine metals.

**ESSENTIALLY NON-TOXIC**  
**ENVIRONMENTALLY SAFER**  
 SIERRA's essentially non-toxic formula guards against poisonings of children and pets. All other leading brands of antifreeze contain ethylene glycol which is highly toxic.  
 SIERRA is naturally biodegradable and is converted to harmless components in activated treatment systems.

- INSTALLATION DIRECTIONS:**
1. Drain out old antifreeze.
  2. Thoroughly flush cooling system with water.
  3. Inspect cooling system. Tighten clamps and replace hoses if necessary.
  4. Install SIERRA using a 50/50 mix with water for a freezing point of -27°F (-32°C). Consult the SIERRA protection chart for other desired freeze point protection.
  5. SIERRA is compatible with leading brands of conventional antifreeze. However, mixing SIERRA with ethylene glycol antifreeze eliminates the toxicity and performance advantages of SIERRA.
  6. Used antifreeze frequently contains toxic metallic compounds which leach out of cooling systems and is particularly toxic if it is ethylene glycol based. For information regarding the proper disposal of used antifreeze contact your local waste disposal or environmental control authorities or contact SafeBrands.

**SIERRA PROTECTION CHART**

Sierra	Water	Protects against freeze-ups down to	Protects against boil-overs up to
50%	50%	-27°F	256°F*
60%	40%	-54°F	261°F*
67%	33%	-76°F	262°F*

\*14 psi radiator cap

**TESTING SIERRA COOLANT**  
 Sierra freeze point protection cannot be accurately measured with conventional antifreeze testers. Special testers are available from SafeBrands. If you would like to order SIERRA testers, or if you have other questions about SIERRA, contact SafeBrands, P.O. Box 3007, Omaha, NE 68103, phone 800-289-7234.

SIERRA contains propylene glycol and although it is not "toxic" as defined by the regulations of the Consumer Product Safety Commission at 16 CFR 1500.34(c)(2), it is not for human consumption and should be kept out of reach of children.



Distributed by  
 SafeBrands Corporation  
 P.O. Box 3007  
 Omaha, NE 68103 Part No.  
 091

OPEN HERE  
 REMOVE THE CAP  
 TO REMOVE THE  
 PLUG  
 FROM THE  
 COOLANT  
 RESERVOIR  
 ON THE  
 ENGINE  
 COVER.  
 THIS IS  
 THE  
 BEST  
 PLACE  
 TO  
 ADD  
 SIERRA  
 TO  
 YOUR  
 COOLANT.  
 IF  
 YOU  
 ARE  
 ADDING  
 SIERRA  
 TO  
 AN  
 EXISTING  
 COOLANT,  
 BE  
 SURE  
 TO  
 MIX  
 IT  
 WITH  
 THE  
 EXISTING  
 COOLANT  
 TO  
 AVOID  
 SEPARATION.

Complaint

EXHIBIT E.1

**6 YEAR • 60,000 MILE**  
 Newer Car Cooling System • Limited  
**WARRANTY**

SEE OWNER'S MANUAL FOR DETAILS

INTEG

# SIERRA<sup>®</sup>

Antifreeze • Coolant

- ▲ Essentially Non Toxic To People & Pets
- ▲ Helps Protect Wildlife In The Environment
- ▲ Outstanding Engine Protection

**SAFETY FREEZE<sup>™</sup>**

Exhibit E.1.

Complaint

121 F.T.C.

## EXHIBIT E.2

## SAFER AND PHOSPHATE FREE - SIERRA PROTECTS YOUR FAMILY AND YOUR CAR

## COOLING SYSTEM BENEFITS

In addition to quality freeze up and boil over protection, SIERRA contains no phosphates and provides outstanding cooling system corrosion protection. SIERRA passes the ASTM D 5216 tests for propylene glycol coolants and the key performance requirements of ASTM D 3306.

SIERRA meets many important car maker requirements including the Ford Dynamometer BL2-2 test and ASTM D 1384, D 2570, D 2809 and D 4340 tests specified in GM's standards GM 1825M and GM 1899M. No conventional antifreeze prevents corrosion better.

## ENVIRONMENTAL BENEFITS

• **Toxicity** - Because it is essentially non toxic, SIERRA is safer for people, pets and wildlife in the environment than other leading brands. Many poisonings of animals are caused by their drinking conventional antifreeze that has spilled or leaked from cars. SIERRA greatly reduces this risk.

• **Biodegradability** - SIERRA biodegrades readily in the natural environment and in activated sewage treatment systems as many other brands. All antifreeze can become contaminated with trace amounts of lead or other metals and should be disposed of properly and in accordance with local regulations. Even if contaminated with trace metals, used SIERRA is far less poisonous to animal life than conventional antifreeze.

• **Recyclability** - Used SIERRA can be mixed with conventional antifreeze in collection systems and recycling processes. This SIERRA container contains at least 25% recycled plastic and can be further recycled. Recycling may not be available in all areas.

## INSTALLATION

Install SIERRA like any antifreeze, but be careful not to leave the radiator cap when engine is hot. While SIERRA is compatible with conventional antifreeze, its safety benefit is eliminated if mixed, so thoroughly flush out old coolant with water. As not all fluid will drain from a cooling system, check car owners manual for system capacity to determine the proper amount of SIERRA to install to achieve desired protection.

SIERRA	Water	Protects against freeze-ups down to	Protects against boil-overs up to*
50%	50%	-28°F	256°F
60%	40%	-54°F	261°F
67%	33%	-76°F	262°F

\*14 psi radiator cap

To maintain optimum corrosion protection, replace SIERRA annually

## TESTING SIERRA COOLANT

SIERRA freeze point protection cannot be measured with conventional antifreeze. . . . SIERRA testers are available from SIERRA retailers or may be purchased from Safe Brands at the address below.

## CAUTIONARY INFORMATION

SIERRA contains propylene glycol and although it is not "toxic" as defined by regulations of the Consumer Product Safety Commission, SIERRA is NOT INTENDED FOR HUMAN OR ANIMAL CONSUMPTION so:

**KEEP OUT OF REACH OF CHILDREN.**

Part No. 091

Do not store in open or unlabeled containers.



Safe Brands  
Corporation  
P.O. Box 3007  
Omaha, NE 68103  
800-289-7234

Exhibit E.2.



Complaint

EXHIBIT F



Safety & Environmental Advantages

**ANTIFREEZE — A TOXIC PROBLEM**

Each year there are over 200 million gallons of toxic antifreeze purchased, installed and disposed of in the United States. This antifreeze is manufactured with ethylene glycol (EG) and includes all major brands such as Prestone, Peak, Zerey and Texaco. Although EG based antifreeze provides freeze protection for automobiles, it has a serious environmental and health protection problem for people and animals. The danger of such EG based antifreeze is magnified by its sweet taste to which children and animals are attracted. Each year a significant number of children and pets are poisoned by antifreeze and require emergency medical treatment for antifreeze ingestion. The sweet taste of antifreeze also attracts dogs and cats to pools of antifreeze formed by drippings from the cooling systems of cars and trucks as well as to pools of improperly disposed of used antifreeze. Many are poisoned each year. The California State University, veterinary toxicologist reported that more than 30 percent of all poisoning deaths of dogs and cats were caused by antifreeze. The toxic dose of EG is as little as 1/4 teaspoon for cats and 2 tablespoons for a child weighing 50 pounds. The toxic dose of EG is 1/2 cup of the most common antifreeze. Concerned European countries and the U.S. EPA have issued consumer safety warnings for EG based antifreeze.



**SIERRA — THE SAFER ANTIFREEZE**

With its mission being to develop effective but environmentally safer products for the automotive market, Safe Brands Corporation initiated research to find a non-toxic, environmentally safer alternative to existing EG based antifreeze brands. We discovered that it was possible to formulate a highly effective, heavy duty antifreeze from essentially non-toxic components — completely omitting ethylene glycol. The results of this research is SIERRA — The Safer Antifreeze. SIERRA is formulated with propylene glycol (PG) and propylene glycol (PG) is safe. It is so safe that it is used in the formulation of many consumer products such as cosmetics including lipsticks and medicines such as Children's Tylenol. It is also a key moisturizing ingredient used in food grade products and pet foods. Pharmaceutical grade PG has been generally recognized as safe (designated from the Food and Drug Administration). The United States Occupational Safety and Health Administration (OSHA) has established an upper exposure limit of 50 parts per million for EG. OSHA has not found it necessary to set an exposure limit for PG because of its inherent low toxicity. SIERRA IS BIODEGRADABLE. PG does not persist in the environment. It is readily consumed by microorganisms. In addition to its natural biodegradability, it is fully degraded within 24 hours in activated sludge treatment plants operating at 65 F.



Performance Advantages

**COOLING SYSTEM PERFORMANCE ADVANTAGES OF SIERRA**

**SUPERIOR FREEZE PROTECTION**

A 50/50 blend of SIERRA and water has a freezing point of 27 F which is 10 F below the lowest temperature protection for most regions. The temperature protection is even greater if the concentration of SIERRA is increased. For example, a 60/40 blend of SIERRA and water gives antifreeze protection to -26 F. Unlike EG based antifreeze solutions which begin expanding soon after their initial freezing contracts are reached, SIERRA solutions do not begin to expand until the temperature becomes considerably lower than the initial freezing point. This insensitivity of SIERRA to its margin of safety against the expansion pressure of engines and cooling systems components.

SIERRA (%)	Water (%)	Freezing Point (F)	Freezing Point (F)
40%	60%	-4 F	-60 F
50%	50%	-27 F	-72 F
60%	40%	-54 F	-100 F
68%	32%	-74 F	-107 F

**EXCELLENT CORROSION PROTECTION**

SIERRA has passed the automotive industry's most demanding corrosion tests including those of ASTM D 3306 and General Motors Specification GM 4900B. It provides corrosion protection to all cooling system components including aluminum, copper, cast iron, steel and solder. Additionally, SIERRA S and its propylene glycol base has been shown to reduce cavitation corrosion in heavy duty diesel engines common with ethylene glycol based coolants. In a paper presented at the 1990 Society of Automotive Engineers (SAE) Convention in Detroit, representatives of Cummins Engine, Peugeot Division and Arco Chemical Company presented data which demonstrated the superior corrosion protection characteristics of propylene glycol over ethylene glycol based systems.



Exhibit F

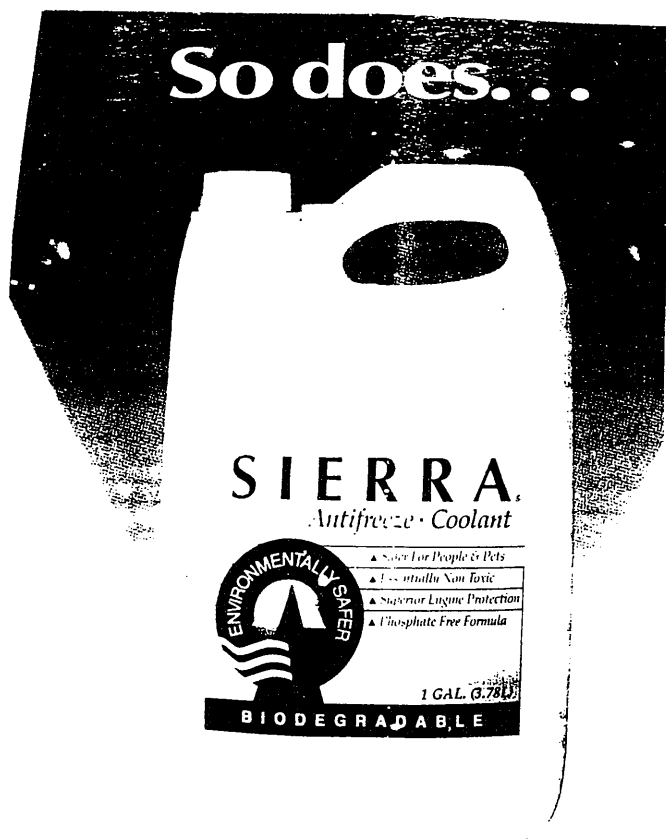
EXHIBIT G



In addition to  
consumer safety,  
these trusted products  
have one thing in common . . .

