

Complaint

116 F.T.C.

IN THE MATTER OF

MONSANTO COMPANY

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

Docket C-3458. Complaint, Sept. 1, 1993--Decision, Sept. 1, 1993

This consent order permits, among other things, a Missouri-based manufacturer of chemicals, including lawn and garden products, to acquire the Ortho Consumer Products Div. of Chevron Corp., and requires the respondent to divest certain assets to Commission-approved acquirers within one year. It also prohibits, among other things, Monsanto, for a period of 10 years, from acquiring, without prior Commission approval, an interest in any company engaged in the manufacture or formulation for sale in the U.S. of any non-selective herbicide for residential use.

Appearances

For the Commission: *Howard Morse* and *Allee A. Ramadhan*.

For the respondent: *Kenneth A. Letzler*, *Abe Krash* and *Richard A. Kleine*, in-house counsel, St. Louis, MO.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (Commission), having reason to believe that respondent Monsanto Company (Monsanto), a corporation, has agreed to acquire the assets of the Ortho Consumer Products Division of the Chevron Corporation (Chevron), in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof

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

I. RESPONDENT

1. Respondent Monsanto is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 800 North Lindbergh Blvd., St. Louis, Missouri.

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

II. THE ACQUISITION

3. Pursuant to a letter agreement dated January 5, 1993, Monsanto agreed in principle to acquire from Chevron substantially all of the assets of the Ortho Consumer Products Division for a price of approximately \$416 million.

III. THE RELEVANT MARKET

4. The relevant line of commerce within which to analyze the effects of Monsanto's proposed acquisition of the Ortho Consumer Products Division of Chevron is the residential non-selective herbicide market, which consists of manufacturing or formulating, marketing and selling non-selective herbicide products for residential use in general control of brush, plants, weeds and grasses.

5. The relevant section of the country or geographic area within which to analyze the effects of the proposed acquisition is the United States.

IV. MARKET STRUCTURE

6. The United States residential non-selective herbicide market is already highly concentrated, whether measured by the Herfindahl-Hirschmann Index or by two-firm and four-firm concentration ratios.

V. ENTRY CONDITIONS

7. Entry into the United States residential non-selective herbicide market is difficult or unlikely.

VI. EFFECTS OF THE ACQUISITION

8. The effects of the proposed acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the relevant market in the following ways, among others:

(a) It will eliminate actual, direct and substantial competition between Monsanto and Chevron and increase Monsanto's ability unilaterally to exercise market power in the United States residential non-selective herbicide market;

(b) It will substantially increase the already high concentration in the United States residential non-selective herbicide market;

(c) It will raise barriers and impediments to entry into the United States residential non-selective herbicide market; and

(d) It will eliminate Ortho as a substantial independent competitive force in the United States residential non-selective herbicide market.

VII. VIOLATIONS CHARGED

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

10. The proposed acquisition of the Ortho Consumer Products Division by Monsanto, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of respondent's proposed acquisition of the Ortho Consumer Products Division of Chevron Corp., and the respondent having been furnished thereafter with a copy of this draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Clayton Act and the Federal Trade Commission Act; and

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

The Commission, having thereafter considered the matter and having determined that it had reason to believe that the respondent has 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 filed thereafter by interested persons 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 jurisdiction findings and enters the following order:

1. Monsanto Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 800 North Lindbergh Boulevard, St. Louis, Missouri.

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. “*Monsanto*” means Monsanto Company, its predecessors, successors and assigns, divisions, subsidiaries, affiliates, companies, groups, partnerships and joint ventures that Monsanto Company controls, directly or indirectly, and their directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. “*Chevron*” means Chevron Corporation, its predecessors, successors and assigns, divisions, subsidiaries, affiliates, companies, groups, partnerships and joint ventures that Chevron Corporation controls, directly or indirectly, and their directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. “*Acquisition*” means the acquisition by Monsanto from Chevron of the assets of the Ortho Consumer Products Division of Chevron, as referenced in Commission Premerger Report Number 93-0514.

D. “*Chevron Assets*” means:

1. The Kleenup Assets;
2. The Shackle C Assets; and
3. The Formula II Assets.

E. “*Kleenup Assets*” means the brand or trademark “Kleenup” obtained by Monsanto in connection with the Acquisition and used by Chevron for nonselective herbicides; provided, however, that the

Ortho brand or trademarks and trade dress are not part of the Kleenup Assets or the Chevron Assets and need not be divested pursuant to this order.

F. “*Shackle C Assets*” means the irrevocable rights to acquire, through September 19, 2000, a total of 102,455 gallons of the Shackle C product described in the product specification attached hereto as Exhibit A.

G. “*Formula II Assets*” means all rights, title and interest in and to any formulation of nonselective herbicide products for residential use obtained by Monsanto in connection with the Acquisition intended for sale by Chevron as a substitute for the current glyphosate-based herbicide products sold by Chevron under the brand or trademark “Kleenup,” as set forth in Exhibit B attached hereto.

H. “EPA” means the United States Environmental Protection Agency.

II.

It is further ordered, That:

For purposes of protecting interim competition pending the introduction of new glyphosate-based herbicide suppliers pursuant to paragraph III of this order, including necessary governmental approvals, Monsanto shall:

A. For a period of twelve (12) months after this order becomes final, offer to sell to each current purchaser, except Chevron, of Shackle C for use in the formulation of nonselective herbicide products for residential use in the United States up to one hundred fifty percent (150%) of the volume of Shackle C that such customer purchased during the twelve (12) months preceding the date on which this order becomes final, under the terms and conditions of the customer's existing contract. If the divestitures of the Shackle C Assets or Kleenup Assets are not accomplished within twelve (12) months after the date on which this order becomes final, the require-

ments of this paragraph II.A. shall be extended until such divestitures are accomplished.

B. Offer to formulate and sell to each person that acquires the Shackle C Assets, pursuant to paragraph III.B. of this order, a portion of such Shackle C Assets in the form of glyphosate-based herbicides using any or all of the formulations sold by Chevron at the time of the Acquisition, for such acquirer's resale pending the acquirer's obtaining of the necessary federal regulatory agency approval to formulate, distribute and sell nonselective, glyphosate-based herbicides for residential use. Such offer by Monsanto to formulate the acquirer's Shackle C shall be on a cost-plus basis and other commercially reasonable terms for a fixed period of up to twelve (12) months from the date on which the acquirer is approved by the Commission. If an acquirer fails to secure the necessary federal regulatory agency approval to formulate, distribute and sell nonselective, glyphosate-based herbicides for residential use within twelve (12) months after the date on which the acquirer is approved by the Commission, the requirements of this paragraph II.B. shall be extended for such acquirer for up to an additional twelve (12) months pending such approval.

III.

