

IN THE MATTER OF  
CONSUMER DIRECT, INC., ET AL.

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

*Docket 9236. Complaint, Jan. 5, 1990\*—Decision, Oct. 29, 1990*

This consent order prohibits, among other things, two Ohio based companies and their officers from making false and unsubstantiated claims about "Gut Buster", an exercise device. Respondents are required to include a notice stating—that overstretching the spring in the device may break the spring and cause injury—in all advertisements and to warn past purchasers of the potential for breakage and personal injury from the device.

*Appearances*

For the Commission: *Maureen Enright* and *Joel Winston*.

For the respondents: *Alan K. Palmer, Morrison & Foerster*,  
Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Fitness Quest, Inc. and Consumer Direct, Inc., corporations, and Richard A. Suarez and LuAnn Suarez, individually and as officers of said corporations, hereinafter sometimes referred to as 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 Fitness Quest, Inc. is an Ohio corporation, with its office and principal place of business located at 1400 Raff Road, S.W., Canton, Ohio.

Respondent Consumer Direct, Inc. is an Ohio corporation, with its office and principal place of business located at 1375 Raff Road, S.W., Canton, Ohio.

Respondents Richard A. Suarez and LuAnn Suarez are officers and directors of each of the corporate respondents named herein. They

\*Order Amending Complaint, in regards to the caption and preamble, issued April 30, 1990. See 113 FTC 327.

formulate, direct and control the acts and practices of said corporate respondents. LuAnn Suarez' address is the same as that of respondent Fitness Quest, Inc. Richard Suarez' address is the same as that of respondent Consumer Direct, Inc.

The aforementioned respondents cooperated and acted together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents have advertised, offered for sale, sold and distributed exercise products and devices, including the Gut Buster, to the public. The Gut Buster is a device marketed as a stomach exerciser which consists of a coil spring attached to a plastic hand grip-bar at one end and to a stirrup-like foot section at the other end.

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

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for the Gut Buster. Typical of respondents' advertisements and promotional materials, but not necessarily all-inclusive thereof, are the attached Exhibits A through C. The aforesaid advertisements and promotional materials contain the following statements and depictions:

1. "Gut Buster is the ultimate fitness machine, designed to do one thing supremely well, it firms and flattens the stomach as nothing else can. And all it takes is minutes a day with belly-burning basics like these spring-ups for the upper abdominal region. Reverse, and tension-assisted high risers exercise the lower abdomen. The secret is this resistance coil that springs into action at a touch and turns ordinary situps into power crunches! Gut Buster is the only stomach slimmer you'll ever need." (Video superscript: "THE 5 MIN. REGIMEN.") [Exhibit A]

2. "Just watch this easy exerciser turn ordinary sit-ups into fat-burning, tummy tightening, power stretches. Each time you activate the resistance coil is like trading ugly flab for sexy, sinous [sic] muscle ... [R]ow, row, row your way to a trimmer you ... [T]hat flat stomach you had in high school can be yours again. Minutes a day is all it takes." (Video superscript: "THE 5 MINUTE REGIMEN.") [Exhibit B]

3. "Flatten your stomach in just minutes a day! ... Yes, this gutsy little machine speeds you from fat to flat! ... Durable, no-nonsense construction makes Gut Buster the only stomach exerciser you'll ever need ... Forget about gyms, expensive rowing machines and wasted energy on exercises you don't need ... Go ahead Gut Busters, order today to get your stomach flat and keep it like that!" [Exhibit C]

PAR. 5. Through the use of the statements and depictions referred to in paragraph four and others in advertisements and promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that:

1. Use of the Gut Buster as stated and depicted will significantly flatten and trim the user's stomach.

2. Use of the Gut Buster as stated and depicted will strengthen or tone the user's stomach (abdominal) muscles sufficiently to significantly improve the user's waistline.

3. When used as stated and depicted, the Gut Buster is effective in burning or reducing stomach fat.

4. Use of the Gut Buster for five minutes per day will achieve the effects described in sub-paragraphs 1 through 3, above.

5. The Gut Buster is superior to ordinary sit-ups as a means of exercising and strengthening stomach (abdominal) muscles.

PAR. 6. In truth and in fact:

1. Use of the Gut Buster as stated and depicted will not significantly flatten and trim the user's stomach.

2. Use of the Gut Buster as stated and depicted will not strengthen or tone the user's stomach (abdominal) muscles sufficiently to significantly improve the user's waistline.

3. When used as stated and depicted, the Gut Buster is not effective in burning or reducing stomach fat.

4. Use of the Gut Buster for five minutes per day will not achieve the effects described in sub-paragraphs 1 through 3 of paragraph five.

5. The Gut Buster is not superior to ordinary sit-ups as a means of exercising and strengthening stomach (abdominal) muscles.

Therefore, the representations set forth in paragraph five were and are, false and misleading.

PAR. 7. Through the use of the statements and depictions set forth in paragraph four, and others not specifically set forth herein, respondents have represented, directly or by implication, that, at the time they made the representations set forth in paragraph five, respondents possessed and relied upon a reasonable basis for such representations.

PAR. 8. In truth and in fact, at the time respondents made the representations set forth in paragraph five, respondents did not possess and rely upon a reasonable basis for such representations. Therefore, respondents' representation as set forth in paragraph seven was, and is, false and misleading.

PAR. 9. In the advertising and sale of the Gut Buster, respondents have failed to disclose adequately that, when performed as directed, the Gut Buster exercises pose a risk of injury to users from snapping

or breakage of the product's spring or other parts. These facts would have been material to purchasers and owners of the Gut Buster in their decisions regarding the purchase and use of the Gut Buster. Respondents' failure to disclose these facts to purchasers and owners of the Gut Buster has caused substantial and ongoing injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. Respondents' failure to disclose these facts was, and is, an unfair act or practice.

PAR. 10. 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.

#### ORDER

1. For purposes of this order, all references to "exercise product or device" shall include any product or device designed or used to develop or maintain fitness or to strengthen, tone, firm, trim, flatten, condition, or stretch one or more body parts.