Exhibit G

EXHIBIT G



**It's Not Just Antifreeze.**

**It's Safety Freeze.**

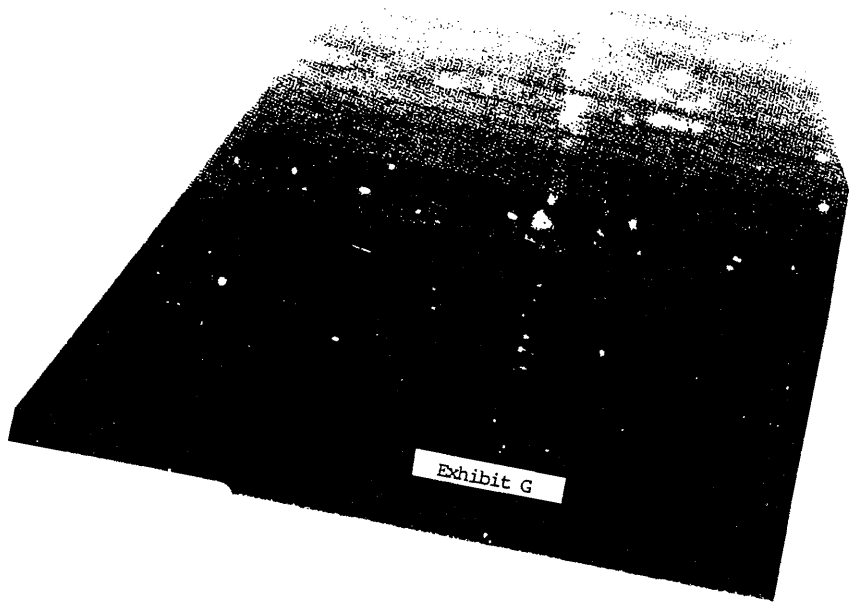
FEDERAL TRADE COMMISSION DECISIONS

Complaint

EXHIBIT G

121 F.T.C.

**They all contain  
propylene glycol.**



## EXHIBIT H

## PG Antifreeze Safety and Environmental Advantages

Although EG is effective as a car and truck antifreeze, it is toxic to humans and animals if ingested. EG is metabolized to oxalic acid, which crystallizes in the kidney, causing death.

### There Is A Safer Alternative...

PG has received a "generally recognized as safe" designation from the Food and Drug Administration. PG has been used safely for many years as an ingredient in foods, cosmetics, and medicinal products.

The United States Occupational Safety and Health Administration (OSHA) has established an exposure limit of 50 parts per million (ppm) for EG. OSHA has not found it necessary to set an exposure limit for PG because of PG's inherent low toxicity.

Concern over the handling of EG has led to the search for alternatives. Bus maintenance workers in the city of Copenhagen, Denmark, for example, have refused to

handle EG-based antifreeze due to health and safety concerns. As a result, Copenhagen has switched to the safer PG antifreeze.

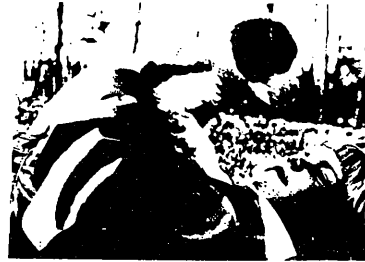
### Pet and Animal Exposure

Dogs and cats are naturally attracted to EG because of its sweet taste and smell, but EG-based antifreeze can be lethal to pets and other animals if ingested. The Colorado State University Veterinary Hospital reported that more than 50 percent of all poisoning deaths of dogs and cats were linked to EG. By contrast, PG is harmless. In fact, it is used as a moisturizing ingredient in many pet foods.

EG also can be toxic to poultry. PG, on the other hand, is used in many animal feed formulations to keep the feed moist and palatable.

### Biodegradability

PG does not persist in the environment. It is readily consumed by microorganisms. In an activated sludge treatment plant operating at 65 degrees Fahrenheit, PG is fully degraded within 24 hours.



### Recyclability

As with all spent engine coolants, PG antifreeze should be disposed of properly or recycled after use. Although biotreatment can be used effectively to dispose of spent coolants, many firms are moving to recycling. PG antifreeze is fully recyclable, and ARCO Chemical is working through the ASTM to develop specifications for recycled antifreeze.

For more information please call our toll free number, 1 800 321 7000.

## DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, and having modified the order in one respect, 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 Safe Brands Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nebraska. It is a wholly-owned subsidiary of respondent Warren Distribution, Inc. Respondent Warren Distribution, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nebraska. Respondents Safe Brands Corporation and Warren Distribution, Inc. have their principal offices or places of business at 727 South 13th Street, Omaha, Nebraska.

Respondent ARCO Chemical Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office or place of business at 3801 West Chester Pike, Newtown Square, Pennsylvania.

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

## ORDER

### DEFINITION

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

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

### I.

*It is ordered,* That respondents, Safe Brands Corporation, a corporation, Warren Distribution, Inc., a corporation, and ARCO Chemical Company, a corporation, their successors and assigns, and their officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any antifreeze, coolant, or deicer product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that any such product will not harm the environment, is less harmful to the environment than other products, or offers any environmental benefit, unless at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

## II.

*It is further ordered,* That respondents, Safe Brands Corporation, a corporation, Warren Distribution, Inc., a corporation, and ARCO Chemical Company, a corporation, their successors and assigns, and their officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any antifreeze, coolant, or deicer product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, about the safety or relative safety of such product for humans or animals unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates such representation.

## III.

*It is further ordered,* That respondents, Safe Brands Corporation, a corporation, Warren Distribution, Inc., a corporation, and ARCO Chemical Company, a corporation, their successors and assigns, and their officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, offering for sale, sale, or distribution of any propylene glycol-based antifreeze or coolant product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall disclose on the front of the container of all such products the following:

"See Back Panel for CAUTIONARY INFORMATION"

and shall disclose on the back of the container of all such products the following:

"CAUTIONARY INFORMATION: This Product MAY BE HARMFUL IF SWALLOWED. STORE SAFELY AWAY FROM CHILDREN AND PETS. Do not store in open or unlabeled containers."

Each disclosure shall be in a conspicuous and prominent place on the container, in conspicuous and legible type in contrast by typography,



layout, or color with all other printed material on the container. The disclosure on the back of the container shall be surrounded by a one (1) point rule. The disclosure on the front of the container and the first two sentences of the disclosure on the back of the container shall be in type at least as large as the largest print type on the back of the container, except for the brand name, but, in any case, no smaller than ten (10) point type. The words "CAUTIONARY INFORMATION" on the front and back of the container shall be in bold type. The last sentence of the disclosure on the back of the container shall be in type at least as large as the type in which the majority of the printed material on the back of the container is printed.

The back of the container shall also contain the following statement, printed in type at least as large as the type in which the majority of the printed material on the back of the container is printed:

"Clean up any leaks or spills."

#### IV.

*It is further ordered*, That respondents, Safe Brands Corporation, a corporation, Warren Distribution, Inc., a corporation, and ARCO Chemical Company, a corporation, their successors and assigns, and their officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any antifreeze, coolant, or deicer product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, the level of vehicular engine protection provided by any such product, unless at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates such representation.

#### V.

*It is further ordered*, That respondents, Safe Brands Corporation, a corporation, Warren Distribution, Inc., a corporation, and ARCO

Chemical Company, a corporation, their successors and assigns, and their officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any antifreeze, coolant, or deicer product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the extent to which:

- A. Any such product or its package is capable of being recycled;
- or,
- B. Recycling collection programs for such product or its package are available.

#### VI.

*It is further ordered,* That the provisions of this order shall not apply to any label or labeling printed prior to the date of service of this order and shipped by respondents to distributors or retailers prior to one hundred (100) days after the date of service of this order.

#### VII.

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

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

## VIII.

*It is further ordered,* That respondents shall distribute a copy of this order to each of their operating divisions and to each of their officers, agents, representatives, or employees engaged in the preparation and placement of advertisements, promotional materials, product labels or other such sales materials covered by 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 corporations such as a dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporations which may affect compliance obligations under this order.

## X.

This order will terminate on March 26, 2016, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

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

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

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

for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

XI.

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

Commissioner Starek recused.

IN THE MATTER OF

PRAXAIR, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE  
FEDERAL TRADE COMMISSION ACT*Docket C-3648. Complaint, April 1, 1996--Decision, April 1, 1996*

This consent order requires, among other things, Praxair, Inc., a Connecticut corporation, to divest, within 12 months to Commission-approved acquirers, four CBI atmospheric gases production plants, located in Vacaville and Irwindale, California; Bozrah, Connecticut; and Madison, Wisconsin. If the transaction is not completed in the prescribed time, a trustee may be appointed to divest the four plants.

*Appearances*

For the Commission: *Ann B. Malester, James Holden and William Baer.*

For the respondent: *Nathan Eimer, Sidley & Austin, Chicago, IL.*

## COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Praxair, Inc. ("Praxair"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the common shares of CBI Industries, Inc. ("CBI"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and that such acquisition, if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18 and Section 5 of the FTC Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

## I. RESPONDENT

1. Respondent Praxair is a corporation organized and existing under and by virtue of the laws of the United States, with its principal

executive offices located at 39 Old Ridgebury Road, Danbury, Connecticut.

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

## II. ACQUIRED COMPANY

3. CBI is a corporation organized and existing under and by virtue of the laws of the United States, with its principal executive offices located at 800 Jorie Boulevard, Oak Brook, Illinois.

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

## III. THE ACQUISITION

5. On November 3, 1995, Praxair commenced a cash tender offer valued at approximately \$2 billion for all of the issued and outstanding common shares of CBI. On December 22, 1995, Praxair and CBI entered into a definitive agreement whereby Praxair will acquire all of the issued and outstanding common shares of CBI.

## IV. THE RELEVANT MARKETS

6. For purposes of this complaint, the relevant lines of commerce in which to analyze the effects of the acquisition are the manufacture and sale of merchant nitrogen, merchant oxygen, and merchant argon, whether sold in liquid form or in cylinders.

7. For purposes of this complaint, the relevant geographic areas in which to analyze the effects of the acquisition on the merchant nitrogen and merchant oxygen markets are:

- a. Northern California;
- b. Southern California; and

c. The Northern Midwest and Northeast United States, and narrower markets contained therein, including the Eastern Connecticut area and the Western Wisconsin/Southeastern Minnesota area.

8. For purposes of this complaint, the relevant geographic area in which to analyze the effects of the acquisition on the merchant argon market is the United States, and narrower markets contained therein, including the Eastern Connecticut area and the Western Wisconsin/Southeastern Minnesota area.

9. The relevant markets are highly concentrated whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios. In addition, CBI's Madison, Wisconsin and Bozrah, Connecticut plants are the closest competing facilities, geographically, to Praxair's Minneapolis, Minnesota and Suffield, Connecticut plants, respectively.

10. New entry into the merchant nitrogen, merchant oxygen, and merchant argon markets would be time consuming, costly and unlikely.

11. Praxair and CBI are actual competitors in the relevant markets.

#### V. EFFECTS OF THE ACQUISITION

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

a. By eliminating direct actual competition between Praxair and CBI;

b. By enhancing the likelihood of collusion or coordinated action between or among the remaining firms in Northern and Southern California;

c. By eliminating competition between the two closest competitors, geographically, in Eastern Connecticut, and the two closest competitors, geographically, in Western Wisconsin and Southeastern Minnesota;

d. By increasing the likelihood that Praxair would unilaterally exercise market power in Eastern Connecticut, and in Western Wisconsin and Southeastern Minnesota; and

e. By increasing the likelihood that consumers would be forced to pay higher prices for merchant nitrogen, merchant oxygen, and merchant argon in the relevant geographic areas.

#### VI. VIOLATIONS CHARGED

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

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

#### DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the



executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Praxair, Inc. ("Praxair") is a corporation organized, existing and doing business under and by virtue of the laws of the United States, with its principal executive offices located at 39 Old Ridgebury Road, Danbury, Connecticut.

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

## ORDER

### I.

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

A. "*Respondent*" or "*Praxair*" means Praxair, Inc., its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, and groups and affiliates controlled by Praxair, Inc., and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

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

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

D. "*Acquisition*" means Praxair's acquisition of issued and outstanding common shares of CBI, pursuant to a cash tender offer dated November 3, 1995.