It is further ordered, That within twelve (12) months after the date on which this order becomes final, Monsanto shall divest, absolutely and in good faith, the Chevron Assets in accordance with the following:

A. The divestiture of the Kleenup Assets shall be only to an acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission. The acquirer of the Kleenup Assets shall also be an acquirer of Shackle C Assets pursuant to paragraph III.B. of this order. Any divestiture agreement shall include a requirement that for a period of three (3) years after the date on which this order becomes final, such acquirer's interests in and rights to the Kleenup Assets shall not be

assignable except upon the prior approval of the Commission. The purpose of the divestiture is to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint and to enable the acquirer to formulate and sell nonselective herbicides for residential use.

(1) Monsanto shall make available to the acquirer of the Kleenup Assets access to such Monsanto personnel (including, but not limited to, former Chevron personnel employed by Monsanto), assistance and training as the acquirer reasonably needs (for a period of time not to exceed six (6) months from the date on which the acquirer is approved by the Commission), to transfer the Kleenup Assets to the acquirer.

(2) Monsanto shall provide such cooperation and assistance to the acquirer of the Kleenup Assets under this order as are reasonably necessary to enable the acquirer to formulate and sell nonselective herbicides for residential use.

B. The divestiture of the Shackle C Assets shall be 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; *provided, however*, that Monsanto shall not be required to divest to more than three (3) acquirers. If there is more than one acquirer of the Shackle C Assets, one such acquirer must also be the acquirer of the Kleenup Assets under paragraph III.A. of this order. Any divestiture agreement shall include a requirement that for a period of three (3) years after the date on which this order becomes final, such acquirer's interests in and rights to the Shackle C Assets shall not be assignable except upon the prior approval of the Commission. The purpose of the divestiture is to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint and to enable the acquirer or acquirers to formulate and sell nonselective, glyphosate-based herbicides for residential use.

(1) At the time of the divestiture, Monsanto shall make available to each acquirer of the Shackle C Assets access to such Monsanto

personnel (including, but not limited to, former Chevron personnel employed by Monsanto), assistance and training as each acquirer reasonably needs (for a period of time not to exceed six (6) months from the date on which the acquirer is approved by the Commission), to transfer the Shackle C Assets to the acquirer.

(2) Monsanto shall grant to each acquirer, (a) nonexclusive rights to any and all research and development, technical information, know-how, patents and all EPA and other federal and state regulatory agency filings and registrations of Chevron relating to nonselective, glyphosate-based herbicides (including, without limitation, combinations of glyphosate and one or more other active ingredients), and (b) for as long as the acquirer holds rights to Shackle C Assets obtained pursuant to paragraph III of this order, nonexclusive rights to reference any Monsanto test data for nonselective, glyphosate-based herbicides for purposes of obtaining governmental regulatory approvals, to the extent that Chevron had such rights prior to the Acquisition.

(3) Monsanto shall provide such cooperation to each acquirer of the Shackle C Assets under this order (including, but not limited to, cooperation in obtaining EPA registrations and any other governmental regulatory approvals to the extent that Chevron had such registrations and approvals prior to the Acquisition) necessary to formulate, distribute and sell nonselective, glyphosate-based herbicides for residential uses in any form (including, but not limited to, in any glyphosate concentration); *provided, however*, that Monsanto shall have no obligation to conduct additional studies to develop data solely for any such acquirer.

(4) In connection with the divestiture of Chevron Assets under this order, Monsanto shall not restrict the ability of any acquirer of the Shackle C Assets to use, or to acquire the right to use, any active ingredient other than glyphosate, nor shall Monsanto restrict the ability of any acquirer to make any lawful product comparison in the labeling, advertising or other promotion of its glyphosate-based product.

C. The divestiture of the Formula II Assets shall be only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The divestiture shall include a requirement that for a period of three (3) years after the date on which this order becomes final such acquirer's interests in and rights to the Formula II Assets shall not be assignable except upon the prior approval of the Commission. The purpose of the divestiture is to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint and to enable the acquirer to formulate and sell nonselective herbicides for residential uses.

(1) Monsanto shall make available to the acquirer of the Formula II Assets access to such Monsanto personnel (including, but not limited to, former Chevron personnel employed by Monsanto), assistance and training as each acquirer reasonably needs (for a period not to exceed six (6) months from the date on which the acquirer is approved by the Commission), to transfer the Formula II Assets to the acquirer.

(2) Monsanto shall provide reasonable cooperation to the acquirer of the Formula II Assets under this order, including, but not limited to, cooperation in obtaining nonexclusive rights to such additional Chevron research and development, technical information, know-how, patents and EPA and other federal and state regulatory agency filings and registrations of Chevron as Chevron (a) has used in the development of Formula II products for residential use or (b) contemplates using to make or market Formula II products for such use.

IV.

It is further ordered, That, pending divestiture of the Chevron Assets, Monsanto shall take such action as is necessary to maintain the viability and marketability of the Chevron Assets (including, but not limited to, research and development, technical information, know-how, patents and EPA filings and registrations) and shall not

cause or permit any destruction, removal, wasting, deterioration or impairment of those assets, except for ordinary wear and tear in the ordinary course of business that does not affect the viability and marketability of the Chevron Assets.

V.

It is further ordered, That:

A. If Monsanto has not fully complied, absolutely and in good faith, with paragraph III of this order within the time period provided in such paragraph, Monsanto shall consent to the appointment by the Commission of a trustee to divest the remaining portion(s) of the Chevron Assets. In the event 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, Monsanto 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 available relief, including a court-appointed trustee, for any failure by Monsanto to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph V.A. of this order, Monsanto 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 Monsanto, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Monsanto has not opposed, in writing, the selection of any proposed trustee within fifteen (15) days after notice by the staff of the Commission to Monsanto of the identity of any proposed trustee, Monsanto 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 Chevron Assets, and to make any further arrangements that may be reasonably necessary to assure the viability and competitiveness of the pertinent assets.

(3) The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph V.B(8) to accomplish the divestiture. 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, in the case of a court-appointed trustee, by the court.

(4) The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Chevron Assets, or any other relevant information, as the trustee may reasonably request. Monsanto shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. Monsanto shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Monsanto shall extend the time for divestiture under paragraph V.B(3) in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

(5) Subject to Monsanto's absolute and unconditional obligation to divest at no minimum price, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each acquirer for the divestiture. The divestiture shall be made in the manner and to the number of acquirers set out in paragraph III of this order.

(6) The trustee shall serve, without bond or other security, at the cost and expense of Monsanto, 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 Monsanto, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's

duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Monsanto and the trustee's power shall be terminated. The trustee's compensation shall be based in significant part on a commission arrangement contingent on the trustee's divesting the Chevron Assets.

(7) Monsanto 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 trusteeship, 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.

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

(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 V.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 Chevron Assets.

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

VI.

It is further ordered, That, within sixty (60) days after the date on which this order becomes final and every sixty (60) days thereafter until Monsanto has fully complied with the provisions of paragraphs II, III, IV, and V of this order, Monsanto shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with those provisions. Monsanto shall include in its compliance reports, among other things that are required from time to time, a full description of all substantive contacts or negotiations for the divestiture of the Chevron Assets, including the identities of all parties contacted. Monsanto 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.

VII.

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

A. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, engaged in the manufacture or formulation (either directly or by contract) for sale in the United States of any nonselective herbicide for residential use.