2. For purposes of this order, all references to "weight control product or device" shall include any product or device designed or used to prevent weight gain or to produce weight loss, reduction or elimination of fat, slimming, or a caloric deficit in a user of the product or device.

#### I.

*It is ordered*, That respondents Fitness Quest, Inc. and Consumer Direct, Inc., corporations, their successors and assigns, and their officers, and Richard A. Suarez and LuAnn Suarez, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, packaging, offering for sale, sale or distribution of the Gut Buster exerciser or any substantially similar device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such product or device will:

A. Significantly flatten or trim the user's stomach;

B. Strengthen or tone the user's stomach or abdominal muscles sufficiently to significantly improve the user's waistline;

C. Burn or reduce stomach fat;

D. Achieve any of the effects described in subparagraphs A through C above with a daily regimen of five minutes of use; or

E. Achieve stomach exercising or strengthening effects superior to those of ordinary sit-ups.

## II.

*It is further ordered,* That respondents Fitness Quest, Inc. and Consumer Direct, Inc., corporations, their successors and assigns, and their officers, and Richard A. Suarez and LuAnn Suarez, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, packaging, offering for sale, sale, or distribution of any exercise product or device or any weight control product or device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such product or device:

A. Is effective for exercising, strengthening or toning the body or any specific muscle or body part;

B. Can achieve any result superior or comparable to that achieved with any other product, device or exercise;

C. Can achieve any specific result upon use for any stated amount of time;

D. Is effective in burning off, reducing or eliminating fat;

E. Is effective in flattening, trimming, or slimming the stomach or any other body part; or

F. Can perform in any manner,

unless such representation is true and unless, at the time of making such representation, respondents possess and rely upon a reasonable basis consisting of competent and reliable evidence substantiating the representation.

For purposes of this provision, to the extent evidence consists of scientific or professional tests, analyses, research, studies or any other evidence based on expertise of professionals in the relevant area, such evidence shall be "competent and reliable" only if those tests,

analyses, research, studies, or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

### III.

*It is further ordered,* That respondents send by first-class mail to all past purchasers of the Gut Buster a notification letter stating in a clear and prominent manner that the device imposes a risk of harm to users from snapping or breakage of the product's spring or other parts.

### IV.

*It is further ordered,* That respondents, their successors and assigns, shall, for three (3) years after the date of the last dissemination of the representation to which they pertain, maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

- a. All materials that were relied upon by respondent(s) in disseminating any representation covered by this order; and
- b. All reports, tests, studies, surveys, demonstrations or other evidence in any respondent's possession or control that contradict, qualify, or call into question such representation, or the basis upon which the respondent relied for such representation, including complaints from consumers.

### V.

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

### VI.

*It is further ordered,* That for a period of ten (10) years from the

date of service of this order, each of the individual respondents named herein shall promptly notify the Commission in the event of the discontinuance of his/her present business or employment and of each affiliation with a new business or employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which said respondent is newly engaged as well as a description of said respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

#### VII.

*It is further ordered,* That respondents Fitness Quest, Inc. and Consumer Direct, Inc. shall distribute a copy of this order to each of its operating divisions, to each of its managerial employees, and to each of its officers, agents, representatives or employees engaged in the preparation and placement of advertising or other sales materials covered by this order and shall secure from each such person a signed statement acknowledging receipt of this order.

#### VIII.

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

Commissioner Calvani dissenting; and Commissioner Azcuenaga not participating by reason of recusal.

Complaint

113 F.T.C.

## EXHIBIT A

GUT BUSTER II 60 SPOT 9F FINAL SHOOT SCRIPT

4/8/87

VIDEO

1. Lift A-1  
Medium neck-to-waist shot of 2 men talking at a bar.
2. Lift A-2  
Both stomachs start to balloon out...
3. Lift A-3  
Cut to MCU. Gaps appear on his shirt front. Two buttons pop off.
4. Lift A-4  
Cut to shot framed as in #1 & #2, stomachs continue swelling until they touch.
5. Lift A-5  
Freeze. SUPER: RED STOP SYMBOL SLASH.
6. Lift A-6  
SUPER: RED CIRCLE TO COMPLETE STOP SYMBOL
7. Lift A-7  
Dissolve to established couple exercising in livingroom. (dolly)  
SUPER: CONSULT YOUR PHYSICIAN BEFORE BEGINNING THIS OR ANY OTHER PROGRAM OF EXERCISE.
8. Lift A-8  
Cut to as above, new angle. (overhead, perhaps).
9. Lift A-18  
Cut to Slide: THE 5 MIN. REGIMEN.
10. Lift A-19  
Cut to woman doing spring-ups in livingroom.
11. Lift A-20  
Diss. to new angle. She reverses to new exercise.
12. Lift A-27 (may need to go to original footage to cover)  
Pan of coil from original spot.
13. Lift A-28  
Cut to CU, man's hands bending spring.
14. Lift A-21 (may need to go to original footage to cover)  
Cut to man doing crunches. (Pick up good video for at least 8 continuous seconds)

AUDIO

1. Lift A-1  
SFX: (VO): If that trim little tum
2. Lift A-2  
you had in high school is getting a bit out of hand....
3. Lift A-3  
SFX: POP! POP!
4. Lift A-4  
you better draw the waistline somewhere. Well now you can.
5. Lift A-5  
SFX: WOOSH! With the original Gut Bust
6. Lift A-6  
SFX: CLANK!
7. Lift A-7  
MUSIC: (THEME, UNDER)  
Gut Buster is the ultimate fitness machi; designed to do one thing supremely well,
8. Lift A-8  
it firms and flattens the stomach as nothing else can.
9. Lift A-18  
And all it takes is minutes a day
10. Lift A-19  
with belly-burning basics like these spring-ups for the upper abdominal region
11. Lift A-20  
Reverse, and tension-assisted high risers exercise the lower abdomen.
12. NEW AUDIO  
The secret is this resistance coil
13. NEW AUDIO  
that springs into action at a touch
14. NEW AUDIO  
and turns ordinary situps into power crunches! Gut Buster is the only stomach slimmer you'll ever need,

000191

Exhibit A

GUT BUSTER II 60 SPOT 9F FINAL SHOOT SCRIPT

4/8/87 Pg. 2

VIDEO

15. Lift D-35  
Vertical crawl white type on black  
YOU MUST BE SATISFIED. PURCHASE  
PRICE REFUNDED IF NOT DELIGHTED
16. Lift C-16  
NEW VIDEO (shot for 60)  
CUT TO THEM EXERCISING IN  
LIVING ROOM HE AND SHE  
WEARING T-SHIRTS SPRING  
INTO VIEW, ONE AFTER ANOTHER.  
(FASTER THAN IN A-36,37)
17. Lift A-42  
Cut to man's hand picks up phone  
receiver and does a curl with it  
as if it were a dumb bell. SUPER:  
CALL TOLL FREE
18. Ordering Slide.