E. "*Merchant atmospheric gases*" means oxygen, nitrogen and argon sold in liquid form or packaged in cylinders.

F. "*Atmospheric gases plant*" means a facility that produces Merchant atmospheric gases.

G. "*Merchant Divestiture Assets and Businesses*" means, the Vacaville Plant, Irwindale Plant, Bozrah Plant, and Madison Plant, whether divested individually or in some combination, including the assets, properties, business and goodwill, tangible and intangible, used in the manufacture and sale of merchant atmospheric gases at those plants, including, without limitation, the following:

1. All real property interests, including rights, title and interest in and to owned or leased property, together with all buildings, improvements, appurtenances, licenses and permits;
2. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property, including distribution equipment and cylinders;
3. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, software licenses, inventions, patents, technology, know-how, specifications, designs, drawings, processes and quality control data;
4. Rights to and in contracts, including customer, dealer, distributor, supply and utility contracts;
5. Inventory, supplies and storage capacity, including storage vessels;
6. All rights under warranties and guarantees, express or implied;
7. All books, records, and files; and
8. All items of prepaid expense.

H. "*Vacaville Plant*" means CBI's atmospheric gases plant located in Vacaville, California, together with all associated Merchant Divestiture Assets and Businesses.

I. "*Irwindale Plant*" means CBI's atmospheric gases plant located in Irwindale, California, together with all associated Merchant Divestiture Assets and Businesses.

J. "*Bozrah Plant*" means CBI's atmospheric gases plant located in Bozrah, Connecticut, together with all associated Merchant Divestiture Assets and Businesses.

K. "*Madison Plant*" means CBI's atmospheric gases plant located in Madison, Wisconsin, together with all associated Merchant Divestiture Assets and Businesses.

## II.

*It is further ordered, That:*

A. Praxair shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Merchant Divestiture Assets and Businesses, and shall also divest such additional ancillary CBI assets and effect such arrangements as are necessary to assure the marketability, viability and competitiveness of the Merchant Divestiture Assets and Businesses.

B. Praxair shall divest the Merchant Divestiture Assets and Businesses, either individually or in some combination, only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture is to ensure the continuation of the Merchant Divestiture Assets and Businesses as an ongoing, viable operation or operations, engaged in the same business in which the Merchant Divestiture Assets and Businesses are engaged at the time of the proposed divestiture, and to remedy the lessening of competition resulting from the proposed acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the Merchant Divestiture Assets and Businesses, Praxair shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Merchant Divestiture Assets and Businesses, and to prevent the destruction, removal, wasting, deterioration or impairment of the Merchant Divestiture Assets and Businesses except for ordinary wear and tear.

D. Praxair shall comply with all terms of the Agreement to Hold Separate attached to this order and made a part hereof as Appendix I. The Agreement to Hold Separate shall continue in effect until such time as respondent has divested all of the Merchant Divestiture Assets and Businesses as required by this order.

## III.

*It is further ordered, That:*

A. If Praxair has not divested, absolutely and in good faith, and with the prior approval of the Commission, the Merchant Divestiture

Assets and Businesses within twelve (12) months of the date this order becomes final, the Commission may appoint a trustee to divest the Merchant Divestiture Assets and Businesses. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, Praxair 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 III shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Praxair to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A., Praxair 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 Praxair, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Praxair has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Praxair of the identity of any proposed trustee, Praxair 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 Merchant Divestiture Assets and Businesses.

3. Within ten (10) days after appointment of the trustee, Praxair 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(s) required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.C.3. to accomplish the divestiture(s), which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time,

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

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Merchant Divestiture Assets and Businesses, or to any other relevant information, as the trustee may request. Praxair shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Praxair shall take no action to interfere with or impede the trustee's accomplishment of the divestiture(s). Any delays in divestiture caused by Praxair 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 Praxair's absolute and unconditional obligation to divest at no minimum price. The divestiture(s) shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order, provided, however, if the trustee receives *bona fide* offers for any of the plants 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 that particular plant to the acquiring entity or entities selected by Praxair from among those approved by the Commission.

7. The trustee shall serve at the cost and expense of Praxair, without bond or other security unless paid for by Praxair, 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 Praxair, 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 Praxair, 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 Merchant Divestiture Assets and Businesses.

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

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

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

11. The trustee shall have no obligation or authority to operate or maintain the Merchant Divestiture Assets and Businesses.

12. In the event that the trustee determines that he or she is unable to divest the Merchant Divestiture Assets and Businesses in a manner consistent with the Commission's purpose as described in paragraph II, the trustee may divest additional ancillary CBI assets of Praxair and effect such arrangements as are necessary to satisfy the requirements of this order.

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

#### IV.

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

being made to comply with paragraphs II and III including a description of all substantive contacts or negotiations for the divestiture(s) required by this order, including the identity of all parties contacted. Praxair shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture(s).

## V.

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

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

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

## VI.

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

## VII.

*It is further ordered,* That respondent shall not be obligated to comply with this order if Praxair abandons the proposed acquisition of CBI. For purposes of this order, Praxair will be deemed to have abandoned the proposed acquisition of CBI after it provides written

notice to the Commission that it has abandoned its proposed acquisition and has withdrawn any related notifications filed pursuant to Section 7A of the Clayton Act, as amended, 15 U.S.C. 18a.

## APPENDIX I

## AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Hold Separate") is by and between Praxair, Inc. ("Praxair"), a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

## PREMISES

*Whereas*, on November 3, 1995, Praxair offered to purchase all of the outstanding common shares of CBI Industries, Inc. ("CBI"); and

*Whereas*, CBI, with its principal office and place of business located at 800 Jorie Boulevard, Oak Brook, Illinois, manufactures and markets, among other things, Merchant atmospheric gases; and

*Whereas*, Praxair, with its principal office and place of business located at 39 Old Ridgebury Road, Danbury, Connecticut, manufactures and markets, among other things, Merchant Atmospheric Gases; and

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

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

*Whereas*, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the Merchant Divestiture Assets and Businesses, as defined in paragraph I.G. of the Consent Agreement, during the period prior to the final acceptance



and issuance of the Consent Agreement by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

*Whereas*, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Merchant Divestiture Assets and Businesses and the Commission's right to have the Merchant Divestiture Assets and Businesses continue as viable competitors; and

*Whereas*, the purposes of this Hold Separate and the Consent Agreement are:

A. To preserve the Merchant Divestiture Assets and Businesses as viable, competitive, and independent businesses pending divestiture of the Merchant Divestiture Assets and Businesses, and

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

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

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

*Now, therefore*, the Parties agree, upon the understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Consent Agreement for public comment, it will grant early termination of the Hart-Scott-Rodino waiting period, as follows:

1. Praxair agrees to execute and be bound by the Consent Agreement.

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

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

b. The time that divestiture of the Merchant Divestiture Assets and Businesses as required by paragraph II of the Consent Agreement is completed.

3. To assure the complete independence and viability of the Merchant Divestiture Assets and Businesses, and to assure that no material confidential information is exchanged between Praxair and the Merchant Divestiture Assets and Businesses, Praxair shall hold the Merchant Divestiture Assets and Businesses separate and apart on the following terms and conditions:

a. Within 30 days from the date this Hold Separate becomes final Praxair shall cause all of its rights, title and interest in the Merchant Divestiture Assets and Businesses, as defined in paragraph I.G. of the Consent Agreement, as well as all such necessary personnel, including but not limited to, payroll and marketing personnel, to be transferred to a separate corporation ("Nucorp"), and effect any other arrangements as are necessary to ensure that Nucorp has complete viability and independence from Praxair (meaning here and hereinafter, Praxair excluding the Merchant Divestiture Assets and Businesses, personnel connected with the Merchant Divestiture Assets and Businesses, and Nucorp as of the date this Agreement is signed, but including all other portions of CBI).

b. Nucorp shall be held separate and apart and shall be managed and operated independently of Praxair, except to the extent that Praxair must exercise direction and control over Nucorp to assure compliance with this Hold Separate or the Consent Agreement.

c. Praxair shall maintain the marketability, viability, and competitiveness of Nucorp, including the Merchant Divestiture Assets and Businesses, and shall not cause or permit the destruction, removal, wasting, deterioration, or impairment of any assets or business it may have to divest except in the ordinary course of business and except for ordinary wear and tear, and it shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of Nucorp including the Merchant Divestiture Assets and Businesses.

d. Praxair shall appoint a knowledgeable person among the top management of CBI's Merchant Atmospheric Gases Business to manage and maintain Nucorp on a day to day basis during the term of the Hold Separate. The manager shall have exclusive management and control of Nucorp, and shall manage Nucorp independently of Praxair's other businesses.

e. The Manager shall report exclusively to the Nucorp Management Committee ("Management Committee"). The Management Committee shall consist of the Manager; two other knowledgeable persons from among the top management of CBI's Merchant Atmospheric Gases Business; and two Praxair financial officers or a comparable, knowledgeable persons from Praxair's financial office who have no direct involvement with Praxair's Merchant Atmospheric Gases Business ("Praxair Management Committee Members"). The Chairman of the Management Committee shall be the Manager. Except for the Praxair Management Committee Members serving on the Management Committee, Praxair shall not permit any officer, employee, or agent of Praxair also to be an officer, employee or agent of Nucorp. Each Management Committee Member shall enter into a confidentiality agreement agreeing to be bound by the terms and conditions set forth in Attachment A, appended to this Hold Separate. The Management Committee shall meet monthly during the course of the Hold Separate, and as otherwise necessary. Meetings of the Management Committee during the term of the Hold Separate shall be audio recorded, and the recording shall be retained for two (2) years after the termination of the Hold Separate.

f. All material transactions, out of the ordinary course of business and not precluded by paragraph three hereof, shall be subject to a majority vote of the Management Committee.

g. Praxair shall not exercise direction or control over, or influence directly or indirectly, Nucorp, including the Merchant Divestiture Assets and Businesses, the Management Committee, or the Manager of Nucorp, any of their operations, assets, or businesses; provided, however, that Praxair may exercise only such direction and control over Nucorp as is necessary to assure compliance with this Hold Separate, the consent order and with all applicable laws and except as otherwise provided in this Hold Separate.

h. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating and

consummating the Acquisition, defending investigations or litigation, obtaining legal advice, complying with this Hold Separate or the consent order or negotiating agreements to divest assets, Praxair shall not receive or have access to, or the use of, any material confidential information of Nucorp or the activities of the Manager or Management Committee not in the public domain, nor shall Nucorp, the Manager, or the Management Committee receive or have access to, or the use of, any material confidential information about Praxair. Praxair may receive on a regular basis from Nucorp aggregate financial information necessary and essential to allow Praxair to file financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information, including, but not limited to, customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets, not independently known to:

1. Praxair, with regard to Nucorp, including the Merchant Divestiture Assets and Businesses, from sources other than Nucorp or its employees or the Management Committee; or

2. The Management Committee or Nucorp or its employees, with regard to Praxair, from sources other than Praxair.)

i. Except as is permitted by this Hold Separate, the Praxair Management Committee Members shall not receive any Nucorp material confidential information and shall not disclose any such information obtained through their involvement with Nucorp to Praxair or use it to obtain any advantage for Praxair. The Praxair Management Committee Members shall participate in matters that come before the Management Committee only for the limited purpose of considering any capital investment of over \$250,000, approving any proposed budget and operating plans, authorizing dividends and repayment of loans consistent with the provisions hereof, reviewing material transactions described in subparagraph 3.f, and carrying out Praxair's responsibilities under the Hold Separate and the Consent Agreement. Except as permitted by the Hold Separate, the Praxair Management Committee Members shall not participate in any matter, or attempt to influence the votes of the other directors on the Management Committee with respect to matters that would involve

a conflict of interest between Praxair and Nucorp, including the Merchant Divestiture Assets and Businesses.

j. Praxair shall not change the composition of the Management Committee unless a majority of the Management Committee consents. The Chairman of the Management Committee shall have the power to remove members of the Management Committee for cause and to require Praxair to appoint replacement members to the Management Committee in the same manner as provided in paragraph 3.e. of this Hold Separate. Praxair shall not change the composition of the management of the Merchant Divestiture Assets and Businesses, except that the Management Committee shall have the power to remove management employees for unsatisfactory performance or for cause.

k. If the Chairman of the Management Committee ceases to act or fails to act diligently, a substitute Chairman shall be appointed in the same manner as provided in paragraphs 3.d. and 3.e.