B. Acquire the brand or trademark of any nonselective herbicide for residential use used in the United States.

C. Acquire from any other person the exclusive rights to manufacture, distribute or sell for residential use in or to the United States a pesticidal active ingredient (within the meaning of 7 U.S.C. 136(u)) that contributes significantly to the actual or perceived efficacy of any nonselective herbicide.

On the anniversary of the date on which this order becomes final, and on every anniversary thereafter for the following nine (9) years, Monsanto shall file with the Commission a verified written report of its compliance with this paragraph VII of this order.

VIII.

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

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

IX.

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

EXHIBIT A

MONSANTO AGRICULTURAL
COMPANY

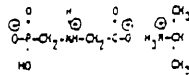
EXHIBIT A
C-3458
B144600

PRODUCT SPECIFICATION

PRODUCT Shackles C Issue No. _____
 P. No. 2139 Date Effective: 8/1/88

GENERAL DESCRIPTION

A light amber to light brown liquid containing 41.0% by weight and 4 lbs./gallon of active, N-phosphonomethyl glycine, isopropylamine Salt (CP 70139)



CHARACTERISTICS	LIMITS	TYPICAL	METHOD NO.
(R) Appearance	Clear solution, light amber to light brown color.		Visual
(R) Assay, IPA salt glyphosate, wt. %	41.00 - 43.0	41.4	AQC-294-87
(R) Sp. Gr. @ 20/15.6°C	Determine	1.1720	AQC-292-86
(R) IPA Salt of glyphosate - Lbs./gallon	4.00 min.	4.05	Calculated (1)
(R) IPA Salt of glyphosate - Lbs./liter	480 min.	485	Calculated (2)
(R) Surfactant (MON 0818), wt. %	14.0 - 17.0	15.4	AQC-140-82 (3)
(OR) Water Content, wt. %	38.5 - 45.0	43.2	Determined by difference
(R) pH	4.4 - 4.9	4.5	AQC-139-81
(R) Insolubles in water, ppm	100 max.	30	AQC-121-74
(R) Cloud Point, °C	60 min.	75	AQC-120-81
(R) Carbon, ppm	5 max.	< 5	AQC-2950-83
(R) Dilution Test	Not turbid after 1 hour.		AQC-316-82
(R) Gardner Color	4 - 7	5	AQC-226-81

Approved by: _____

Decision and Order

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EXHIBIT A

FINISHED PRODUCT SPECIFICATION
SHACKLE C

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<u>CHARACTERISTICS</u>	<u>LIMITS</u>	<u>TYPICAL</u>	<u>METHOD NO.</u>
(R) NNG Content, ppb	600 max.		AQC-684-86

NOTES:

- (1) IPA Salt of Glyphosate, Lb/Gal = $\frac{\% \text{ IPA Salt} \times \text{Sp. Gr.} \times 8.33722}{100}$
- (2) Ipa Salt of Glyphosate, Gm/Liter = $\frac{\% \text{ IPA Salt} \times \text{Sp. Gr.} \times 9.990}{100}$
- (3) The surfactant method determines surfactant amount in units of "lb/gallon", however the specification is expressed as "wt. %". To convert from "lb./gallon" to "wt. %" units, use the following:
- $$(\text{Surfactant, wt. \%}) = \frac{(\text{Surfactant, Lb/Gallon}) \times 100}{(\text{Specific Gravity}) \times 8.33722}$$

For a typical specific gravity of 1.1720, the 14.0 - 17.0 wt. % specification limit is equivalent to 1.37 - 1.66 lb/gallon. Since specific gravity will vary, wt. % must be calculated and compared to specification for each lot.

TYPICAL FORMULATION

<u>Ingredient</u>	<u>% By Weight</u>
Glyphosate (98%)	31.32 (30.70)
Iscropropylamine	10.70
Surfactant (MON 0818)	15.40
Water	42.58

Manufacturing should target for a surfactant content of 15.40%. The specification range of 14.0 - 17.0% is to allow for normal process variation around a target value of 15.4%.

PLANT QUALITY CONTROL SYNOPSIS:A. Circulating Plant - Sampling

Shackle C is stored in storage tanks in Formulation. When a tank is full, it is circulated for six hours and a sample is removed for complete analysis. The circulation is continued for two hours and another sample is taken. When a tank is on specification, which is determined by the analysis of the two samples, the material is transferred to Glyphosate Packaging via pipeline.

EXHIBIT A

4027 028

FINISHED PRODUCT SPECIFICATION
SHACKLE C

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PLANT QUALITY CONTROL SYNOPSIS: (Continued)

Packaging has two lot tanks which receive product from Formulation. When a transfer is made to one of these tanks, the material is circulated for a minimum of four hours and sampled. This sample is analyzed for assay and specific gravity. The assay must be 41.00% active before Packaging can start. The specific gravity measurement is used to calculate the minimum average gross fill weight for the lot. This tank then constitutes a lot and is ready for packaging.

Plant personnel withdraw a 4 oz. sample from a filling head at two hour intervals while a given lot is packaged. Each two hour sample should be labeled with the date, time, lot number and sampler's name. A sampling log is kept, which must be filled in for each sample taken to show chain of custody.

B. Fayetteville Plant - Sampling

Shackle C is stored in a storage tank at the formulation plant. When the tank is full, it is circulated and sampled for complete analysis. When on specification, the storage tank is transferred to the lot tank.

The lot tank is circulated for 7 hours and sampled. the circulation is continued for another hour and another sample is taken. When the tank is on specification, which is determined by the analysis of the two samples, the material is drummed.

Plant personnel withdraw a 15-20 ml. aliquot from every 10th filled drum while a given lot is packaged. A sampling record is maintained indicating date, time, lot number and sampler's name for the composite sample.

C. Composite Sample Analysis

When the entire lot is packaged, the laboratory will composite the lot sampling and run a complete lot analysis. If the lot passes all specifications, including weight control limits, it is released for shipment.

D. Retains

The laboratory will retain a four ounce sample of each lot composite for a minimum of five years. Analytical records will be maintained for a five year period.

EXHIBIT B

The Formula II assets identified in Paragraph I.G. of this order shall include all rights obtained by Monsanto in connection with the Acquisition relating specifically to the formulation of a nonselective lawn and garden herbicide product developed or currently under development by Chevron as replacement or substitute for Chevron's Kleenup products and including as active ingredients a combination of 24D, MCPP, fusilade and diquat. The Formula II assets include, without limitation, the following:

(1) All Environmental Protection Agency and other federal and state regulatory agency registrations and applications for Formula II products, including the precise recipe or mixture of the four active ingredients and toxicology, stability, effectiveness, and such other studies as were conducted to support the EPA or other regulatory applications.

(2) All rights, title and interest in and to the contracts, if any, entered in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, brokers and distributors, agents, inventors, product testing and laboratory research institutions, providers of electronic data exchange services, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees relating exclusively to Formula II products.