AUDIO

15. Lift C-14  
NEW AUDIO  
and it's yours with a money-back guarant
16. Lift C-16  
NEW AUDIO  
So go ahead Gut Busters, if your serious  
about a flat stomach
17. Lift A-42  
Exercise your right to call toll free now  
MUSIC: OUT
18. Tag.

600192

Complaint

113 F.T.C.

## EXHIBIT B

ORIGINAL CUT BUSTER 129 *\* linked stink - 90 sec.*

- | <u>VIDEO</u>   | <u>AUDIO</u>  |
|--|---|
| 1. Waist-high shot of two fat businessmen at a bar. One of them, who wears a vest with a broad chain across it, is holding a beer mug. The second is tapping his finger on his friend's stomach to make a point. | 1. ANCR. (VO): Behold the beer belly!   |
| 2. Waist-high shot of a fat mechanic in a T-shirt, changing a tire.  | 2. The old spare tire!  |
| 3. Waist-high shot of a fat woman serving a huge platter of pasta.   | 3. The labonza!!!   |
| 4. Freeze above and super the red international circle/slash symbol.   | 4. 50 million Americans need a shortcut to from fat...  |
| 5. Dissolve to male and female models, exercising at home as in the Trim-Track commercial.<br>SUPER: CONSULT YOUR PHYSICIAN BEFORE BEGINNING THIS OR ANY PROGRAM OF EXERCISE.                                    | 5. And here it is. It's called the Gut Buster!<br>MUSIC: IN<br>It's the ultimate fitness machine specifically designed to firm and flatter the stomach. |
| 6. Cut to new angle.   | 6. Just watch this easy exerciser turn ordinary sit-ups into  |
| 7. Cut to CU of his washboard stomach.   | 7. fat-burning, tummy tightening, power stretches.  |
| 8. Cut to CU of product in limbo. Start at hand grips and pan down spring.   | 8. Each time you activate the resistance coil   |
| 9. Dissolve to limbo shot of man's 2 hands bending spring.   | 9. is like trading ugly flab for sexy, sinou muscle.  |
| 10. CU of man's foot slipping into stirrup, shot from above.   | 10. Just slip into the stirrups...  |
| 11. CU man's hand tightening on grip.  | 11. curl your fingers around the molded handgrips   |
| 12. Cut to medium shot of man pulling back on machine.   | 12. and row,  |
| 13. Repeat shot 12.  | 13. row,  |
| 14. Repeat and complete shot 12.   | 14. row your way to a trimmer you.  |
| 15. Pull back to reveal woman in leotard seated near man.  | 15. And ladies, if you're as serious as he is   |
| 16. She starts exercising while he looks on.   | 16. that flat stomach you had in high school can be yours again.  |

000176 Exhibit B

ORIGINAL GUT BUSTER 120

Pg. 2

VIDEO

AUDIO

- |  |  |
|--|--|
| <p>17. Dissolve to white type on blue:</p> <p>18. Cut to woman doing "Spring-Ups" (sit-ups)</p> <p>19. Cut to woman on back, legs in air.</p> <p>20. Dissolve to woman in hotel room. She's wearing a business suit. She opens her suitcase...</p> <p>21. ...and takes out the product.</p> <p>22. Dissolve to woman exercising in hotel room. Camera circles her while horizontal crawl at the bottom of the frame reads: THE OFFICE...ON BUSINESS TRIPS...VACATIONS...</p> <p>23. Dissolve to vertical crawl white type on blue: AVOID IMITATIONS. YOU MUST SEE RESULTS FAST. YOU MUST BE SATISFIED. PURCHASE PRICE REFUNDED IN 30 DAYS IF NOT DELIGHTED.</p> <p>24. Man wearing T-shirt with circle/slash symbol on his stomach, enters frame left.</p> <p>25. Woman, wearing same T-shirt, enters frame right.</p> <p>26. Cut to hand reaching for and grasping phone receiver.</p> <p>27. Hand picks up phone receiver and does a curl with it, as if it were a dumb-bell.</p> <p>28. Freeze frame. SUPER: CALL TOLL FREE © 1986 Fitness Quest, Inc. Gut Buster™ is a trademark of Fitness Quest, Inc. Patent Pending</p> | <p>17. SLIDE: THE 5 MINUTE REGIMEN.</p> <p>18. Minutes a day is all it takes. Basic spring-ups like these work the upper abdominal region.</p> <p>19. Reverse, for tension-assisted high riser that exercise lower stomach muscles.</p> <p>20. This light but sturdy unit weighs in at just 27 ounces,</p> <p>21. and travels easily so you can exercise anywhere.</p> <p>22. Forget about gyms, expensive rowing machines, and exercises you don't need. If your stomach's the problem, Gut Buster is the answer.</p> <p>23. Copy cat devices may look similar, but nothing fights the battle of the bulge li the original Gut Buster. And it's yours with a 30-day money back guarantee of satisfaction. So go ahead Gut Busters!</p> <p>24. If you're serious...</p> <p>25. and you're serious about a flat stomach.</p> <p>26. just pick up the phone</p> <p>27. and exercise your right</p> <p>28. to call toll free now.</p> |
|--|--|

000177

The Original

Exhibit C

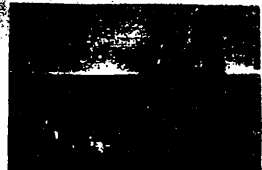
# Gut Buster™



## Flatten your stomach in just minutes a day!



**Amazing Gut Buster™ turns ordinary sit-ups into tummy tightening power stretches.**



Gut Buster power-assisted sit-ups work the upper abdominal region . . .