1. CBI personnel connected with Nucorp or the Merchant Divestiture Assets and Businesses or providing support services to Nucorp or the Merchant Divestiture Assets and Businesses as of the date this Hold Separate is signed shall continue, as employees of Praxair, to provide such services as of the date of this Hold Separate. Such Praxair personnel must retain and maintain all material confidential information relating to Nucorp, including the Merchant Divestiture Assets and Businesses on a confidential basis and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other Praxair business.

Such Praxair personnel shall also execute a confidentiality agreement prohibiting the disclosure of any material confidential information concerning Nucorp, including the Merchant Divestiture Assets and Businesses, or Praxair information.

m. Nucorp shall be staffed with sufficient employees to maintain the viability and competitiveness of the Merchant Divestiture Assets and Businesses, which employees shall be the Nucorp employees and may also be hired from sources other than Praxair. Each management employee of Nucorp shall execute a confidentiality agreement prohibiting the disclosure of any material confidential information concerning Nucorp.

n. Praxair shall circulate to the management employees of Nucorp and appropriately display a notice of this Hold Separate and consent order in the form attached hereto as Attachment A.

o. Praxair shall cause Nucorp to expend funds for research and development, quality control, manufacturing and marketing of the products produced at Nucorp at a level not lower than that budgeted for the 1994 fiscal year, and shall increase such spending as deemed reasonably necessary in light of competitive conditions. Within thirty (30) days of the date of this Hold Separate, the Chairman of the Management Committee shall develop a budget and operating plan for the 1996 fiscal year that complies with the provisions of this paragraph and present it to the Management Committee for approval. If necessary, Praxair shall provide Nucorp with any funds to accomplish the foregoing. Praxair shall provide to Nucorp such support services as provided by CBI prior to the Acquisition.

p. Praxair shall provide Nucorp with sufficient working capital to operate at a level not less than the rate of operation in effect during the twelve (12) months preceding the date of this Hold Separate.

q. The Management Committee shall serve at the cost and expense of Praxair. Praxair shall indemnify the Management Committee against any losses or claims of any kind that might arise out of its involvement under this Hold Separate, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Management Committee members.

r. The Management Committee shall have access to and be informed about all companies who inquire about, seek or propose to buy the Merchant Divestiture Assets and Businesses.

s. Notwithstanding the provisions of paragraph 3.i., companies who undertake a due diligence process in the course of negotiations to purchase Nucorp, or any part thereof, may be accompanied and assisted by either or both of the Praxair Management Committee Members, in addition to appropriate Nucorp employees selected by the Management Committee. The Praxair Management Committee Members may delegate tasks relating to such due diligence to attorneys, accountants and/or other financial employees of Praxair who are not directly engaged in the Praxair Merchant Atmospheric Gases Business; provided, however, that such Praxair employees, accountants and attorneys shall execute a confidentiality agreement prohibiting the disclosure of any Nucorp material confidential information.

4. Should the Federal Trade Commission seek in any proceeding to compel Praxair to divest itself of Nucorp, or any additional assets, as provided in the Consent Agreement, or to seek any other injunctive or equitable relief, Praxair shall not raise any objection based on the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Praxair shall also waive all rights to contest the validity of this Hold Separate.

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

6. For the purpose of determining or securing compliance with this Hold Separate, subject to any legally recognized privilege or provision of applicable law, and upon written request with reasonable notice to Praxair made to its General Counsel, Praxair shall permit any duly authorized representative or representatives of the Commission:

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

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

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

## ATTACHMENT A

NOTICE OF DIVESTITURE AND  
REQUIREMENT FOR CONFIDENTIALITY

Praxair, Inc. ("Praxair") and CBI Industries, Inc. have entered into a Consent Agreement and Agreement to Hold Separate with the Federal Trade Commission ("Commission") relating to the divestiture of the Merchant Divestiture Assets and Businesses. Until after the Commission's order becomes final and the Merchant Divestiture Assets and Businesses are divested, the Merchant Divestiture Assets and Businesses must be managed and maintained as a separate company, independent of all other Praxair businesses. All competitive information relating to The Merchant Divestiture Assets and Businesses must be retained and maintained by the persons involved in the Merchant Divestiture Assets and Businesses on a confidential basis and such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment or agency involves any other Praxair business. Similarly, all such persons involved in any other Praxair business shall be prohibited from providing, discussing, exchanging, circulating or otherwise furnishing competitive information about such business to or with any person whose employment or agency involves the Merchant Divestiture Assets and Businesses.

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



## IN THE MATTER OF

## THE STOP &amp; SHOP COMPANIES, INC., ET AL.

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

*Docket C-3649. Complaint, April 2, 1996--Decision, April 2, 1996*

This consent order requires, among other things, the respondents to divest 17 supermarkets, within nine months, to Commission-approved acquirers. If the respondents fail to satisfy any of the divestiture provisions, the Commission may appoint a trustee to divest the supermarkets.

*Appearances*

For the Commission: *Ronald B. Rowe, James Fishkin and William Baer.*

For the respondents: *Richard Weisberg, Simpson, Thacher & Bartlett, New York, N.Y. and David Beddow, O'Melveny & Myers, Washington, D.C.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondents, The Stop & Shop Companies, Inc. ("Stop & Shop"), a corporation, and SSC Associates, L.P. ("SSC Associates"), a limited partnership, both subject to the jurisdiction of the Commission, have entered into an agreement to acquire Purity Supreme, Inc. ("Purity") in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

## DEFINITIONS

## 1. For the purposes of this complaint:

*"Supermarket"* means a full-line retail grocery store with annual sales of at least two million dollars 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 STOP &amp; SHOP COMPANIES, INC.

2. Respondent The Stop & Shop Companies, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1385 Hancock Street, Quincy, MA.

3. Respondent Stop & Shop is, and at all times relevant herein has been, engaged in the operation of supermarkets in Massachusetts and Connecticut.

4. Respondent Stop & Shop 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.

## SSC ASSOCIATES, L.P.

5. Respondent SSC Associates, L.P. ("SSC Associates") is a limited partnership 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 c/o Kohlberg, Kravis, Roberts & Co., 9 West 57th Street, New York, NY.

6. Respondent SSC Associates is, and at all times relevant herein has been, controlling the operations of Stop & Shop.

7. Respondent SSC Associates 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

8. On or about April 21, 1995, Stop & Shop and SSC Associates entered into an agreement with Purity Supreme to acquire all of the supermarkets and other related assets owned and operated by Purity Supreme.

#### TRADE AND COMMERCE

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

10. Stores other than supermarkets do not have a significant price-constraining effect on food and grocery products sold at supermarkets. 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. In addition, supermarkets do not regularly price-check food and grocery products sold at other types of stores and do not typically change their food and grocery prices in response to prices at other types of stores.

11. Food stores other than supermarkets, such as convenience stores, "mom & pop" stores, and specialty food stores (*e.g.*, seafood markets, bakeries, etc.), typically offer far fewer items than the average supermarket and charge higher prices for many of the same or similar items. Other types of stores that sell some food and grocery products, such as large drug stores and mass merchandisers, offer only a limited number of items sold in the typical supermarket. The small number of upscale food stores emphasizing organically grown fruits and vegetables, hormone-free meat and poultry products, and other more expensive food products, and club stores that offer

only a limited number of food and grocery products in bulk sizes, do not have a significant effect on market concentration.

12. Relevant sections of the country in which to analyze the acquisition described herein are the following:

a. Barnstable County, Massachusetts (a/k/a Cape Cod), and narrower markets contained therein, including Falmouth, Mashpee, Hyannis, Yarmouth, Harwich, and Orleans;

b. The South Shore area of Massachusetts, which consists of parts of Suffolk and Plymouth counties, and narrower markets contained therein, including Marshfield and Kingston;

c. The Boston, Massachusetts metropolitan area, which consists of the city of Boston and parts of Essex, Middlesex, Norfolk, and Suffolk counties, and narrower markets contained therein, including Saugus, Medford, Watertown, Brookline, the Roslindale neighborhood in Boston, and Weymouth;

d. Brockton, Massachusetts; and

e. Bedford, Massachusetts.

#### MARKET STRUCTURE

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

14. The post-acquisition HHI in Barnstable County, Massachusetts (a/k/a Cape Cod) would increase by approximately 2,778 points, from approximately 3,541 to approximately 6,319. The post-acquisition HHI in Falmouth, Mashpee, and Hyannis would increase to 10,000 or near 10,000 in each of these markets. The post-acquisition HHI in Yarmouth, Harwich, and Orleans would significantly increase already highly concentrated markets.

15. The post-acquisition HHI in the South Shore area of Massachusetts would increase by approximately 3,866 points, from approximately 3,930 to approximately 7,795. The post-acquisition HHI in Marshfield and Kingston would increase to 10,000 or near 10,000 in each of these markets.

16. The post-acquisition HHI in the Boston, Massachusetts metropolitan area would increase by approximately 512 points, from approximately 1,381 to approximately 1,893. The post-acquisition

HHI exceeds 2,000 when club stores and upscale food stores are not included in the market. The post-acquisition HHI in Saugus, Medford, Watertown, Brookline, the Roslindale neighborhood in Boston, and Weymouth would significantly increase already highly-concentrated markets.

17. The post-acquisition HHI in Bedford, Massachusetts would increase by approximately 4,702 points, from approximately 5,298 to approximately 10,000.

18. The post-acquisition HHI in Brockton, Massachusetts would increase by approximately 497 points, from approximately 5,162 to approximately 5,659.

#### ENTRY CONDITIONS

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

20. Entry that would prevent the anticompetitive effects in the relevant sections of the country is generally difficult because there are few available sites suitable for supermarkets and the time necessary to receive state and local regulatory approval for a new supermarket is typically quite long.

#### ACTUAL COMPETITION

21. Stop & Shop and Purity Supreme are actual competitors in the relevant lines of commerce and sections of the country.

#### EFFECTS

22. The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant lines of commerce in the relevant sections of the country in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct competition between supermarkets owned or controlled by Stop & Shop and supermarkets owned or controlled by Purity Supreme;

b. By increasing the likelihood that Stop & Shop will unilaterally exercise market power; or

c. By increasing the likelihood of, or facilitating, collusion or coordinated interaction,

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

#### VIOLATIONS CHARGED

23. The proposed acquisition by Stop & Shop of assets of Purity Supreme violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and 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.

Commissioner Azcuenaga concurring in part and dissenting in part.

#### DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of Purity Supreme, Inc. by The Stop & Shop Companies, Inc. ("Stop & Shop") and SSC Associates, L.P. ("SSC Associates"), and Stop & Shop and SSC Associates (collectively, "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, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in

such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent The Stop & Shop Companies, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1385 Hancock Street, Quincy, MA.

2. Respondent SSC Associates, L.P. is a limited partnership 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 c/o Kohlberg, Kravis, Roberts & Co., 9 West 57th Street, New York, New York.

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

## ORDER

### I.

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

A. "*Respondent*" or "*Stop & Shop*" means The Stop & Shop Companies, Inc., its predecessors, subsidiaries, divisions, and groups and affiliates controlled by The Stop & Shop Companies, Inc., their successors and assigns, and their directors, officers, employees, agents, and representatives.

B. "*Respondent*" or "*SSC Associates, L.P.*" means SSC Associates, L.P., its predecessors, subsidiaries, divisions, and groups

and affiliates controlled by SSC Associates, L.P., their successors and assigns, and their directors, officers, employees, agents, and representatives.

C. "*Assets to be divested*" means the supermarket assets described in paragraph II.A. of this order.

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

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

F. The term "*Eastern Massachusetts*" means the area in Massachusetts consisting of the counties of Barnstable, Bristol, Essex, Middlesex, Norfolk, Plymouth, and Suffolk, and all cities and towns therein.