CONCURRING STATEMENT OF COMMISSIONER DENNIS A. YAO

I concur with the Commission's vote to condition Monsanto's acquisition of Ortho's assets on the divestiture of the Kleenup brand name, related formulas, and the inventory of and certain purchase rights for Monsanto's patented product, glyphosate, currently held by Ortho. I write to address some of the economic issues raised by a proposed acquisition that would merge two competing products and would include a reacquisition of patented product by the patent holder.

Since Ortho's glyphosate inventory was acquired from Monsanto, the patent holder, one might argue that Monsanto's reacquisition of its own patented product would not entail any enlargement of patent power. This view, however, would over-simplify the economic analysis that is appropriate in a case like this. A critical fact here is that the proposed acquisition involves not only a reacquisition of patent rights or patented product alone, but also an acquisition of other assets whose value is significantly intertwined with that of the patented product. Regardless of how one would assess a reacquisition of patent rights or patented product alone, an acquisition of such a combination of assets by the patent holder potentially raises antitrust concerns.

The importance of assets that are related to the patent or patented product is underscored by the fact that a significant commercial value is generally achieved only when a patented idea is combined with complementary assets -- for example, productive capital, technology, a brand name, or a marketing and distribution network. Complementary assets can be characterized as either general or specific. A specific asset is one whose value is diminished when it is redeployed to its next-best use.¹ Once complementary assets add to the value of a patented idea, it is often difficult to disentangle what components of value derive from the patented idea itself or from other assets. This is particularly true for specific assets because, by definition, the value of optimally combined specific assets is more than the sum of its parts.

¹ Possible examples of specific assets are specialized plant and equipment, a unique production technology, a product's particular brand name image, or a specialized distribution network.

Specific complementary assets are potentially a source of product differentiation, which often makes it difficult for a patent holder to gain monopoly profit merely by controlling the price and quantity of the patented input. Moreover, the next-best use of these assets could be in combination with other inputs to form a new rival product that competes with products based on the patented idea. For these reasons, the acquisition or merger of such assets may have an anticompetitive effect. Indeed, it may be argued that the more specific the assets, the greater the potential for anticompetitive effect.

In this case, it appears that the two glyphosate-based products, Monsanto's Roundup and Ortho's Kleenup, are differentiated products, using different formulas and reflecting different brand name images. Therefore, Monsanto's proposed acquisition of Ortho involves a patented product and several specific complementary assets potentially relevant to the residential nonselective herbicide market: Ortho's inventory of and purchase rights for glyphosate products, the Ortho brand name and specialized distribution network, and the Kleenup brand name and formula. The Kleenup brand name is linked directly to the market for residential nonselective herbicides and to the functional properties of glyphosate as well.

Thus, this transaction involves more than simply a reacquisition of patented products. Among other things, the proposed acquisition would eliminate brand name competition between Monsanto's Roundup and Ortho's Kleenup, raising the concentration of assets in the market for residential nonselective herbicides and likely increasing Monsanto's ability unilaterally to exercise market power in the relevant market.

Divestiture of the Kleenup brand name and related formulas mitigates the likely anticompetitive effects of the merger, particularly when combined with divestiture of the Ortho glyphosate inventory and purchase rights, which increases the value of the divested Kleenup brand name by permitting Kleenup to remain a glyphosate product. For this and other reasons, I concur.

IN THE MATTER OF

MICHAEL S. LEVEY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3459. Complaint, Sept. 23, 1993--Decision, Sept. 23, 1993*

This consent order prohibits, among other things, the California-based producers of infomercials from misrepresenting infomercials as independent programming rather than paid advertising and from selling any baldness or impotence product not approved by the Food and Drug Administration; and requires the respondents to have competent and reliable scientific evidence to support any representations about the efficacy or safety of any food, drug or device they sell. In addition, the respondents are required to pay \$275,000 in consumer redress.

Appearances

For the Commission: *Kathryn C. Nielsen* and *Patricia Hensley*.

For the respondents: *Harvey Saferstein* and *Alexander Wiles*,
Irell & Manella, Topanga, CA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Positive Response Marketing, Inc., a corporation, also trading and doing business as Positive Response Television and Positive Response Advertising, and Michael S. Levey, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. (a) Respondent Michael S. Levey (“Levey”) is an officer and shareholder of Positive Response Marketing, Inc. Individually or in concert with others, he formulates, directs and controls the acts and practices of Positive Response, including the acts and practices alleged in this complaint. Levey resides at 1975 North Topanga Canyon Boulevard, Topanga, California.

(b) Respondent Positive Response Marketing, Inc. (“Positive Response”), is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Positive Response also trades and does business as Positive Response Television and Positive Response Advertising. Positive Response has its principal office and place of business at 1861 North Topanga Canyon Boulevard, Topanga, California.

PAR. 2. (a) From 1987 until approximately February 1989, Levey was an employee and shareholder of Twin Star Productions, Inc. (“Twin Star”). Individually or in concert with others, Levey formulated, directed and controlled the acts and practices of Twin Star, including the acts and practices alleged in this complaint. Levey and Positive Response developed, wrote, directed, edited and produced the television advertisements for numerous products advertised, offered for sale, sold and distributed by Twin Star to consumers throughout the United States, including the “Euro Trym Diet Patch,” a weight-loss product; “Foliplerx,” a hair-loss product; and “Y-Bron,” an impotence treatment. These advertisements, which are referred to as program-length commercials, run for 30 minutes or less and fit within normal television broadcasting time slots. Respondents’ commercials were broadcast on network, independent and cable television stations throughout the United States.

(b) Since March 1989, Levey and Positive Response have been engaged in and continue to be engaged in developing, writing, directing, editing and producing television advertisements for numerous products advertised, offered for sale, sold and distributed by National Media Corporation and Media Arts International, Ltd., to consumers throughout the United States, including the “Magic Wand,” an immersion-style kitchen mixer. These advertisements,

which are referred to as program-length commercials, run for 30 minutes or less and fit within normal television broadcasting time slots. The commercial for the Magic Wand is part of a series of commercials titled “Amazing Discoveries.” Respondent Levey acts as the host for the series. Respondents’ commercials are broadcast on network, independent and cable television stations throughout the United States.

PAR. 3. The Euro Trym Diet Patch, Foliplerx and Y-Bron are “drugs” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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.