. . . Reverse, for tension-assisted high knee that work magic on lower stomach muscle

000173

**Y**es, this gutsy little machine speeds you from fat to flat!

Gut Buster is specifically designed to firm and flatten the stomach as nothing else can. Get back that flat stomach you had in high school—even though you thought those days were gone forever.

This extraordinary exerciser turns ordinary sit-ups into tummy tightening power stretches. Gals, Gut Buster is so tough on tummies you quickly get in perfect shape for snug jeans, knits and swim suits. Guys can trade those bulging bellies for sexy, sensuous muscle—fast!

### SO COMPACT IT TRAVELS ANYWHERE

Durable, no-nonsense construction makes Gut Buster the only stomach exerciser you'll ever need. Yet, it's so compact you can take it wherever you go. Pop it in your suitcase for trimming when you travel. Use it while you watch TV, at the office—anywhere—anytime you have a few minutes to spare.

Forget about gyms, expensive rowing machines and wasted energy on exercises you don't need. If your stomach is the problem, Gut Buster is your answer!

### NO RISK GUARANTEE

Don't settle for anything but the original Gut Buster. You risk nothing when you order. You must see a flat-as-a-pancake stomach or return it within 30 days for a full refund of your purchase price.

Go ahead Gut Busters, order today to get your stomach flat and keep it like that!

### ORDER TOLL FREE

Credit card customers don't wait any longer to get a flat stomach. Call toll free today: **1-800-255-4321.** Ask for operator 4042

### MAIL NO RISK COUPON TODAY

YES, I want to flatten my stomach in just minutes a day. Please send me \_\_\_\_\_ Gut Busters ordered below. I understand that I must be delighted or return it within 30 days for a refund (less shipping & handling).  EXTRA RUSH SERVICE: I'm in a hurry, I'm enclosing an extra \$1 for special handling and printing the word "RUSH" on the front of my envelope.

- CHECK OFFER DESIRED:**
- 1 Gut Buster ..... only \$19.95 + \$2.00 shipping & handling
  - YOU SAVE \$6.00 WHEN YOU ORDER TWO**
  - 2 Gut Busters ..... only \$34.90 + \$4.00 shipping & handling
- (Ohio residents add 6% sales tax—Any order outside Continental U.S. send \$8 shipping & handling per unit and allow 6 to 8 weeks for delivery. Canadian Residents: Please send \$29.99 + \$3 shipping and handling.)

**YOU MAY PAY IN ONE OF TWO WAYS:**

Cash, check or Money Order

MasterCard  VISA  Discover Card

Est. Date \_\_\_\_\_

Ass. # \_\_\_\_\_

**CHARGE IT!** By toll free phone: 1-800-255-4321 Ask for operator 4042

Name \_\_\_\_\_ Address \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_

## DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served a copy of that complaint, together with a notice of contemplated relief; 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 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 Secretary of the Commission having thereafter withdrawn the matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Consumer Direct, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 1375 Raff Road, S.W., Canton, Ohio.

Respondent The Gut Buster Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 1400 Raff Road, S.W., Canton, Ohio.

Respondent Fitness Quest, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 1400 Raff Road, S.W., Canton, Ohio.

Respondent Richard A. Suarez is an officer and director of the corporate respondents named herein. LuAnn Suarez is an officer of The Gut Buster Corporation and an officer and director of Fitness Quest, Inc. They formulate, direct and control the policies, acts and

practices of said corporations. Richard Suarez' address is the same as that of respondent Consumer Direct, Inc. LuAnn Suarez' address is the same as that of respondent Fitness Quest, Inc.

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

1. For purposes of this order, all references to "exercise product or device" shall include any product or device designed or used to develop or maintain fitness or to strengthen, tone, firm, trim, flatten, condition, or stretch one or more body parts.

2. For purposes of this order, all references to "any substantially similar device" means any exercise device consisting of a spring connected to handles and foot pedals that is marketed to be used to perform any spring-assisted stomach exercise.

3. For purposes of this order, all references to "weight control product or device" shall include any product or device designed or used to prevent weight gain or to produce weight loss, reduction or elimination of fat, slimming, or a caloric deficit in a user of the product or device.

#### I.

*It is ordered,* That respondents Consumer Direct, Inc., The Gut Buster Corporation, and Fitness Quest, Inc., corporations, their successors and assigns, and their officers, and Richard A. Suarez and LuAnn Suarez, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, packaging, offering for sale, sale or distribution of The Gut Buster exerciser or any substantially similar device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such product or device will:

- A. Significantly flatten or trim the user's stomach;
- B. Strengthen or tone the user's stomach or abdominal muscles sufficiently to significantly improve the user's waistline;

- C. Burn or reduce stomach fat;
- D. Achieve any of the effects described in subparagraphs A through C above with a daily regimen of five minutes of use; or
- E. Achieve stomach exercising or strengthening effects superior to those of ordinary sit-ups.

## II.

*It is further ordered,* That respondents Consumer Direct, Inc., The Gut Buster Corporation, and Fitness Quest, Inc., corporations, their successors and assigns, and their officers, and Richard A. Suarez and LuAnn Suarez, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, packaging, offering for sale, sale, or distribution of any exercise product or device or any weight control product or device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such product or device:

- A. Is effective for exercising, strengthening or toning the body or any specific muscle or body part;
- B. Can achieve any result superior or comparable to that achieved with any other product, device or exercise;
- C. Can achieve any specific result upon use for any stated amount of time;
- D. Is effective in burning off, reducing or eliminating fat;
- E. Is effective in flattening, trimming, or slimming the stomach or any other body part; or
- F. Can perform in any manner,

unless, at the time of making such representation, respondents possess and rely upon a reasonable basis consisting of competent and reliable evidence substantiating the representation.