## II.

*It is further ordered, That:*

A. Respondents shall divest, absolutely and in good faith, within nine (9) months from the date this order becomes final:

1. The following supermarkets located in Barnstable County, Massachusetts (a/k/a Cape Cod) to one acquirer who shall own and operate them:

a. Purity store no. 67 located at 137 Main St. (Route 28 - Falmouth Mall), Falmouth, MA;

b. Purity store no. 79 located at Mashpee Circle (Routes 28 and 151 - Mashpee Commons Shopping Center), Mashpee, MA;

c. Purity store no. 63 located at 625 West Main St., Hyannis, MA;

d. Purity store no. 72 located at 1070 Iyanough Road (Route 132), Hyannis, MA;



- e. Purity store no. 66 located at 1080 State Road (Route 28 and Forest Street), Yarmouth, MA;
  - f. Purity store no. 65 located at 18 Sisson Road, Harwich, MA;
- and
- g. Purity store no. 86 located at Cranberry Highway (Route 6A) and West Road, Orleans, MA.

If respondents are unable to divest all of the supermarkets listed to one acquirer who shall own and operate them, respondents may divest all of the supermarkets listed, to no more than two acquirers who shall own and operate them.

2. The following supermarkets located in Plymouth County, Massachusetts:

- a. Purity store no. 89 located at 182 Summer St. (Routes 3A and 53 - Kingsbury Square Shopping Center), Kingston, MA;
- b. Purity store no. 74 located at Ocean and Webster Sts. (Routes 139 and 3A -- Webster Square), Marshfield, MA; and
- c. Purity store no. 25 located at 240 East Ashland St. (Cary Hill Shopping Center), Brockton, MA.

3. The following supermarket located in Suffolk County and in the city of Boston, Massachusetts:

- a. Purity store no. 41 located at 630 American Legion Highway, Roslindale, MA.

4. The following supermarkets located in Middlesex County, Massachusetts:

- a. Purity store no. 03 located at 170 Great Road (Routes 4 and 225), Bedford, MA;
- b. Purity store no. 44 located at 2151 Mystic Valley Parkway, Medford, MA; and
- c. Stop & Shop store no. 436 located at 550 Arsenal Street (Watertown Mall), Watertown, MA.

5. The following supermarket located in Essex County, Massachusetts:

a. Purity store no. 01 located at 400 Lynn Fells Parkway, Saugus, MA.

6. The following supermarkets located in Norfolk County, Massachusetts:

a. Purity store no. 20 located at 525 Harvard St., Brookline, MA; and

b. Purity store no. 24 located at 10 Pleasant Valley Street, South Weymouth, MA.

The assets to be divested shall include the supermarket business operated, and all assets, leases, properties, business and goodwill, tangible and intangible, utilized in the supermarket operations at the locations listed above, but shall not include those assets consisting of or pertaining to Stop & Shop or Purity trade names, trade dress, trade marks, service marks, and such other intangible assets that respondents also utilize in their business at locations other than those listed above.

B. Respondents shall divest the assets to be divested only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture 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.

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

D. Respondents shall comply with all the terms of the Asset Maintenance Agreement attached to this order and made a part hereof as Appendix I. The Asset Maintenance Agreement shall continue in effect until such time as all assets to be divested have been divested as required by this order.

## III.

*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 nine (9) months from the date this order becomes final, the Commission may appoint a trustee to divest any of 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 III.A. of this order, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

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

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest 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 the divestitures 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 III.B.3. to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this 12-month period only one (1) time for one (1) year.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to 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 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 respondents from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and

assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the assets to be divested to satisfy paragraph II. of this order.

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

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

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

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

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

#### IV.

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

A. Acquire any ownership or leasehold interest in any facility that has operated as a supermarket within six (6) months of the date of such proposed acquisition in Eastern Massachusetts.

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 of such proposed acquisition in Eastern Massachusetts.

Provided, however, that advance written notification shall not apply to the construction of new facilities by respondents or the acquisition of or leasing of a facility that has not operated as a supermarket within six (6) months of respondents' 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 respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty days prior to acquiring any such interest (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, respondents shall not consummate the transaction until twenty days after substantially complying with such request for additional information. 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.

V.

*It is further ordered*, That, for a period of ten (10) years commencing on the date this order becomes final:

A. Respondents shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. 12(a)) that acquires any supermarket, any leasehold interest in any supermarket, or any interest in any retail location used as a supermarket on or after July 1, 1995, to operate a supermarket at that site if such supermarket was formerly owned or operated by Purity in Eastern Massachusetts, or was owned or operated by respondents either in Barnstable County, Massachusetts (a/k/a Cape Cod) or not more than two miles from any other supermarket formerly owned or operated by Purity in Eastern Massachusetts. Provided, however, respondents shall not be prevented from entering into or enforcing any agreement (1) requiring their approval of any sublease, assignment, or change in occupancy, which approval shall not be unreasonably withheld; provided further that use of a site for the operation of a supermarket shall not be a basis for withholding such approval; or (2) affecting any existing supermarket owned or operated by respondents and located not more than one mile from a replacement supermarket owned or operated by respondents and opened within six months of the date of such agreement.

B. Respondents shall not remove any equipment from a supermarket owned or operated by respondents in Eastern Massachusetts prior to a sale, sublease, assignment, or change in occupancy, except for replacement or relocation of such equipment in or to any other supermarket owned or operated by respondents in the ordinary course of business, or as part of any negotiation for a sale, sublease, assignment, or change in occupancy of such supermarket.

## VI.

*It is further ordered, That:*

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of paragraphs II. or III. of this order, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II. and III. of this order. Respondents shall include in their compliance

reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II. and III. of the order, including a description of all substantive contacts or negotiations for 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 year (1) from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondents shall file verified written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this order.

## VII.

*It is further ordered,* That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in 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.

## VIII.

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

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

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



Commissioner Azcuenaga concurring in part and dissenting in part.

#### APPENDIX I

##### ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement ("Agreement") is by and between The Stop & Shop Companies, Inc. ("Stop & Shop"), 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 1385 Hancock Street, Quincy, MA; SSC Associates, L.P. ("SSC Associates"), a limited partnership 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 c/o Kohlberg, Kravis, Roberts & Co., 9 West 57th Street, New York, New York; and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively "the Parties").

##### PREMISES

*Whereas*, Stop & Shop and SSC Associates, pursuant to an agreement dated April 21, 1995, agreed to acquire all of Purity Supreme, Inc. (hereinafter "Acquisition"); and

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

*Whereas*, if the Commission accepts the attached Agreement Containing Consent Order, the Commission is required to place it on the public record for a period of sixty (60) days for public comment and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

*Whereas*, the Commission is concerned that if an agreement is not reached preserving the *status quo ante* of the assets to be divested as described in II.A. of the attached Agreement Containing Consent Order ("Assets") during the period prior to their divestitures, when those Assets will be in the hands of Stop & Shop and SSC Associates, that any divestiture resulting from any administrative

proceeding challenging the legality of the Acquisition might not be possible, or might produce a less than effective remedy; and

*Whereas*, the Commission is concerned that prior to divestiture to the acquirer, it may be necessary to preserve the continued viability and competitiveness of the Assets; and

*Whereas*, the purpose of this Agreement and of the consent order is to preserve the Assets pending the divestiture to the acquirer approved by the Federal Trade Commission under the terms of the order, in order to remedy any anticompetitive effects of the Acquisition; and

*Whereas*, Stop & Shop and SSC Associates entering into this Agreement shall in no way be construed as an admission by Stop Shop and SSC Associates that the Acquisition is illegal; and

*Whereas*, Stop & Shop and SSC Associates understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws, or the Federal Trade Commission Act by reason of anything contained in this Agreement;

*Now, therefore*, in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will not seek further relief from the parties with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the consent order annexed hereto and made a part thereof, and, in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Assets, the Parties agree as follows:

#### TERMS OF AGREEMENT

1. Stop & Shop and SSC Associates agree to execute, and upon its issuance to be bound by, the attached consent order. The Parties further agree that each term defined in the attached consent order shall have the same meaning in this Agreement.

2. Unless the Commission brings an action to seek to enjoin the proposed Acquisition pursuant to Section 13(b) of the Federal Trade Commission Act, 15. U.S.C. 53(b), and obtains a temporary restraining order or preliminary injunction blocking the proposed Acquisition, Stop & Shop and SSC Associates will be free to close the Acquisition after 3:00 p.m., October 31, 1995.

3. Stop & Shop and SSC Associates agree that from the date this Agreement is accepted until the earlier of the dates listed in subparagraphs 3.a - 3.b, they will comply with the provisions of this Agreement:

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

b. On the day the divestiture set out in the consent order has been completed.

4. From the time Stop & Shop and SSC Associates acquire the Assets until the divestiture set out in the consent order has been completed, Stop & Shop and SSC Associates shall maintain the viability, competitiveness and marketability of the Assets, and shall not cause the wasting or deterioration of the Assets, nor shall they sell, transfer, encumber or otherwise impair their marketability or viability.

5. Should the Commission seek in any proceeding to compel Stop & Shop and SSC Associates to divest themselves of the Assets or to seek any other injunctive or equitable relief, Stop & Shop and SSC Associates shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has not sought to enjoin the Acquisition. Stop & Shop and SSC Associates also waive all rights to contest the validity of this Agreement.

6. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to Stop & Shop and SSC Associates and to their principal offices, Stop & Shop and SSC Associates shall permit any duly authorized representative or representatives of the Commission:

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

b. Upon five (5) days' notice to Stop & Shop and SSC Associates and without restraint or interference from them, to interview officers

or employees of Stop & Shop and SSC Associates, who may have counsel present, regarding any such matters.

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

STATEMENT OF COMMISSIONER MARY L. AZCUENAGA  
CONCURRING IN PART AND DISSENTING IN PART

I concur in the Commission's decision to approve and issue its final decision and order to the extent that the order requires divestiture of supermarkets on Cape Cod and the South Shore but dissent to the extent that the order requires divestiture of stores in the Boston metropolitan area. Although serious questions may be raised about some of the allegations in the complaint that relate to the product market, I find reason to believe that the law has been violated even if the product market includes sales of food and groceries in stores other than traditional supermarkets. Assuming either the product market alleged in the complaint or a broader product market, I concur in the decision to accept the order as to Cape Cod and the South Shore. I dissent from the decision to require divestiture of stores in the Boston metropolitan area. Although a small geographic market theoretically may exist within a broad metropolitan area, at this time, the information before the Commission is not sufficient to support a finding of reason to believe that the communities of Saugus, Medford, Brookline, Rosindale, Watertown, Weymouth, Brockton and Bedford, Massachusetts, are relevant antitrust markets.

## IN THE MATTER OF

## DEVRO INTERNATIONAL PLC, ET AL.

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

*Docket C-3650. Complaint, April 3, 1996--Decision, April 3, 1996*

This consent order requires, among other things, the respondents to divest, within three months to a Commission-approved acquirer, the assets they use to produce collagen sausage casings in the United States and Canada. If the transaction is not completed in the prescribed time, the Commission may appoint a trustee to divest the assets.

*Appearances*

For the Commission: *Ronald B. Rowe* and *Joseph S. Brownman*.

For the respondents: *Bertram M. Kantor, Wachtell, Lipton, Rosen & Katz*, New York, N.Y. and *James A. Rhodes, ICA International*, New York, N.Y.

## 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, having reason to believe that Devro International plc ("Devro International") and Teepak International, Inc. ("Teepak") have entered into an agreement in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that the terms of such agreement, were they to be satisfied, would result in a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

## I. RESPONDENT DEVRO INTERNATIONAL PLC

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

Scotland, with its headquarters office and principal place of business located at Moodiesburn, Chryston, G69 OJE, Scotland.

2. Respondent Devro International manufactures collagen sausage casings at plants located in Somerville, New Jersey; Moodiesburn, Scotland; and Bathurst and Kelso, Australia. Devro International uses these and other facilities to finish the collagen sausage casings produced at its three plants.

3. Respondent Devro International had \$140.1 million in sales in 1994. All these sales were of collagen sausage casings.

4. Respondent Devro International is, and at all times relevant herein has been, engaged in the manufacture and sale of collagen sausage casings in the relevant geographic markets.

5. Respondent Devro International is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

## II. RESPONDENT DEVRO INC.

6. Respondent Devro Inc. is a corporation existing, and doing business under and by virtue of the laws of the State of Delaware with its headquarters and principal place of business located at Southside Avenue, Somerville, New Jersey.

7. Respondent Devro Inc. is a wholly-owned subsidiary of, and is operated under the direction and control of, respondent Devro International.