False and Unsubstantiated Efficacy Claims

PAR. 5. Respondents have disseminated or have caused to be disseminated advertisements for the Euro Trym Diet Patch, including but not necessarily limited to a 30-minute television commercial identified as “The Michael Reagan Show” and attached as Exhibit A. This advertisement contains the following statements:

1. Mike Reagan: “You know, we have all kinds of patches we hear about all the time. We hear about the patch you put behind your ear for motion sickness. We hear about the patch for people with heart problems. Now there’s also a patch for regulating your pulse. You have a diet patch. How can your diet patch help people lose weight?”
- Dr. Keith Kenyon: “Well, remember, we are bodies electric. That’s why an EKG measures the electrical current from your heart. Now what my solution does, it’s an electrically charged solution, and we put it on acupuncture points, and acupuncture points connect our electrical system of our body. When we put this electrical charge solution on our acupuncture points, it sends a signal to the brain, the hunger part of the brain, the appetite control center of the brain, and it does this non-

- transdermally, and the electrical signal makes you feel that you're not hungry."
2. Man: "Just a little thing like this will really be helping me a lot in trying to reduce weight because it really takes that sensation of hunger and craving for food. It really takes it away."
3. Woman: "For the first time, I have found something that really works. I'm not hungry any more and I'm losing weight and it's so easy."
4. Man: "I'm a single guy. I'm young. I have a lot to live for. I want to lose this weight. That's when I started using the Diet Patch. The Diet Patch allowed me to lose the weight, even though I had tried other diets in the past. The one thing that was missing was that I was always hungry. So, after I got off the diet, I subsequently gained more weight. But the Diet Patch really works for me and it allowed me to keep off the weight and not feel hungry."
5. Mike Reagan: "Richard, tell me. There are so many diets out there. There's the powder diets, the pill diets and so on. Why is everybody buying the Diet Patch?"
- Richard Crew: "Well, because they discovered that, really, pills and powders are really not the answer. The most effective weight-loss system is to reduce the quantity of food that you eat, in other words, reduce your caloric intake. Now, when you do that, you will obviously get hungry. Therefore, the patch prevents hunger (from) taking place and therefore the diet sustains itself. In other words, you can stay on it longer."
6. Dr. Marshall Berger: "But seriously, I don't have any ill effects as far as being uptight or hyper. It's very easy for me to monitor my intake of food. I'm just not hungry. I don't think about the food and it's just very easy for me."
7. Mike Reagan: "And what you believe is your Euro Trym Diet Patch is going to solve that problem?"
- Christine Westheim: "Yes. Most of the people that have been using the Diet Patch have found it to be a solution to a problem that they've been dealing with most of their lives."
8. Announcer: "If you're among the 88 million Americans that need to lose weight, there's good news. Now you can join the thousands that have said goodbye forever to pills, powders and fad starvation diets since they've

discovered the easiest, the safest, the most effective fat-fighting weapon ever, the original Euro Trym Diet Patch System. And the Diet Patch is so simple to use. After activating the non-transdermal patch, simply apply it to the appetite control center's acupressure point and forget about it. For the next 12 to 14 hours, the Euro Trym Diet Patch puts you back in control of your appetite so you can begin immediately to shed those unwanted pounds. It even works while you're sleeping. Whether your weight-loss goal is 20, 30, 50 or even 100 pounds or more, with the Euro Trym Diet Patch you can finally have the body of your dreams, and maybe someone else's, too."

9. Mike Reagan: "I mean, Dr. Kenyon, is everybody experiencing this kind of weight loss? Is this typical?"
- Dr. Keith Kenyon: "Well, 70 to 80 percent it succeeds with. Of course, nothing works on everybody. Nothing in medicine works on everybody. But there is a high percentage of successful weight loss with this product."
10. Mike Reagan: "Now, I understand that a small but well-monitored study was done by a doctor, what, Robert Rogers in Florida?"
- Richard Crew: "Yes, that's correct."
- Mike Reagan: "You want to tell us about that?"
- Richard Crew: "Yes, I will . . . I went to see him a few months ago and we talked about the product and he's also been in touch with Dr. Kenyon a few times on the telephone. And he's conducting, he's prescribing the patch and the system to patients of his and he's getting some remarkable results. There's some there, there's one with a ten-pound loss, we have one that's over 50 pounds, and there's a lady that's actually lost 80 pounds. But one interesting case was when the lady who lost about 100 pounds before she came to Rogers, not on the patch but just through her own efforts, because she followed a system which lowered the caloric rate, but she got to a plateau and she used the patch and she instantly started to lose weight again and she since lost another 35 pounds, which I think is marvelous."

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not

necessarily limited to the “The Michael Reagan Show” advertisement attached as Exhibit A, respondents have represented, directly or by implication, that:

- (a) Use of the Euro Trym Diet Patch prevents feelings of hunger.
- (b) Use of the Euro Trym Diet Patch enables users to lose substantial amounts of weight.
- (c) Use of the Euro Trym Diet Patch enables users to lose weight in a large majority of cases.
- (d) Competent and reliable tests or studies establish that the Euro Trym Diet Patch promotes weight loss.

PAR. 7. In truth and in fact:

- (a) Use of the Euro Trym Diet Patch does not prevent feelings of hunger.
- (b) Use of the Euro Trym Diet Patch does not enable users to lose substantial amounts of weight.
- (c) Use of the Euro Trym Diet Patch does not enable users to lose weight in a large majority of cases.
- (d) No competent and reliable test or study establishes that the Euro Trym Diet Patch promotes weight loss.

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

PAR. 8. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to “The Michael Reagan Show” advertisement attached as Exhibit A, 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. 9. In truth and in fact, at the time they made the representations set forth in paragraph six, respondents did not possess and rely upon a reasonable basis that substantiated such

representations. Therefore, the representation set forth in paragraph eight was and is false and misleading.

PAR. 10. Respondents have disseminated or have caused to be disseminated advertisements for Foliplexx, including but not necessarily limited to a 30-minute television commercial identified as “Breakthrough ‘88” and attached as Exhibit B. This advertisement contains the following statements:

1. Sarah Simmons: “We learned of Foliplexx International quite by accident. When our remote crew went into the field to interview Americans across the country who are experiencing hair loss, they ran into several people who had been using the Foliplexx System quite successfully. These people indicated that their hair loss had stopped and, in many instances, they were actually experiencing re-growth.”
2. Announcer: “Regardless of your age, the fast-acting powerful Foliplexx System will provide an environment so perfect, so nutritionally charged, that thousands have already had their hair-loss stopped and are enjoying the relief and excitement of seeing re-growth. Do not confuse Foliplexx with any other product or system you tried or heard about before. Foliplexx is the only bio-active system having the complex synergistically combined ingredients just proclaimed as safe and effective by medical professionals.”
3. Steve Carlson: “Mr. Sarradet, it looks like you have a fan here. Can you tell me how long it takes to notice results when someone starts on your Foliplexx System?”
- Richard Sarradet: “Well, Steve, usually they’re reporting noticeable results in anywhere from three to six weeks. The first indications are the stopping of hair loss. First thing I noticed was that there was less of my hair in the bottom of the shower, which made me quite happy.”
- Steve Carlson: “Is the Foliplexx System guaranteed to work?”
- Richard Sarradet: “Our own in-house study shows that it works for a strong percentage of people who still have living follicles realizing, of course, that so far, nothing works for everybody. Now, to answer your question. The Foliplexx System comes with an unconditional 90-day guarantee, and we feel that’s plenty of time for people

to find out if the system will work for them. Now, the fact that we offer such an incredible money-back policy and we've kept the price of the product low, we feel that anyone experiencing hair loss or who wants to prevent future hair loss has absolutely nothing to lose by trying our system."