For purposes of this provision, to the extent evidence consists of scientific or professional tests, analyses, research or studies, such evidence shall be "competent and reliable" only if those tests, analyses, research, or studies are conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

## III.

*It is further ordered,* That respondents shall include a clear and prominent notice in all advertisements, promotional materials, and product instructions, and on the product itself, for the Gut Buster exerciser or any substantially similar device, stating that overstretching the spring may break the spring and cause injury, and describing what steps should be taken to avoid overstretching the spring.

Nothing contrary to, inconsistent with, or in mitigation of the above required notice shall be used in any such advertising, instruction or promotional materials.

## IV.

*It is further ordered,* That respondents, their successors and assigns, and their officers, employees, agents and representatives, shall, in accordance with the provisions of this Part, provide notification to purchasers of the Gut Buster. *Provided, however,* that the requirements of this Part shall not apply to any owner or purchaser of a Gut Buster who returned the device to respondents or reported that it had been discarded, and received a full refund.

A. *Notification of Consumers*

1. Within twenty (20) days from the date of service of this order, respondents shall compile a current mailing list containing the name and last known address of each customer who purchased a Gut Buster from respondents in the United States. This list shall be separate from the list of names and last known addresses of Gut Buster purchasers and owners compiled pursuant to Parts IV.B.1 and IV.B.2 of this order.

2. In compiling this list, respondents shall retain a National Change of Address System ("NCOA") licensee to update this list by processing the list through the NCOA database.

3. Within thirty (30) days from the date of service of this order, respondents shall send a postcard, 3½ inches by 6 inches, in the form set forth in Appendix A to this order, by third class mail, to the last known address of each customer named on the mailing list compiled in accordance with Parts IV.A.1 and IV.A.2. The text of the postcard shall be printed in black ink. The phrase "WARNING! SAFETY NOTICE Read Carefully" shall appear on both the front and the back

of the postcard in red ink. The typeface of both the text and the phrase "WARNING! SAFETY NOTICE" shall be equal or larger in size to that set forth in Appendix A. No information other than that contained in Appendix A shall be included in or added to the postcard, nor shall any other material be transmitted therewith.

4. Respondents shall also mail the postcard described in Part IV.A.3 to any person about whom a respondent receives information through any inquiry indicating that (s)he purchased or owns a Gut Buster or any substantially similar device. The mailing required by this subparagraph shall be made within thirty (30) days of a respondent's receipt of a corrected address for, or information identifying, each such person.

*B. Notification of Persons Who Purchased Gut Busters  
Through Credit Card Solicitations*

1. Respondents shall use their best efforts to obtain the names and last known addresses of all persons who either purchased Gut Busters through solicitations in credit card bills or statements, or who own Gut Busters as a result of such a purchase. Such efforts shall include, but are not limited to, sending within five (5) days from the date of service of this order the letter attached hereto as Appendix B to all credit card syndicators used by respondents, and directly notifying, upon the approval of the appropriate syndicator, any credit card company that fails in response to a request from the syndicator to provide all available names and last known addresses of persons who purchased Gut Busters through solicitations in its bills or statements.

2. Within sixty (60) days from the date of service of this order, respondents shall compile a list of all purchasers identified pursuant to Part IV.B.1, shall retain a National Change of Address licensee to update this list in the manner specified in Part IV.A.2, and shall notify all such persons in the manner specified in Part IV.A.3 within seventy (70) days from the date of service of this order, or pay all reasonable expenses of having notices sent directly by the credit card syndicators or credit card companies.

3. Within seventy (70) days from the date of service of this order, respondents shall submit to the staff of the Federal Trade Commission a written report on all efforts taken to acquire the names and last known addresses of all persons who purchased the Gut Buster through solicitations in credit card bills or statements, including the total number of persons who purchased Gut Busters through this

method. Such report, which may be submitted as a part of the report filed pursuant to Part IX of this order, shall include a list of all Gut Buster purchasers whose names and last known addresses have been acquired from credit card syndicators or credit card companies. For each credit card company that provides any names and last known addresses of Gut Buster purchaser and/or represents that any names or last known addresses are not in its possession or control and are otherwise not reasonably available, respondents shall procure and submit as part of its report a written statement signed by an authorized corporate officer or responsible departmental manager of the credit card company stating that all names and last known addresses reasonably available have been provided, and with respect to any names or last known addresses that are not available, describing with specificity the reason(s) for the unavailability. *Provided*, that in any instance in which a credit card syndicator is in possession of the names and last known addresses of all persons who purchased the Gut Buster through solicitations in a particular credit card company's bills or statements, respondents shall instead procure and submit as part of its report a written statement signed by the credit card syndicator stating that all names and last known addresses reasonably available have been provided.

4. If any credit card syndicator or credit card company either (a) fails to respond to requests by any credit card syndicator and by respondents made pursuant to Part IV.B.1; or (b)(i) fails to provide either the names and last known addresses of all persons who purchased a Gut Buster through that company's solicitations or a written statement as described in Part IV.B.3 that said information is not available, and (ii) fails to provide a written statement that it mailed out all notifications itself, the report required by Part IV.B.3 shall include the names, addresses, and telephone numbers of each such credit card syndicator or credit card company. The staff of the Federal Trade Commission shall retain the right to contact each such credit card syndicator or credit card company directly.

5. Respondents shall notify in the manner specified in Part IV.A herein all Gut Buster owners or purchasers whose names and last known addresses the staff of the Federal Trade Commission has obtained from any credit card syndicator or credit card company within ten (10) days of their receipt of the names and addresses, or shall pay all reasonable expenses of having notices sent by the staff of the Federal Trade Commission or its agents or by credit card syndicators or credit card companies.

6. The submission to the staff of the Federal Trade Commission of the report required in Parts IV.B.3 and IV.B.4 containing all required information and the mailing of all required notifications to all Gut Buster purchasers identified pursuant to Part IV.B herein shall be deemed to be satisfactory compliance with the terms of Part IV.B of this order.