8. Respondent Devro Inc. manufactures collagen sausage casings at a plant located in Somerville, New Jersey. Collagen sausage casings produced by Devro Inc. are finished at facilities located in its Somerville facility and in Markham, Ontario, Canada. Most of the sausage casings produced by Devro Inc. are sold in the United States, Canada, and Japan.

9. Respondent Devro Inc. had \$29.4 million in sales in 1994. All these sales were of collagen sausage casings.

10. Respondent Devro Inc. is, and at all times relevant herein has been, engaged in the manufacture and sale of collagen sausage casings in the relevant geographic markets.

11. Respondent Devro Inc. is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce,

within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

### III. THE ACQUISITION

12. Teepak is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its headquarters and principal place of business located at Three Westbrook Corporate Center, Suite 1000, Westchester, Illinois. Teepak is a wholly-owned subsidiary of Hillside Industries, Inc. Total sales in 1994 were more than \$300 million.

13. On or about December 14, 1994, respondent Devro International, Hillside Industries, and Teepak executed a letter of intent for Devro International to acquire Teepak. On or about June 14, 1995, Devro International and Teepak entered into a formal agreement for Devro International to acquire Teepak. The price is approximately \$135 million.

14. Among other things, Teepak manufactures and sells fibrous sausage casings, cellulose sausage casings, and collagen sausage casings. Teepak produces and finishes collagen sausage casings at a plant located in Sandy Run, South Carolina.

15. In 1994, Teepak had \$25.1 million in sales of collagen sausage casings in the United States and \$60.9 million in sales of collagen sausage casings worldwide.

16. Teepak is, and at all times relevant herein has been, engaged in the manufacture and sale of collagen sausage casings in the relevant geographic markets.

17. Teepak is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

### IV. TRADE AND COMMERCE

#### *A. Relevant Product Markets*

18. Relevant product markets in which it is appropriate to assess the effects of the proposed acquisition are the manufacture of (a) all collagen sausage casings and (b) edible collagen sausage casings.

19. Sausage casings of all types are used by sausage makers and other meat processors to form, size, and hold together ingredients used to manufacture or process smoked meat or poultry products such as frankfurters, sausages, hams, salami and jerky. The distinctive property of a sausage casing is its ability to allow smoke to pass through the casing to the meat while not allowing the meat inside the casing to lose its moisture during the smoking process.

20. Synthetic sausage casings have replaced animal sausage casings in most commercial applications: cellulose sausage casings, used in part to make skinless frankfurters; fibrous sausage casings, used in part to make salami and other large sausages; and collagen sausage casings, used in part to make breakfast sausages and beef jerky.

21. There are four types of sausage casings: animal casings, produced primarily from sheep and goat intestines; cellulose sausage casings, produced from cellulose; fibrous sausage casings, produced from paper impregnated with cellulose; and collagen sausage casings, produced from the corium or collagen inner layer of cattle hides. Originally, all sausage casings were made from animal intestines.

22. What distinguishes collagen sausage casings from cellulose sausage casings and fibrous sausage casings is that most collagen sausage casings are edible. Edible collagen sausage casings impart a "bite" taste to the sausage products they are made with.

23. Because the various casing types are not substitutes for one another, the prices of the different casings types are determined independently of one another. There are no commercial substitutes for collagen sausage casings at or anywhere near the prevailing prices of collagen sausage casings.

#### *B. Relevant Geographic Markets*

24. Relevant geographic markets in which it is appropriate to assess the effects of the proposed acquisition are (a) the United States and (b) the world.

#### *C. Conditions of Entry*

25. Entry into the relevant markets is difficult, and would not be timely, likely or sufficient to prevent anticompetitive effects in the relevant markets.



26. A new entrant into the manufacture of collagen sausage casings would need to devote at least five years to learning and developing the technology, expertise, and knowhow that are essential to producing and finishing collagen sausage casings in a form that would be acceptable for commercial sale, and there is no guarantee that such a venture would be successful. After the technology is developed, an additional period of approximately two years would be necessary to construct manufacturing facilities to produce the collagen sausage casings.

27. Most of the major purchasers of collagen sausage casings also purchase cellulose and fibrous sausage casings. There are efficiencies associated with the selling, marketing, and distributing of more than one type of sausage casing. A new entrant would need to have, or be able to develop, the capability of producing or distributing other sausage casings in order to distribute and sell collagen sausage casings in the most efficient manner.

#### V. MARKET STRUCTURE

28. The relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschmann Index (or "HHI") or by two-firm and four-firm concentration ratios. The proposed acquisition, if consummated, will substantially increase that concentration.

29. In the United States all-collagen and edible collagen product markets, there are only four firms, and Devro and Teepak are the top two firms. In the world all-collagen and edible collagen markets, only four firms, including Devro and Teepak, account for approximately 98% of all sales. In each relevant market, the proposed acquisition would convert a market now comprised only of four significant firms to a market that would be comprised only of three significant firms.

30. In the United States all-collagen sausage casings market, the proposed acquisition would increase the HHI by approximately 2000 points and produce an industry concentration of approximately 4700 points. In the United States edible collagen sausage casings market, the proposed acquisition would increase the HHI by approximately 3300 points and produce an industry concentration of approximately 6800 points. In the world all-collagen sausage casings market, the proposed acquisition would increase the HHI by approximately 1600 points and produce an industry concentration of approximately 4700

points. In the world edible collagen sausage casings market, the proposed acquisition would increase the HHI by approximately 3700 points and produce an industry concentration of approximately 5100 points.

#### VI. EFFECTS OF THE ACQUISITION

31. The acquisition may substantially lessen competition in the relevant markets in the following ways, among others:

- (a) By eliminating direct competition between respondents and Teepak;
- (b) By increasing the likelihood that respondents will unilaterally exercise market power; and
- (c) By increasing the likelihood of, or facilitating, collusion or coordinated interaction;

each of which increases the likelihood that the prices of collagen sausage casings will increase, and services to customers of collagen sausage casings are likely to decrease.

#### VII. VIOLATIONS CHARGED

32. The letter of intent, and the subsequent agreement, entered into between respondent Devro International and Teepak, for Devro International to acquire Teepak, constitute a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. Further, if the acquisition is consummated, Devro International and Devro Inc. would be in violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. 18.

#### DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Devro International plc and Devro Inc. of the outstanding voting securities of Teepak International, Inc. ("Teepak"), and it now appearing that Devro International plc and Devro Inc., hereinafter sometimes referred to as "respondents," have 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 the Clayton Act and Federal Trade Commission Act;

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

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

1. Respondent Devro International plc is a corporation organized, existing, and doing business under and by virtue of the laws of Scotland, with its office and principal place of business at Moodiesburn, Chryston, G69 OJE, Scotland.

2. Respondent Devro Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business at Southside Avenue, Somerville, New Jersey.

3. Teepak International, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at Three Westbrook Corporate Center, Suite 1000, Westchester, Illinois.

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

## ORDER

### I.

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

A. "*Devro International plc*" means that company and its predecessors, subsidiaries, divisions, groups and affiliates controlled by Devro International plc, and its respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of each.

B. "*Devro Inc.*" means that company and its predecessors, subsidiaries, divisions, groups and affiliates controlled by Devro Inc. and its respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of each.

C. "*Devro Canada*" means DCI Devro Canada Inc., and its predecessors, subsidiaries, divisions, groups and affiliates controlled by DCI Devro Canada Inc. and its respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of each.

D. "*Teepak*" means Teepak International, Inc., and its predecessors, subsidiaries, divisions, groups and affiliates controlled by Teepak International, Inc. and its respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of each. The definition of "Teepak" specifically excludes Devro International plc, Devro Inc., and Devro Canada. For purposes of Parts VII and VIII of this order, after the Acquisition, Teepak will be regarded as part of respondent Devro International plc.

E. "*Respondents*" means Devro International plc and Devro Inc.

F. "*Acquisition*" means the proposed acquisition by Devro International plc of the outstanding voting securities of Teepak International, Inc.

G. "*Assets To Be Divested*" means:

1. All assets related to the collagen sausage casings business of Devro Inc. and Devro Canada, including, but not limited to:

a. All production and finishing facilities, plant, and equipment of Devro Inc., including the plant located at Somerville, New Jersey,

and, wherever located, all machinery, fixtures, equipment, kitchen facilities, laboratory testing equipment and facilities, research and development facilities and programs, vehicles, transportation facilities, furniture, tools and other tangible personal property, customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, technical information, and management information systems;

b. All production and finishing facilities, plant, and equipment of Devro Canada, including the plant located in Markham, Ontario, Canada, and, wherever located, and to the extent they exist, all machinery, fixtures, equipment, kitchen facilities, laboratory testing equipment and facilities, research and development facilities and programs, vehicles, transportation facilities, furniture, tools and other tangible personal property, customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, technical information, and management information systems;

c. All intellectual property, including product and process patents, patent rights, patent improvements, process improvements, trademarks, service marks, copyrights, technology, knowhow, basic research, trade secrets, goodwill, or trademarks that Devro Inc. or Devro Canada use, license, have rights to, or otherwise have an interest in; provided, however, that Devro International may retain all rights to the trademark Devro®, trade name "Devro", and the stylized letter "D";

d. All Devro Inc. and Devro Canada inventory and storage capacity;

e. All rights, titles, and interest in and to real property owned or leased by Devro Inc. and Devro Canada, together with all appurtenances, licenses, and permits;

f. All rights, titles, and interests in and to contracts entered into in the ordinary course of business between Devro Inc. and Devro Canada with customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, and consignees;

g. All rights of Devro Inc. and Devro Canada, under warranties and guarantees, express or implied;

h. All books, records, and files of Devro Inc. and Devro Canada;

i. All items of prepaid expense to Devro Inc. and Devro Canada;  
and

2. From Devro International plc:

a. On a non-exclusive basis, with no right to sub-license to a third party, all rights to any information or intellectual property relating to Devro International (but not any information or intellectual property of Teepak in existence at the time of the Acquisition) in development or already developed by Devro International at the time of the divestiture, plus all enhancements, improvements or perfections thereof within twenty-four (24) months of the divestiture, including information or intellectual property relating to product and process patents, patent rights, patent improvements, technology, knowhow, basic research, or trade secrets regarding any research and development programs or activities, wherever located, to the extent that such information or intellectual property relate to the manufacture, finishing, distribution, or sale of collagen sausage casings; and

b. All additional tangible and intangible assets of Devro International, wherever located, reasonably necessary to enable the acquirer of the Assets To Be Divested to manufacture, finish, distribute, and market collagen sausage casings in substantially the same manner, quality, and quantity achieved by Devro Inc. and Devro Canada prior to the divestiture, other than any tangible or intangible assets of Teepak in existence at the time of the Acquisition.

H. "*Excluded Assets*" means the following entities: Devro Limited, Devro Holdings Limited, Devro Pty Limited, Devro BV, Devro Asia Limited, Devro GmbH, and Devro KK, and Teepak and its tangible and intangible assets in existence at the time of the Acquisition. The term "*Excluded Assets*" does not include (that is, the following assets are not *Excluded Assets*) specifically identifiable tangible and intangible assets of these excluded entities (other than those of Teepak at the time of the divestiture) related to the manufacture and finishing of collagen sausage casings.

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

II.

*It is further ordered, That:*

A. Within three (3) months of the date the order becomes final, respondents shall divest, absolutely and in good faith, at no minimum price, the Assets To Be Divested.

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

C. The proposed acquirer shall not be a firm that has been engaged in the manufacture of collagen sausage casings for sale, other than to itself, in the United States.

D. The Assets To Be Divested shall be divested only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

### III.

*It is further ordered, That:*

A. If respondents have not divested the Assets To Be Divested, absolutely and in good faith, with the Commission's prior approval, within three (3) months of the date this order becomes final, 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(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), 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(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by respondents to comply with this order.

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

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after 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, and consistent with the provisions of paragraphs II. B. - D. of this order, 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 the divestiture required by this order.

4. The trustee shall have six (6) months from the date the Commission approves the trust agreement described in paragraph III. B. 3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the six-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 for up to an additional twelve (12) months each time.