4. Man:

"I've been very concerned about my hair loss. I have a receding hair line, long, wide forehead and a rather definite bald spot at the top of my head. And so, my hair was falling out. I could see a lot of hair in the comb every day. And, by jingle, I started using, Foliplexx and it seems to have stopped. Appearance is very, very important. One should always look one's best, I feel. And when your hair begins to fall out, until recently, it's been a permanent, well, disaster."

5. Sarah Simmons:

"Demetre, when you and I were talking earlier, you told me some very impressive results your clients had been getting using the Foliplexx formulation. Would you mind telling our viewing audience something about that?"

Demetre Addis:

"I'd be happy to, Sarah. This gentleman's name is Ron. And Ron came to us with a problem quite common known as 'losing his hair' or 'balding.' Ron's problem was in the crown area here. There was literally almost no hair at all, and now, since we've been using the Foliplexx formula, you can see that this whole area is filled in considerably. The hair is looking thicker and healthier.

Behind us, we have another example, results that we get from the Foliplexx formula. This gentleman's name is Phil and he's Terry's client. Since she's been using the Foliplexx formula on him, his recession area is where he had the problem and it's all filling in. The results are sensational and we're all very pleased with it."

6. Ron:

"The first thing that I noticed when I started using the system was a lot less hair loss. I noticed that there was not a lot of hair in the shower at the bottom. But I was losing my hair. I felt that I was losing my youth, and I was kind of depressed about that and I didn't want to be in that situation. And the system was out there to be used and so I started using it and I'm very happy with the results. I was at a party and a friend,

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I had run into him, that I hadn't seen in some time and he took, and noticed that I was growing quite a bit of hair back there. And he is losing his hair in the back and like he was kind of envious of me getting my hair back."

7. Man: "I noticed that the hair started coming back. There was real short hairs you noticed with a guy that's going bald. And I noticed that they started growing and getting longer, and I started even getting thicker hair. So I've been real pleased with the results. I've just been on the program about two months. I'm just so damn happy! I can't believe it!"
8. Announcer: "If you or someone you know is experiencing the agony, frustration and embarrassment of hair loss, there is good news. The new powerful Foliplexx System has just been approved by its exclusive North American manufacturer for release without prescription. Independent tests reviewed by the medical and scientific professionals who attended the International Hair Loss Symposium proclaimed the ingredients in Foliplexx to be safe and effective regardless of nationality, ethnic origin or hair color. That means that anyone ready to do something about their hair loss can stop just complaining and start taking action now."
9. Announcer: "The doctors and scientists that attended the International Hair Loss Symposium concluded that there is indeed a safe and effective treatment for those thousands of men and women worldwide experiencing unwanted hair loss. The Foliplexx formulation was extremely effective on patients regardless of nationality, ethnic origin or hair color."
10. Sarah Simmons: "Then, in your opinion, doctor, does the Foliplexx System just released by Mr. Sarradet's company...can that actually work?"
- Dr. Ward Dean: "Well, I've personally interviewed a number of people who've already been on the program and they're quite excited and satisfied with the results, and frankly, I'm quite impressed myself. I think the results speak for themselves."

PAR. 11. Through the use of the statements contained in the advertisements referred to in paragraph ten, including but not

necessarily limited to the "Breakthrough '88" advertisement attached as Exhibit B, respondents have represented, directly or by implication, that:

(a) Use of Foliplexx curtails loss of hair, thus relieving or preventing baldness.

(b) Use of Foliplexx promotes growth of new hair where hair has already been lost, thus curing or reversing the advance of baldness.

(c) Foliplexx is an effective remedy for baldness in a large percentage of cases.

(d) Competent and reliable tests or studies establish that Foliplexx relieves, cures, prevents, or reverses the advance of baldness.

PAR. 12. In truth and in fact:

(a) Use of Foliplexx does not curtail loss of hair, and does not relieve or prevent baldness.

(b) Use of Foliplexx does not promote growth of new hair where hair has already been lost, and does not cure or reverse the advance of baldness.

(c) Foliplexx is not an effective remedy for baldness in a large percentage of cases.

(d) No competent and reliable test or study establishes that Foliplexx relieves, cures, prevents, or reverses the advance of baldness.

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

PAR. 13. Through the use of the statements contained in the advertisements referred to in paragraph ten, including but not necessarily limited to the "Breakthrough '88" advertisement attached as Exhibit B, respondents have represented, directly or by implication, that at the time they made the representations set forth

in paragraph eleven, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 14. In truth and in fact, at the time they made the representations set forth in paragraph eleven, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph thirteen was and is false and misleading.

PAR. 15. Respondents have disseminated or have caused to be disseminated advertisements for Y-Bron, including but not necessarily limited to a 30-minute television commercial identified as "Let's Talk" and attached as Exhibit C. This advertisement contains the following statements:

1. Lyle Waggoner: "Now, you've given the ingredients in the product Y-Bron here to some of your patients with favorable results. Is that correct?"
 Dr. Marvin Hausman: "That's correct. We've used yohimbine which is a product that has activity in the central nervous system; in the - in the head region, it causes an increase in libido - a sexual desire. We've also had evidence that it increases penile-erectile response."
2. Lyle Waggoner: "Carl, what happened when you used this formulation? What kind of results did you . . . could you see or feel?"
 Carl: "Well, suddenly, the erections were very different than before . . . And you know, your sex drive greatly improves. It's like a miracle happens."
 Lyle Waggoner: "Dr. Hausman, is this a typical reaction?"
 Dr. Marvin Hausman: "Yes, it depends on the diagnosis and the reason for using the program and the medication. Many people experience excellent results with this treatment program."
3. Case Study 4C711: "I started taking the Y-Bron and within three, two or three weeks, it began to have an effect on me. I began to feel it, I began to have an erection and not only had the erection, I was able to maintain the erection until we both received, we both attained satisfaction."
4. Case study 5P021: "I'm 58 years old. I've been married 40 years, and very, very happily married. My wife was very happy with me. But I became unhappy with myself because

I found that I was impotent. What is impotence? Impotence is when you can't function with your loved one. And you hide, you do things, you stay away from close quarters with your loved one, your mate, due to your inadequacies. Then I found the Y-Bron program. Now I'm so happy. My whole life has changed. I'm like I was when I was first married: young, vibrant, and full of life, looking forward to the future."

5. Case study 05005: "It happened just a couple of years ago. My wife and I used to argue over the most ridiculous things: who's gonna mow the lawn, who's gonna cook. But I knew what the problem was. It wasn't her, it was me. I was impotent. The problem was so severe, we got a divorce. When I went into the Y-Bron program, after just few weeks, I started to see the results. It was fantastic. I felt youthful, energetic. I felt like a new man."
6. Case study 1B007: "And I'm very, very happy now. I know that I'm having a good relationship, an intimate sexual relationship with my lady, and I'm the happiest guy in the world. Well actually, this has lasted now for several years. I am 64 years old. We still have this marvelous relationship, and I think I owe it all to Y-Bron, because before then, I-I didn't think there was any hope. I just thought I'd just kind of get old and fade away and not have any kind of a sex life at all. It's proved entirely different. I feel like I'm 30 years old. I love it."
7. Lyle Waggoner:
Gary Ballen: "Okay, but Y-Bron does increase the libido?"
"Absolutely."
8. Announcer: "Every day we're surrounded by pollution, anxiety and stress that can often lead to frustrating and embarrassing male impotency. But for thousands, this silent suffering has been ended, thanks to Y-Bron. A safe and effective formulation to address the problem of non-organic impotency. After recently undergoing two clinical studies, the Y-Bron formulation was shown successful in increasing desire and ability by raising the libido level in many male test subjects. The test results were so impressive that now Y-Bron comes with a 60-day money-back guarantee so you have nothing to lose."