*C. Respondents' Obligation to Provide  
Retrofit Instructions*

1. Respondents shall maintain and provide adequate staffing for the toll-free telephone number specified in Appendix A which purchasers may call to request retrofit instructions or with inquiries relating to the retrofit program. This obligation shall expire two (2) years from the date of service of this order. From the date of the first mailing of a postcard pursuant to Part IV.A.3 to a date 120 days after the last mailing of a postcard pursuant to Part IV.A.3, the toll-free telephone number shall be staffed seven days a week between the hours of 8:00 a.m. to 10:00 p.m., Eastern Standard Time/Eastern Daylight Time, national holidays excluded. For the remainder of the two-year period in which respondents are to maintain this toll-free telephone number, respondents shall staff the number from 8:00 a.m. to 5:00 p.m., Eastern Standard Time/Eastern Daylight Time, Monday through Friday, national holidays excluded. At all times during the two-year period when respondents are not under an obligation to staff the toll-free number, respondents shall answer the number with a tape recorder announcing the hours during which the number is staffed. Respondents shall not promote or solicit the sale of any product or service in response to requests or inquiries to this toll-free telephone number.

2. Within ten (10) days from the receipt in any manner of a customer request for retrofit instructions, respondents shall mail instructions in the form set forth in Appendix C to this order by third class mail to the mailing address of each customer requesting such instructions.

3. If a customer informs a respondent that (s)he is unable to retrofit his or her Gut Buster after telephone assistance, respondents shall pay for shipment of the customer's Gut Buster to respondents for respondents to make the retrofit without charge to the customer.

*D. Respondents' Record-Keeping Requirements*

Respondents, their successors and assigns, shall, for three (3) years

after the date of service of this order, maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

1. Sufficient records to identify:

a. The name and last known address of each purchaser of the Gut Buster compiled pursuant to Part IV of this order;

b. The name and last known address of each person sent a notification postcard pursuant to Part IV.A.3 of this order and the date the postcard was mailed;

c. The name and last known address of each person sent a notification postcard pursuant to Part IV.A.4 of this order and the date the postcard was mailed;

d. The name and last known address of each person sent retrofit instructions pursuant to Part IV.C.2 of this order and the date the instructions were mailed;

e. The name and last known address of each person who requested retrofit instructions and was refused, the reason for each refusal and the dates of the request and refusal; and

f. The name and last known address of each person who purchased or owned a Gut Buster, returned the device to respondents or reported that it had been discarded, and received a full refund.

2. Sample copies of all postcards, letters and instructions sent to consumers pursuant to this order.

3. All correspondence and records of communications between respondents and any person relating to the notification program.

V.

*It is further ordered,* That respondents, their successors and assigns, shall, for three (3) years after the date of the last dissemination of the representation to which they pertain, maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

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

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

which the respondent relied for such representation, including complaints from consumers.

## VI.

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

## VII.

*It is further ordered,* That for a period of ten (10) years from the date of service of this order, each of the individual respondents named herein shall promptly notify the Commission in the event of the discontinuance of his/her present business or employment and of each affiliation with a new business or employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which said respondent is newly engaged as well as a description of said respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

## VIII.

*It is further ordered,* That respondents Consumer Direct, Inc., The Gut Buster Corporation, and Fitness Quest, Inc. shall distribute a copy of this order to each of their operating divisions, to each of their managerial employees, and to each of their officers, agents, representatives or employees engaged in the preparation and placement of advertising or other sales materials covered by this order and shall secure from each such person a signed statement acknowledging receipt of this order.

## IX.

*It is further ordered,* That respondents shall, within seventy (70)

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

Commissioner Azcuenaga recused.

## IN THE MATTER OF

## E-Z-EM, INC., ET AL.

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

*Docket C-3311. Complaint, Oct. 29, 1990—Decision, Oct. 29, 1990*

This consent order requires, among other things, a Westbury, N.Y., based corporation and certain officers to divest, within twelve months of the issuance of this order, the Lafayette Pharmacal barium business and assets to a Commission-approved acquirer. Respondents are prohibited, for a period of ten years, from acquiring any interest in any other firm in the relevant market without prior Commission approval, and from selling or otherwise disposing of any interest in or assets of respondents to such a firm without providing thirty days prior notice to the Commission.

*Appearances*

For the Commission: *Susan P. Pettee* and *Steven A. Newborn*.

For the respondents: *Terry M. Gordon, Lasky, Haas, Cohler & Munter, P.C.*, San Francisco, CA.

## COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, E-Z-EM, Inc. ("EZM"), a corporation subject to the jurisdiction of the Federal Trade Commission, has acquired the barium diagnostic products business and assets of Lafayette Pharmacal, Inc., ("Lafayette"), in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

## I. E-Z-EM, INC.

1. Respondent EZM is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 7 Portland Avenue, Westbury, New York.

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

## II. LAFAYETTE PHARMACAL, INC.

3. Lafayette is a corporation organized and existing under the laws of the State of Delaware, with its headquarters at 4200 S. Hulén, Fort Worth, Texas.

4. Lafayette 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 or about December 22, 1988, EZM entered into a purchase agreement with Lafayette pursuant to which EZM agreed to purchase the barium business of Lafayette for approximately \$16.9 million and issued stock warrants worth at least \$2.5 million to the remaining entity of Lafayette.

## IV. THE RELEVANT MARKET

6. The relevant line of commerce in which to analyze EZM's acquisition of Lafayette is the business of formulating, manufacturing, marketing and selling barium diagnostic products and related accessories.

7. The relevant area of the country is the United States.

## V. MARKET STRUCTURE

8. The market for barium diagnostic products and related accessories is highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

## VI. BARRIERS TO ENTRY

9. Entry into the relevant market set forth in paragraphs 6 and 7 is very difficult.

## VII. ACTUAL COMPETITION

10. EZM and Lafayette were actual competitors in the relevant market.

## VIII. EFFECTS OF THE ACQUISITION

11. The effect of the acquisition may be substantially to lessen competition in the relevant market in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45, in the following ways, among others:

- a. Actual competition between EZM and Lafayette has been eliminated;
- b. EZM has acquired a monopoly in the relevant market in the barium business in the United States; and
- c. The resulting monopoly in the relevant market would increase the likelihood of collusion if another firm should enter the market.