5. The trustee shall, to the extent not prohibited by United States or Canadian law, have full and complete access to the personnel, books, records and facilities related to the Assets To Be Divested or to any other relevant information, as the trustee may reasonably request. Respondents shall develop such financial or other information as such 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 the acquirer as set out in Part II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondents from among those approved by the Commission.

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

10. In the event the trustee is unable to divest the Assets To Be Divested, the trustee may divest such additional assets of respondent Devro International, other than the Excluded Assets, as may be reasonably necessary to enable the trustee to divest the Assets To Be Divested.

11. 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.

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 divestiture.

#### IV.

*It is further ordered, That:*

A. Upon reasonable notice to respondents from the acquirer approved by the Commission pursuant to this order, respondents shall provide such assistance to the acquirer as is reasonably necessary to enable the acquirer to manufacture, finish, distribute and market collagen sausage casings in substantially the same manner, quality, and quantity achieved by Devro Inc. and Devro Canada prior to the divestiture. Such assistance shall include reasonable consultation with knowledgeable employees of respondents and training at the acquirer's facility for a period of time sufficient to ensure that the acquirer's personnel are appropriately trained in the manufacture, finishing, distribution, and marketing of collagen sausage casings in the manner carried on by Devro Inc. and Devro Canada prior to the divestiture. Respondents, however, shall not be required to continue providing such assistance for more than two (2) years from the date of the divestiture. Respondents may charge the acquirer at a rate no greater than their direct costs for providing such technical assistance.

B. Respondents shall facilitate and not interfere with the hiring by the acquirer approved by the Commission of employees of Devro Inc. and Devro Canada who may desire to undertake employment.

C. Pending divestiture of the Assets To Be Divested, respondents shall take such actions as are reasonably necessary to maintain the

viability and marketability of the Assets To Be Divested and to prevent their destruction, removal, wasting, deterioration or impairment of any kind, except for ordinary wear and tear.

V.

*It is further ordered,* That respondents shall continue to comply with all terms of the Agreement to Hold Separate attached to this order and made a part hereof as Appendix II. Said Agreement shall remain in force and effect until the Assets To Be Divested have been divested as required by this order.

VI.

*It is further ordered,* That:

Within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until respondents have fully complied with the provisions of Parts II, III, and IV of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, or have complied with 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 the order, and their compliance with the terms and conditions of the Agreement To Condition Acquisition and the Agreement To Hold Separate, and set forth the monthly sales of Devro Inc. and Devro Canada during the preceding two months and compared to the monthly sales during the same months in the preceding calendar year. Respondents shall include in their compliance reports copies of all written communications, internal memoranda, and reports and recommendations concerning divestiture and the manner in which the Assets To Be Divested are being held separate.

VII.

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

each respondent shall permit any duly authorized representative of the Commission:

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

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

### VIII.

*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 corporations that may affect compliance obligations arising out of the order.

### APPENDIX I

#### AGREEMENT TO CONDITION ACQUISITION ON SHAREHOLDER APPROVAL OF DIVESTITURE AND RETROACTIVE INDEMNIFICATION

This Agreement to Condition Acquisition on Shareholder Approval of Divestiture and Retroactive Indemnification ("Agreement to Condition Acquisition") is by and between Devro International plc, a corporation organized, existing, and doing business under and by virtue of the laws of Scotland, with its office and principal place of business at Moodiesburn, Chryston, Scotland; Devro Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business at Somerville, New Jersey; and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

*Whereas*, Devro International plc entered into an agreement with Hillside Industries Incorporated for Devro International plc to acquire the outstanding voting securities of Teepak International Inc. ("Teepak"), a Delaware corporation (hereinafter "the Acquisition");

*Whereas*, Devro International plc and Devro Inc. manufacture, finish, distribute, and sell collagen sausage casings, and DCI Devro Canada Inc. ("Devro Canada") finishes, distributes, and sells collagen sausage casings;

*Whereas*, Teepak, with principal offices located at Westchester, Illinois, among other things, also manufactures, finishes, distributes, and sells collagen sausage casings;

*Whereas*, the Commission is investigating the Acquisition to determine whether it would violate any statute enforced by the Commission;

*Whereas*, Devro International plc and Devro Inc. are willing (a) to enter into an Agreement Containing Consent Order requiring them to divest certain Assets To Be Divested, as defined in Part I of the proposed consent order of the Agreement Containing Consent Order, which include the collagen sausage casings business of Devro Inc., Devro Canada, and assets of Devro International plc related thereto (hereinafter "the Divestiture"); (b) to enter into an Agreement To Hold Separate requiring that the Assets To Be Divested be held separate and apart from the remainder of the assets of Devro International pending their divestiture; and (c) to arrange and provide for the unlimited indemnification for the independent auditor/manager, retroactive as of the date of the appointment of the auditor/manager, pursuant to this Agreement to Condition Acquisition and the Agreement to Hold Separate (hereinafter "the Retroactive Indemnification");

*Whereas*, if the Commission accepts the attached Agreement Containing Consent Order, which would require the divestiture of the Assets To Be Divested, the Commission is required to place the consent order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Rule 2.34 of the Commission's Rules of Practice and Procedure, 16 CFR 2.34;

*Whereas*, the Commission is advised and concerned that, under the applicable law of the United Kingdom, Devro International will be unable to commit to, or be bound by, certain of the terms of the Agreement Containing Consent Order and the Agreement to Hold

Separate unless and until those terms are approved by the shareholders of Devro International plc;

*Whereas*, the Commission is advised that, under the applicable law of the United Kingdom, Devro International plc will not be able to seek shareholder approval for (a) the Divestiture or (b) the Retroactive Indemnification, until after all of the terms of the Agreement Containing Consent Order, the Agreement to Hold Separate, and this Agreement to Condition Acquisition are made known to the shareholders of Devro International plc, which can only happen after the Commission accepts the Agreement Containing Consent Order for public comment, and the Agreement to Hold Separate and the Agreement To Condition Acquisition;

*Whereas*, the Commission will not accept for public comment an Agreement Containing Consent Order or an Agreement to Hold Separate that is not binding on the proposed respondents;

*Whereas*, the undersigned officials of Devro International plc and Devro Inc. and their attorneys at this time are authorized to make the following binding commitments:

1. Devro International plc and Devro Inc. will seek shareholder approval for, at the same time, as part of a single package, and as a mutually contingent matter, (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification;

2. The shareholder approval will be sought, and if unconditionally obtained, (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification will be fully authorized, no less than seven (7) days prior to the completion of the sixty (60) day public comment period during which the Agreement Containing Consent Order will have been placed on the public record;

3. Devro International plc and Devro Inc. will advise the Commission's Bureau of Competition in writing, within twenty-four (24) hours, of all actions taken by the shareholders in connection with the effort to obtain approval for (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification; and

4. Devro International plc, Devro Inc., and all entities controlled by either of them will not acquire, directly or indirectly, Teepak or any of its assets without unconditional shareholder approvals having been obtained and fully authorized for (a) the Divestiture and (b) the Retroactive Indemnification;

*Whereas*, Devro International plc represents to the Commission that (1) the directors of Devro International plc will officially recommend to the shareholders of Devro International plc that they approve (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification; (2) Devro International plc will use its best efforts to obtain shareholder approval for (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification; (3) in light of (1) and (2) above, it would be highly unusual if the shareholders of Devro International plc were to reject (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification; and (4) Devro International plc fully expects the shareholders of Devro International plc to approve (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification;

*Whereas*, shareholder approval of (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification will be presented to the shareholders for their approval as part of a single resolution, to be voted upon as a package only, and Devro International plc and Devro Inc. will not be authorized to consummate the Acquisition unless and until they are also authorized (a) to make the Divestiture and (b) to grant the Retroactive Indemnification;

*Whereas*, shareholder approval for (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification will be sought, and determined, prior to the time that the Commission will consider whether to accept the final Agreement Containing Consent Order under the Commission's Rules;

*Whereas*, the Commission is concerned that if an agreement is not reached regarding the nature and timing of the shareholder approval and the commitment on the part of Devro International and Devro Inc. not to consummate the acquisition unless and until the requisite shareholder approvals are obtained, appropriate divestiture resulting from any proceeding challenging the Acquisition might not be possible or might produce a less than effective remedy;

*Whereas*, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the Divestiture and the continued viability and competitiveness of the Assets To Be Divested;

*Whereas*, Devro International plc and Devro Inc.'s entering into this Agreement shall in no way be construed as an admission by them that the Acquisition is illegal;

*Whereas*, Devro International plc and Devro Inc. understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement;

*Now, therefore*, the parties agree, upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will not seek further relief from Devro International plc or Devro Inc. with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement, the Agreement to Hold Separate, and the consent order to which this Agreement is annexed and made a part thereof, as follows:

1. The Acquisition by Devro International plc or Devro Inc. of Teepak is contingent upon shareholder approval.

2. Devro International plc and Devro Inc. will not seek shareholder approval for the Acquisition without, at the same time, and as part of the same package, also seeking mutually contingent shareholder approval for (a) the Divestiture and (b) the Retroactive Indemnification.

3. Unconditional shareholder approval will be sought, and if obtained, be fully authorized, no less than seven (7) days prior to the completion of the sixty (60) day public comment period during which the Agreement Containing Consent Order will have been placed on the public record.

4. In no event will Devro International plc or Devro Inc. or any entity controlled by either acquire, directly or indirectly, Teepak or any of its assets without unconditional shareholder approvals having been obtained and fully authorized for (a) the Divestiture and (b) the Retroactive Indemnification.

5. Unless and until unconditional shareholder approval is obtained for (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification, Devro International plc and Devro Inc., or any entity controlled by either, will not acquire, directly or indirectly, Teepak or any of its assets.

6. At such time as the shareholders of Devro International may unconditionally approve (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification, Devro International and Devro



Inc., by and through their authorized representatives, shall notify the Commission's Bureau of Competition, in writing, within twenty-four (24) hours, of the action taken.

7. Devro-International and Devro Inc., by and through their signatories, warrant that they are fully-authorized to enter into the terms of this Agreement to Condition Acquisition and to bind Devro International plc and Devro Inc. to all of its terms and conditions.

8. This Agreement shall be binding when approved by the Commission.

## APPENDIX II

### AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Agreement") is by and between Devro International plc, a corporation organized, existing, and doing business under and by virtue of the laws of Scotland, with its office and principal place of business at Moodiesburn, Chryston, Scotland; Devro Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business at Somerville, New Jersey; and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

*Whereas*, Devro International plc entered into an agreement with Hillside Industries Incorporated for Devro International plc to acquire the outstanding voting securities of Teepak International, Inc. ("Teepak"), a Delaware corporation (hereinafter "Acquisition");

*Whereas*, Devro International plc and Devro Inc. manufacture, finish, distribute, and sell collagen sausage casings, and DCI Devro Canada Inc. ("Devro Canada") finishes, distributes, and sells collagen sausage casings;

*Whereas*, Teepak, with principal offices located at Westchester, Illinois, among other things, also manufactures, finishes, distributes, and sells collagen sausage casings;

*Whereas*, the Commission is investigating the Acquisition to determine whether it would violate any statute enforced by the Commission;

*Whereas*, if the Commission accepts the attached Agreement Containing Consent Order, which would require the divestiture of certain Assets To Be Divested, as defined in Part I of the consent order, which include the collagen sausage casings business of Devro Inc., Devro Canada, and assets of Devro International plc related thereto, the Commission is required to place the consent order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules of Practice and Procedure, 16 CFR 2.34;

*Whereas*, the Commission is concerned that if an understanding is not reached preserving the *status quo ante* of the Assets To Be Divested during the period prior to the acceptance of the final consent order by the Commission, after the 60-day notice period, divestiture resulting from any proceeding challenging the Acquisition might not be possible or might produce a less than effective remedy;

*Whereas*, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Assets To Be Divested and the continued viability and competitiveness of the Assets To Be Divested;

*Whereas*, the purpose of this Agreement and the consent order is to:

1. Preserve and maintain the Assets To Be Divested as a viable, competitive and independent business engaged in the manufacture, finishing, distribution and sale of collagen sausage casings pending divestiture;
2. Limit the potential for interim competitive harm during the period between the Acquisition and the required divestiture; and
3. Remedy any anticompetitive effects of the Acquisition;

*Whereas*, Devro International plc and Devro Inc.'s entering into this Agreement shall in no way be construed as an admission by them that the Acquisition is illegal;

*Whereas*, Devro International plc and Devro Inc. understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement;

*Now, therefore*, the parties agree, upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will not seek further relief from Devro International plc or Devro Inc. with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement, the Agreement to Condition Acquisition, and the consent order to which this Agreement is annexed and made a part thereof, as follows:

1. Devro International plc and Devro Inc. agree to execute the Agreement Containing Consent Order and be bound by the consent order.