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9. Lyle Waggoner: "Mr. Ballen, we were talking before we went on the air about your product Y-Bron, and you were telling me that this has been changing people's lives. Could you share that with our audience?"
- Gary Ballen: "Yes, Lyle, I can. We originally developed the product to treat male impotence. However, after various clinical tests, we discovered that not only did it help, frankly, the impotent, but it also helped those who were experiencing a loss of sexual desire."
10. Audience member: "Mr. Ballen, are there any side effects from your Y-Bron product?"
- Gary Ballen: "There are no known -- We've done two clinical trials, and there are no side effects. But, however, there are no negative side effects. However, there are some very good side effects. Most people report a feeling of well-being, of less stress, of being more sensual with their partner, feeling more sensual. Warmer, just a . . . even younger."
11. Lyle Waggoner: "Welcome back to Let's Talk. Now we're talking about the silent suffering of sexual dysfunction. And a new product, called Y-Bron, just released that appears to increase the sex drive and has been a tremendous help in treating impotent men. Now, I have a question. Dr. Hausman, if a person, if a man, has dysfunction or a loss of sex desire, is Y-Bron the answer?"
- Dr. Marvin Hausman: "Oh, from the studies we've been presented with today, the studies have shown that Y-Bron could be effective in increasing male sexual libido, male sexual desire."

PAR. 16. Through the use of the statements contained in the advertisements referred to in paragraph fifteen, including but not necessarily limited to the "Let's Talk" advertisement attached as Exhibit C, respondents have represented, directly or by implication, that:

- (a) Use of Y-Bron relieves, cures, prevents, or reverses impotence.
- (b) Use of Y-Bron increases sexual drive, ability, desire, or libido.

(c) Y-Bron is an effective remedy for impotence or increases sexual drive, ability, desire, or libido in a substantial percentage of cases.

(d) Competent and reliable tests or studies establish that Y-Bron is an effective remedy for impotence or increases sexual drive, ability, desire, or libido.

PAR. 17. In truth and in fact:

(a) Use of Y-Bron does not relieve, cure, prevent, or reverse impotence.

(b) Use of Y-Bron does not increase sexual drive, ability, desire, or libido.

(c) Y-Bron is not an effective remedy for impotence nor does it increase sexual drive, ability, desire, or libido in a substantial percentage of cases.

(d) No competent and reliable test or study establishes that Y-Bron is an effective remedy for impotence or increases sexual drive, ability, desire, or libido.

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

PAR. 18. Through the use of the statements contained in the advertisements referred to in paragraph fifteen, including but not necessarily limited to the "Let's Talk" advertisement attached as Exhibit C, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph sixteen, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 19. In truth and in fact, at the time they made the representations set forth in paragraph sixteen, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph eighteen was and is false and misleading.

Deceptive Demonstrations

PAR. 20. Respondents have prepared advertisements for the Magic Wand, including but not necessarily limited to a 30-minute television commercial identified as “Amazing Discoveries: Magic Wand.” This advertisement depicts an immersion-style kitchen mixer crushing the pulp of a whole, fresh pineapple and states that it is done “in seconds, literally seconds.” The pulp is then used to make a tropical drink. The advertisement also depicts the immersion-style kitchen mixer whipping skim milk, which is shown in the advertisement being used as mouse-like desserts and cake frosting.

PAR. 21. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twenty, including but not necessarily limited to the “Amazing Discoveries: Magic Wand” advertisement, respondents have represented, directly or by implication, that:

(a) The immersion-style kitchen mixer can crush a whole, fresh pineapple in seconds.

(b) Skim milk whipped by the immersion-style kitchen mixer can be used as mousse-like desserts and cake frosting.

PAR. 22. In truth and in fact:

(a) The immersion-style kitchen mixer cannot crush a whole, fresh pineapple in seconds, or in any reasonable period of time.

(b) Skim milk whipped by the immersion-style kitchen mixer cannot be used as mousse-like desserts and cake frosting, because it stays whipped for only a few minutes.

Therefore, the representations set forth in paragraph twenty-one were, and are, false and misleading.

PAR. 23. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twenty, including but not necessarily limited to the “Amazing Discoveries:

Magic Wand” advertisement, respondents have represented, directly or by implication, that:

(a) The demonstration of the immersion-style kitchen mixer included an unaltered, whole, fresh pineapple used to make a tropical drink.

(b) The demonstration of the immersion-style kitchen mixer included mousse-like desserts and cake frosting made from skim milk whipped by the immersion-style kitchen mixer.

PAR. 24. In truth and in fact:

(a) The demonstration of the immersion-style kitchen mixer did not include an unaltered, whole, fresh pineapple used to make a tropical drink. Respondents substituted crushed pineapple pulp with a slice of pineapple on top to resemble a whole, fresh pineapple.

(b) The demonstration of the immersion-style kitchen mixer did not include mousse-like desserts and cake frosting made from skim milk whipped by the immersion-style kitchen mixer. Respondents substituted Cool Whip dairy topping to resemble mousse-like desserts and prepared frosting mix to resemble cake frosting.

Therefore, the representations set forth in paragraph twenty-three were, and are, false and misleading.

Deceptive Format

PAR. 25. Through the advertising and dissemination of “The Michael Reagan Show,” “Breakthrough ‘88,” “Let’s Talk,” and “Amazing Discoveries: Magic Wand” advertisements, respondents have represented, directly or by implication, that these commercials are independent television programs and not paid commercial advertising.

PAR. 26. In truth and in fact, “The Michael Reagan Show,” “Breakthrough ‘88,” “Let’s Talk,” and “Amazing Discoveries: Magic Wand” advertisements are not independent television

programs and are paid commercial advertising. Therefore, the representation set forth in paragraph twenty-five was, and is, false and misleading.

Deceptive Endorsements

PAR. 27. Through the statements and depictions contained in the advertisements referred to in paragraphs five, ten and fifteen, including but not necessarily limited to “The Michael Reagan Show,” “Breakthrough ‘88,” and “Let’s Talk” advertisements, respondents have represented, directly or by implication, that various testimonials and endorsements contained therein:

(a) Reflect the typical or ordinary experiences of consumers after using the advertised products.

(b) Were obtained from individuals or other entities who, at the time of providing their endorsements, were independent from all of the individuals and entities marketing the product.

PAR. 28. In truth and in fact, the various testimonials and endorsements contained in the advertisements referred to in paragraphs five, ten and fifteen:

(a) Do not reflect the typical or ordinary experiences of consumers after using the advertised products.