## IX. VIOLATIONS CHARGED

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

13. The acquisition agreement described in paragraph 5 constitutes 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 certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with 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

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 comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, 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 EZM 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 7 Portland Avenue, Westbury, New York.

2. Respondent Howard S. Stern is a Director, Chairman of the Board, and Chief Executive Officer of EZM, and the beneficial owner of approximately 34 percent of the outstanding shares of common stock of EZM, with his business address at 7 Portland Avenue, Westbury, New York.

3. Respondent Phillip H. Meyers is a Director, Senior Vice President, and Medical Director of EZM, and the beneficial owner, jointly with Betty S. Meyers, of approximately 34 percent of the outstanding common stock of EZM, with his business address at 7 Portland Avenue, Westbury, New York.

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

#### ORDER

##### I.

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

A. "*EZM*" means E-Z-EM, Inc., its predecessors, successors and assigns, parents, subsidiaries, divisions, groups controlled by EZM, and affiliates, and their respective directors, officers, employees,

agents and representatives, and their respective successors and assigns.

B. "*Lafayette*" means Lafayette Pharmacal, Inc. as it was constituted prior to the acquisition, its predecessors, parents, subsidiaries, divisions, groups controlled by Lafayette, and affiliates, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. "*Acquisition*" means acquisition by EZM of the barium diagnostic products business and related assets of Lafayette.

D. "*Barium diagnostic products business*" means the business of either manufacturing or importing barium diagnostic products and marketing and selling those products to distributors and or end-users, except that it does not extend to the distribution and selling, by one primarily engaged in distributing and selling x-ray supplies, of barium diagnostic products produced or imported by another firm, to end-users.

E. "*Barium diagnostic products manufacturing plant*" means the premises described in numbered paragraph 1 of Schedule A of this order.

F. "*Schedule A Properties*" means the assets and manufacturing plant listed in Schedule A of this order.

## II.

*It is ordered, That:*

A. EZM shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Schedule A Properties, as well as any additional assets relating to the barium diagnostic products business that EZM may at its discretion include as a part of the assets to be divested and that are acceptable to the acquiring entity.

B. Divestiture of the Schedule A Properties shall be made only to an acquirer or acquirers that receive the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Schedule A Properties is to ensure the continuation of the assets as an ongoing, viable enterprise engaged in the barium diagnostic products business and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

C. On or before the date six weeks prior to the closing by which the

Schedule A Properties will be divested, EZM shall make available to the acquirer or acquirers of the Schedule A Properties the names, addresses, titles, job descriptions, and salary histories of two-thirds of its employees concerned with the barium diagnostic products business and EZM shall not interfere in any way with the hiring of any of those employees by the acquirer or acquirers of the Schedule A Properties.

D. On or before the date six weeks prior to the closing by which the Schedule A Properties will be divested, EZM shall make available all records it has of the names and most recent addresses and telephone numbers of all former Lafayette employees to the acquirer of the Schedule A Properties.

E. Respondents shall maintain the viability and marketability of the Schedule A Properties and shall not cause or permit the destruction, removal, wasting, deterioration, or impairment of any assets or businesses to be divested except in the ordinary course of business and except for ordinary wear and tear that does not affect the viability and marketability of the Schedule A Properties. In this regard:

1. Respondents shall maintain the Schedule A Properties, including both premises and assets to the extent and in the manner maintained by Lafayette prior to the acquisition.

2. Respondents shall maintain and perform in good faith all contracts for products sold under the trade names transferred to EZM by the acquisition, and will refrain from taking any action toward terminating such contracts other than that which would be commercially reasonable under the terms of those agreements.

3. Respondents shall, at the option of the acquirer of the Schedule A Properties, continue to maintain in good faith, on identical terms, conditions and stipulations, all contracts for barium products sold under the trade names transferred to EZM by the acquisition that expire by their terms prior to divestiture for a period lasting until such divestiture is completed.

### III.

*It is further ordered, That:*

- A. If EZM has not divested, absolutely and in good faith and with the Commission's approval, the Schedule A Properties within twelve (12) months of the date this order becomes final, EZM shall consent to the appointment by the Commission of a trustee to divest the Schedule

A Properties. In the event the Commission or the Attorney General brings an action pursuant to Section 5 (l) of the Federal Trade Commission Act, 15 U.S.C. 45 (l), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee to divest the Schedule A Properties. Neither the appointment of a trustee nor a decision not to appoint a trustee shall constitute a waiver by the Commission or the Attorney General of its right to seek civil penalties and other relief available to it, including a court-appointed trustee, for any violation of 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, authorities, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of EZM, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall have the power and authority to divest the Schedule A Properties. The trustee shall have twelve (12) months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission or by the court for a court-appointed trustee, *provided, however*, that the Commission or the court for a court-appointed trustee may only extend the divestiture period two (2) times.

3. The trustee shall have full and complete access to the personnel, books, records, and facilities of EZM relating to the schedule A Properties, and EZM shall develop such financial or other information relevant to the assets to be divested as such trustee may reasonably request. Respondents shall cooperate with the trustee and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

4. 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 EZM's absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in paragraphs II.A. and II.B. of this order.

5. The trustee shall serve, without bond or other security at the cost

and expense of EZM, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of EZM, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as may be reasonably necessary. 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 to EZM and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement (percentage of price) that is contingent on the trustee's divesting the Schedule A Properties. Nothing herein shall be construed to limit the trustee's compensation to an amount not in excess of the monies derived from the divestiture.

6. Within fifteen (15) days after appointment of the trustee and subject to the Commission's prior approval and, if the trustee was appointed by a court, subject also to the prior approval of the court, EZM shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to cause divestiture of the Schedule A Properties and sign agreements.

7. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraphs III.A. and III.B., for the balance of the time periods specified in paragraph III.B.2 or any extensions thereof. EZM shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order. The trustee shall have no obligation or authority to operate or maintain the Schedule A Properties.

8. The trustee shall report in writing to EZM and the Commission every sixty (60) days from the date the trust agreement is executed concerning the trustee's efforts to accomplish divestiture.

9. If EZM and the trustee are unable to resolve a dispute regarding the reasonable value of his/her services or the reasonableness of an expenditure or obligation incurred by the trustee in connection with his/her efforts to divest the assets, then EZM and the trustee shall submit the dispute to the Commission for resolution, but the time periods shall continue to run. The trust agreement shall recite that the

Commission's determination of the reasonable value of the trustee's services or the reasonableness of expenditures and other obligations incurred by the trustee shall be binding upon EZM and the trustee.

IV.

*It is further ordered,* That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until EZM has fully complied with the provisions of paragraphs II and III of this order, EZM 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 with, or has complied with those provisions. EZM shall include in its compliance reports, among other things that are required from time to time, a full description of the contacts or negotiations for the divestiture of the Schedule A Properties, including the identity of all parties contacted. EZM also shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

V.

*It is further ordered,* That:

A. Until divestiture of the Schedule A properties is final, respondents are prohibited from acquiring, directly or indirectly, any interest in any person or business that is engaged in the barium diagnostic products business in the United States.

B. For a ten (10) year period commencing on the date this order becomes final, EZM shall cease and desist from selling or disposing of in any other way, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, any assets, related to, or used or previously used in (and still suitable for use in) the barium diagnostic products business or the whole or any part of EZM stock or share capital to any person or business engaged in the barium diagnostic products business in the United States, except that EZM may continue to sell barium diagnostic products and dispose of used equipment in the ordinary course of business.

C. For a ten (10) year period commencing on the date this order becomes final EZM shall cease and desist from acquiring, without the

prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, any stock or share capital of, or interest in, any person that is engaged in the barium diagnostic products business in the United States, or any assets related to, or currently or previously used in (and still suitable for use in) the barium diagnostic products business in the United States except raw material and new equipment purchased in the ordinary course of business. *Provided, however,* that paragraph V.C. shall not apply to the construction of new facilities.

D. For a ten (10) year period commencing on the date this order becomes final, respondents Stern and Meyers (but only so long as they remain shareholders, officers, or directors of EZM) shall give thirty (30) days' prior notice to the Federal Trade Commission before selling or disposing of in any other way, individually or jointly, directly or indirectly, through subsidiaries or otherwise, the whole or any part of their holdings of EZM stock or share capital to any person or business that is engaged in the barium diagnostic products business in the United States.

## VI.

*It is further ordered,* That one year from the date this order becomes final, annually thereafter for nine (9) years, and at such other times as the Commission or its staff may request, respondents shall each file with the Commission a verified written report of their compliance with paragraph V.

## VII.

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

## SCHEDULE A

The properties to be divested by EZM, as provided in the Agreement and Consent Order, are the following assets:

1. The manufacturing plant located at 526 North Earl Avenue, Lafayette, Indiana, including all the land, all buildings and improvements on the land, and all machinery and other equipment used in the testing, formulation, production, packing, shipping, or for any other purpose relating to the barium diagnostic products business that were transferred by the December 22, 1988 acquisition agreement between EZM and Lafayette ("the premises").

2. All other assets of Lafayette transferred by the December 22, 1988, acquisition agreement, including all of Lafayette's right, title and interest in and to all corporate names, trade names, service marks, know-how, trade secrets, product formulas, and other intellectual property (including all applications relating thereto) of the Lafayette barium diagnostic products business and all customer lists, sales and credit reports, sales literature, manuals, regulatory permits and other filings with and approvals by regulatory authorities and product formulas. The assets include all assets and rights relating to the business acquired by Lafayette from Mallinckrodt, Inc., Alcon Laboratories, Inc., C.B. Fleet Company, Incorporated and their respective subsidiaries and affiliates ("the assets").

IN THE MATTER OF  
BOISE CASCADE CORP.

*Docket 9133. Interlocutory Order, November 1, 1990*

ORDER REISSUING FINAL ORDER

This matter has been remanded to the Commission for further proceedings by the United States Court of Appeals for the District of Columbia Circuit. *Boise Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988). The remand directs the Commission to determine whether Boise Cascade Corporation's rebuttal evidence overcomes the inference of competitive injury previously drawn by the Commission. Having reviewed the record and considered the briefs and oral arguments of the parties, the Commission has determined that Boise Cascade Corporation has failed to overcome the inference of competitive injury established by the evidence. Accordingly,

*It is ordered*, That paragraphs I to V of the Commission's order dated February 11, 1986, are reissued. See *Boise Cascade Corp.*, 107 FTC 76, 224-25 (1986).

Chairman Steiger abstaining and Commissioner Owen not participating.\*

OPINION OF THE COMMISSION

BY CALVANI, *Commissioner*:<sup>1</sup>

\* Prior to leaving the Commission, former Commissioner Calvani registered his vote in the affirmative for the Final Order and Opinion of the Commission in this matter.

<sup>1</sup> The following abbreviations are used throughout this opinion.

- RFFF — Respondent Boise Cascade Corporation's Proposed Findings of Fact and Conclusions of Law.  
 CRRPFF — Complaint Counsel's Reply to Respondent's Proposed Findings of Fact and Conclusions of Law.  
 IDF — Initial Decision, February 14, 1984 (cited by finding number).  
 BOP — Brief of Petitioner Boise Cascade Corporation to the United States Court of Appeals for the District of Columbia Circuit dated August 15, 1986.  
 BRC — Brief for Respondent Federal Trade Commission to the United States Court of Appeals for the District of Columbia Circuit dated October 15, 1986.  
 BOR — Brief of Respondent dated May 18, 1988.  
 BOC — Brief of Complaint Counsel dated June 15, 1988.  
 RBR — Reply Brief of Respondent dated June 27, 1988.  
 TR — Transcript of July 28, 1988 hearing before the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit.