2. Devro International plc and Devro Inc. agree to execute and be bound by the Agreement To Condition Acquisition.

3. Devro International plc and Devro Inc. agree that until the earlier of the dates listed in subparagraphs 3 (a) and 3 (b) of this paragraph, they will comply with the provisions of paragraph 4 of this Agreement:

(a) Three (3) business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Commission Rule 2.34, 16 CFR 2.34; or

(b) The day after the divestiture required by the consent order has been completed.

4. To ensure the complete independence and viability of Devro Inc., Devro Canada, and the Assets To Be Divested, and to further ensure that no competitive information is exchanged between Devro International plc and Devro Inc., Devro Canada, and the persons responsible for maintaining and operating the Assets To Be Divested, Devro International plc shall hold Devro Inc., Devro Canada, and the Assets To Be Divested, as defined in the consent order, separate and apart from all of its other operations, on the following terms and conditions:

(a) Devro International plc will appoint three persons to manage and maintain the business and assets of Devro Inc., Devro Canada, and the Assets To Be Divested. These persons ("the Management Team") shall agree to be bound by this Agreement and shall manage

Devro Inc., Devro Canada, and the Assets To Be Divested independent of the management of Devro International plc's other business operations, including those of Teepak, after Devro International plc acquires Teepak. The persons on the Management Team shall not be involved in any way in the manufacture, finishing, distribution, or sale of sausage casings by Devro International plc or Teepak. The management team shall conduct the business operations of Devro Inc., Devro Canada, and the Assets To Be Divested.

(b) The Management Team, in its capacity as such, shall report directly and exclusively to an independent auditor/manager, to be appointed by Devro International plc. The independent auditor/manager, who shall not be an employee or agent of Devro International plc or a person likely to be an employee or agent of Devro International plc within two years of the divestiture, shall have expertise in the manufacture, finishing, distribution, or sale of collagen sausage casings. The independent auditor/manager shall agree to be bound by this Agreement and shall have exclusive control over the operations of Devro Inc., Devro Canada, and the Assets To Be Divested, with responsibility for their management and maintaining their independence. The independent auditor/manager shall not be involved in any way in the business of manufacturing, finishing, distribution, or sale of sausage casings by Devro International plc or Teepak.

(c) Devro International plc shall not exercise direction or control over, or influence directly or indirectly, the independent auditor/manager, or the Management Team, or Devro Inc., Devro Canada, or the Assets To Be Divested, other than as may reasonably be necessary to assure compliance with this Agreement and with all applicable laws.

(d) Devro International plc shall not change the composition of the Management Team without the consent of the independent auditor/manager.

(e) Devro International plc shall maintain the viability, competitiveness, and marketability of the Assets To Be Divested and shall neither cause nor permit the destruction, removal, wasting, deterioration, or impairment of the Assets To Be Divested, except as may occur in the ordinary course of business and except for ordinary wear and tear, and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair their viability, competitiveness, or marketability.

(f) Except for the Management Team, Devro International plc shall not permit any Devro International plc Board Member, officer, director, employee, or agent to be involved in the business operations of the Assets To Be Divested.

(g) Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, complying with requirements of the London Stock Exchange and independent auditors, defending investigations or defending or prosecuting litigation, negotiating agreements to divest assets, or complying with this Agreement or the consent order, Devro International plc shall not receive or have access to, or use or continue to use, any material confidential information about Devro Inc., Devro Canada, or the Assets To Be Divested, in connection with the operation of Devro International plc or its operation of the Teepak business. "Material confidential information" means competitively sensitive or proprietary information not in the public domain, including, but not limited to, customer lists, price lists, marketing methods, patent rights, knowhow, technologies, processes, process improvements or other trade secrets or confidential business information.

(h) Devro International plc, Devro Inc. and Devro Canada shall circulate to all employees of Devro Inc. and Devro Canada, and display in a conspicuous place at Devro Inc. and Devro Canada manufacturing facilities, notice of this Agreement to Hold Separate and the proposed consent order in the form attached hereto as Attachment A.

(i) Devro International plc shall give funds to the Management Team for all capital expenditures relating to Devro Inc. and Devro Canada previously planned or approved by Devro International plc to the extent Devro Inc. does not generate sufficient cash flow to fund such capital expenditures. The Management Team shall expend the funds for these previously planned capital expenditures.

(j) The Management Team shall take all steps reasonably necessary to optimize the profitable operations and continued viability of Devro Inc., Devro Canada, and the Assets To Be Divested, including, but not limited to:

(1) Paying all direct costs and indirect overheads relating to the business of Devro Inc., Devro Canada, and the Assets To Be Divested;

(2) Making available funds for advertising and other marketing and promotional activities at no less than the level for the comparable period in the preceding calendar year;

(3) Providing no less than the same level of sales commissions or incentives for sales personnel as were provided for the comparable period in the preceding calendar year;

(4) Maintaining the same level of resources involved in sales and marketing as was the case in the normal course of business prior to the Acquisition; and

(5) Expending funds sufficient to perform all reasonably necessary routine maintenance to, and replacements of, the Assets To Be Divested.

In the event that Devro Inc., Devro Canada, and the Assets To Be Divested do not generate sufficient cash flow to fund the activities reasonably necessary to optimize the profitable operations and viability of Devro Inc., Devro Canada, and the Assets To Be Divested, Devro International plc shall advance such sums as are reasonably necessary to pay for same, to be repaid by the acquirer at no interest within two (2) years.

(k) The compensation and expenses of the independent auditor/manager shall be the responsibility of Devro International plc. Devro Inc., Devro Canada, and the Assets To Be Divested shall not be charged by Devro International plc with those costs and expenses.

(1) Devro International plc shall indemnify the independent auditor/manager against any losses or claims of any kind that might arise out of his or her involvement under this Agreement, not to exceed \$5 million, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts or bad faith; provided however, upon shareholder approval of the unlimited indemnification of the auditor/manager, retroactive as of the date of the appointment of the auditor/manager, the \$5 million liability limitation shall become null and void, under the terms of the Agreement to Condition Acquisition.

(m) If the independent auditor/manager fails to act, or ceases to act, diligently, a substitute auditor/manager shall be appointed by Devro International plc in the manner provided in paragraph 4 (b) of this Agreement.

(n) The independent auditor/manager shall have access to, and be informed about, the names of the companies who may inquire about,

or seek or propose to buy, Devro Inc., Devro Canada, or the Assets To Be Divested. Devro International plc may require the independent auditor/manager to sign a confidentiality agreement prohibiting the auditor/manager from disclosing any material confidential information obtained as a result of his or her role as independent auditor/manager, to anyone other than the Commission.

(o) All material transactions other than those in the ordinary course of business, if not precluded by this paragraph, shall be subject to a majority vote of the Management Team. In the event of a tie vote, the independent auditor/manager shall cast the deciding vote.

5. Should the Federal Trade Commission seek in any proceeding to compel Devro International plc or Devro Inc. to divest any of the Assets To Be Divested, or any additional assets, as provided in the consent order, or to seek any other injunctive or equitable relief for any failure to comply with the consent order or this Agreement, as defined in the draft complaint attached to the Agreement Containing Consent Order, Devro International plc and Devro Inc. shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission permitted the Acquisition. Devro International plc and Devro Inc. also waive all their rights to contest the validity of this Agreement.

6. To the extent that this Agreement requires Devro International plc or Devro Inc. to take, or prohibits them from taking, certain actions that otherwise may be required or prohibited by contract, Devro International plc and Devro Inc. shall abide by the terms of this Agreement and the consent order and shall not assert as a defense such contract requirements in a civil penalty action brought by the Commission to enforce the terms of this Agreement or consent order.

7. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to counsel, Devro International plc and Devro Inc. shall permit any duly authorized representative or representatives of the Commission:

(a) Access during the office hours of Devro International plc and Devro Inc., and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other

records and documents in their possession or under their control relating to compliance with this Agreement; and

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

8. This Agreement shall not be binding until approved by the Commission. Devro International plc and Devro Inc. acknowledge that from the date they sign this Agreement until such time as the Commission may approve this Agreement, they will undertake to maintain the Assets To Be Divested in a viable condition.

9. Subsequent to acceptance for public comment of the Agreement Containing Consent Order by the Commission and after the unconditional approval by the shareholders of Devro International obtained not less than seven (7) days prior to the end of the 60-days public comment period, of (a) the Acquisition, (b) the divestiture of the Assets To Be Divested under the terms of the Agreement Containing Consent Order, and (c) the retroactive indemnification, under the definitions and terms of the Agreement To Condition Acquisition and this Agreement to Hold Separate, with written notice having been given to the Commission's Bureau of Competition, in writing, within twenty-four (24) hours, of the unconditional approval by the shareholders, Devro International plc may consummate the Acquisition.

10. This Agreement shall be binding when approved by the Commission.

11. Devro International plc and Devro Inc., by and through their signatories, warrant that they are fully authorized to enter into the terms of this Agreement to Hold Separate and to bind Devro International plc and Devro Inc. to all of its terms and conditions.

#### ATTACHMENT A

#### IMPORTANT NOTICE

As you know, Devro International plc has entered into an agreement with the Federal Trade Commission ("FTC") in connection with the proposed acquisition of Teepak International, Inc. Under the terms of the agreement with the FTC, Devro International must sell



Devro Inc. and DCI Devro Canada Inc. to a third party that is acceptable to the FTC. We anticipate that this will occur within the next several months.

The agreement with the FTC also requires that, until Devro Inc. and Devro Canada are sold, Devro International must preserve and maintain them as competitive and independent businesses separate from Devro International.

To ensure that Devro Inc. and Devro Canada are kept separate from Devro International, a three-person management team, composed of \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, will assume the management of Devro Inc. and Devro Canada. This management team, which will operate totally independently of Devro International, will report directly and exclusively to \_\_\_\_\_, an independent auditor/manager.

The effect of Devro International's agreement with the FTC is that, for all intents and purposes, Devro International will no longer be playing any role in the management and operation of Devro Inc. and Devro Canada. Until such time as the future owners of Devro Inc. and Devro Canada are determined, it is the responsibility of every employee of Devro Inc. and Devro Canada to cooperate with the new management team and to help to preserve Devro Inc. and Devro Canada as competitive and independent businesses.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Although I have voted to accept the consent order requiring divestiture, I have reservations about the provision of the order that excludes some incumbent firms from eligibility to acquire the assets to be divested.<sup>1</sup> According to the Notice To Aid Public Comment that accompanied the proposed order when it was published for comment, the "purpose of this exclusion is to preclude Devro from attempting to divest Devro North America to a competitor where there are likely to be further anticompetitive effects." Since any proposed divestiture under the order must be approved by the Commission,<sup>2</sup> an attempt by Devro to make an anticompetitive divestiture likely would be fruitless. In addition, Devro would risk appointment under the order

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<sup>1</sup> Order paragraph II.C states that the acquirer of the assets to be divested "shall not be a firm that has been engaged in the manufacture of collagen sausage casings for sale, other than to itself, in the United States."

<sup>2</sup> Order paragraph II.D.

of a trustee to accomplish divestiture and incurring civil penalties for failure to make a timely divestiture.

Attempts to define in advance the field of eligible acquirers under a divestiture order are unnecessary, at best, potentially inefficient and possibly even anticompetitive. It is an inefficient use of resources to attempt to assess in advance the competitive effects of a transaction that Devro might or might not propose (especially if the exclusion covers more than one firm), even if the transaction-specific information necessary to our merger analysis were available. As a practical matter, any such exclusions will be based on something less than an adequate factual examination of the various possible proposed divestitures and will necessarily involve the risk of excluding firms that might have been acceptable and even procompetitive acquirers. That risk is unnecessary and should be unacceptable in view of the requirement to obtain the Commission's approval before any divestiture can take place and the availability of other sanctions for failing to make a timely divestiture.