(b) Were in some instances obtained from individuals or other entities who, at the time of providing their endorsements, were not independent from all of the individuals and entities marketing the product.

Therefore, the representations set forth in paragraph twenty-seven were, and are, false and misleading.

PAR. 29. Respondents have disseminated or have caused to be disseminated advertisements for various products, including but not necessarily limited to the “Amazing Discoveries: Magic Wand” advertisement, which display the purported seal of an organization

called the National Association of Advertising Producers (“NAAP”), and contain the following statement:

“The following special promotional program has been approved by the national Association of Advertising Producers for its integrity and excellence.”

PAR. 30. Through the use of the statements and depictions contained in the advertisements referred to paragraph twenty-nine, including but not necessarily limited to the “Amazing Discoveries: Magic Wand” advertisement, respondents have represented, directly or by implication, that:

(a) The NAAP is an existing organization whose qualifications give it the expertise to evaluate commercials for their integrity and excellence.

(b) The NAAP is an entity that, at the time of providing the endorsements, was independent from all of the individuals and entities marketing the product.

PAR. 31. In truth and in fact,;

(a) The NAAP is not an existing organization whose qualifications give it the expertise to evaluate commercials for their integrity and excellence.

(b) The NAAP is not an entity that, at the time of providing its endorsements, was independent from all of the individuals and entities marketing the product.

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

PAR. 32. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Commissioner Azcuenaga recused.

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Complaint

EXHIBIT A

TRANSCRIPT OF EUROTRYM DIET PATCH COMMERCIAL

Announcer: This program deals with an exciting new method of losing weight with the non-transdermal diet patch. The opinions expressed here may not necessarily be that of the general medical or scientific communities.

Woman: For the first time I have found something that really works.

Woman: And I have just started on the patch and I have already lost 15 pounds and it was so easy.

Announcer: Welcome to this edition of the Michael Reagan Show. Now here's Michael.

Mike Reagan: Hi, everyone, I'm Mike Reagan and welcome to our show. Today's topic, the Diet Patch, must be of great interest to everyone out there. We've had a record breaking turn-out of people that wish to be in the audience for today's program and I must apologize to those people that we had to turn away for lack of room here in the studio.

Do you know that there is an estimated 88 million Americans across this nation who are considered by medical experts to be overweight? I don't know if I, I didn't talk to a medical expert, but I feel overweight all the time. I mean I think they all tried to show up here for today's show just to find out about what we're going to be talking about. The Diet Patch. Introduced to the general public only six months ago, the Diet Patch has become a fat-fighting weapon that has caused a craze to develop across America. Our special guest with us today is none other than Dr. Keith Kenyon, a surgeon and practicing physician in Southern California, and also a respected author. Dr. Kenyon, I am told by our research staff, is considered to be the inventor of the Diet Patch.

Welcome to our show, Dr. Kenyon.

Dr. Keith Kenyon: Thank you, Mike.

Mike Reagan: You know, we have all kinds of patches we hear about all the time. We hear about the patch you put behind your ear for motion sickness. We hear about the patch for people with heart problems. Now there's also a patch for regulating your pulse. You have a Diet Patch. How can your Diet Patch help people lose weight?

- Dr Keith
Kenyon: Well, remember, we are bodies electric. That's why an EKG measures the electrical current from your heart. Now what my solution does, it's an electrically charged solution, and we put it on acupuncture points, and acupuncture points connect our electrical system of our body. When we put this electrical charge solution on our acupuncture points, it sends a signal to the brain, the hunger part of the brain, the appetite control center of the brain, and it does this non-transdermally, and the electrical signal make you feel that you're not hungry.
- Mike Reagan: Okay, I mean there's many acupuncture points. We've read about them, we've seen them in magazines and all that. Do you have a special acupuncture point that you put this patch?
- Dr. Keith
Kenyon: Yes, there is a special acupuncture point that's best for it. It's two finger breadths away, two of your finger breadths away from your --
- Mike Reagan: I have big fingers.
- Dr. Keith
Kenyon: And therefore you have the acupuncture point
- Mike Reagan: Okay.
- Dr. Keith
Kenyon: -- spread apart. Two finger breadths above the hand-wrist junction on the palm side right where your watch will be and those there electrically stimulates the appetite control center right from there through your electrical system of the body.
- Mike Reagan: Boy, that really -- that sounds so simple. Just a little patch like that put there and it gets to your hunger control system and tells you to stop eating.
- Dr. Keith
Kenyon: That's right.
- Mike Reagan: That is amazing. Also joining us today on the show is Mr. Richard Crew, President of Am Euro Sciences International. And with him is Christine Westheim, who is the Marketing Director for Am Euro Sciences, which is the manufacturer and distributor of the Diet Patch called Euro Trym, which uses Dr. Kenyon's formulation. Welcome to the show.
- Christine
Westheim: Thank you.
- Mike Reagan: Christine, good to have you here. You look trim and fit.
- Christine
Westheim: Thank you.
- Mike Reagan: You use one of your own patches?
- Christine
Westheim: Yes, I do. Right on the wrist.

- Mike Reagan: Right there. That's why you're trim and fit.
Christine Westheim: That's right.
- Mike Reagan: Listen, you're out there in the marketplace. Eighty-eight million Americans think they have a weight problem. Is this true?
Christine Westheim: Well, in fact, Michael, really we think the figures are a lot higher than that. America's excess weight has become a very, very serious health problem today.
- Mike Reagan: And what you believe is your Euro Trym Diet Patch is going to solve that problem?
Christine Westheim: Yes. Most of the people that have been using the Diet Patch have found it to be a solution to a problem that they've been dealing with most of their lives.
- Mike Reagan: Richard Crew, you are the President of Am Euro Sciences. Tell me, how'd you come up with the name Am Euro?
Richard Crew: Well, America and Europe are two different cultures. And yet we have a common problem. We over there just have as many people overweight or the percentage overweight as you have here. And by bringing the two different scientific approaches, the medical profession over there and the medical profession here, it was easy having met Dr. Kenyon, to utilize the formulation that he's created to solve that problem and therefore create the Diet Patch which is having such a terrific success in Europe.
- Mike Reagan: Yeah, you know 200 years ago we left -- did we leave your country or you left ours?
Richard Crew: No, you threw us out.
Mike Reagan: Oh, that was it.
Richard Crew: Yes.
Mike Reagan: And since then, you've been talking that way?
Richard Crew: Yes. And, had you not thrown us out you'd have been talking this way.
- Mike Reagan: I think I would have liked to talk your way. I love going to Europe. It's a wonderful place to go. It's great. I'll tell you, you have certainly gotten my antenna up and I know that your Diet Patch has caught the attention of everybody here in America. But I'm going to introduce a couple more people to our show right now. And joining us today also are Dr. Michael Levitt, a successful practicing physician from Phoenix, Arizona. First, I'd like to ask you, Dr. Levitt, here we are in the '80s, people are still worried about weight. I mean, why are people

