

Complaint

116 F.T.C.

IN THE MATTER OF

S.C. JOHNSON & SON, INC.

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

Docket C-3418. Complaint, March 16, 1993--Decision, March 16, 1993

This consent order requires, among other things, a Wisconsin-based manufacturer of home care products to divest its assets used in the production, manufacture and sale of continuous action and aerosol air freshener products and furniture care products, in order to acquire certain assets of the Drackett Company, a subsidiary of Bristol-Myers Squibb Company. In addition, for a 10-year period, Johnson must obtain Commission approval before acquiring any interest in any air freshener or furniture care product manufacturer or distributor.

Appearances

For the Commission: *Steven A. Newborn* and *Jane R. Seymour*.

For the respondent: *Tefft W. Smith, Kirkland & Ellis*,
Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondent, S.C. Johnson & Son, Inc. ("Johnson"), a corporation, proposes to acquire all of the voting securities of The Drackett Company ("Drackett"), a wholly-owned subsidiary of Bristol-Myers Squibb Company ("BMS"), from BMS, and certain assets of BMS relating to Drackett's international business, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect

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

I. RESPONDENT

1. Respondent Johnson is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business at 1525 Howe Street, Racine, Wisconsin.

2. Johnson 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. THE ACQUIRED COMPANY

3. BMS 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 345 Park Avenue, New York, New York.

4. BMS 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.

5. Drackett 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 201 East Fourth Street, Cincinnati, Ohio.

6. Drackett 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

7. On or about October 26, 1992, Johnson agreed to acquire all of the voting securities of Drackett, a wholly-owned subsidiary of BMS, and certain assets of BMS relating to Drackett's international business, for a price of approximately \$1.15 billion.

IV. THE RELEVANT MARKETS

8. The relevant lines of commerce in which to analyze Johnson's acquisition of Drackett from BMS are:

a. The continuous action air freshener products business and the instant action air freshener products business, which means the business of formulating, manufacturing, marketing and selling products designed to combat and eliminate offensive odors in the home, that are applied by aerosol spray or in liquid, solid, wick and other forms and that are distributed to consumers primarily in grocery, drug, and mass merchandise stores; and

b. The furniture care products business, which means the business of formulating, manufacturing, marketing and selling household polishes and dusting aids designed to clean, shine, and protect furniture and other household surfaces, that are applied by aerosol spray or in cream, paste, liquid and other forms and that are distributed to consumers primarily in grocery, drug, and mass merchandise stores.

9. The relevant section of the country for each relevant line of commerce specified in paragraph 8 above is the United States.

10. The relevant markets set forth above are highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

11. Entry into the relevant markets is difficult or unlikely.

12. Johnson and BMS are actual competitors in the relevant markets.

V. EFFECTS OF THE ACQUISITION

13. The effects of the acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

14. All of the above increase the likelihood that firms in the relevant markets will increase prices and restrict output both in the near future and in the long term and that Johnson will unilaterally exercise market power in the relevant markets.

VI. VIOLATIONS CHARGED

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

16. The acquisition described in paragraph seven, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission 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 respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in

the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure 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 S.C. Johnson & Son, Inc. ("Johnson") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business located at 1525 Howe Street, Racine, Wisconsin.

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.

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

A. "*Johnson*" means S.C. Johnson & Son, Inc., its predecessors, successors and assigns, divisions, subsidiaries, affiliates, companies, groups, partnerships and joint ventures that S.C. Johnson & Son, Inc. controls, directly or indirectly, and their directors, officers, employees, agents and representatives, and their respective successors and assigns.

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

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

D. “*Acquisition*” means the acquisition by Johnson from BMS of all the voting securities of Drackett, a wholly-owned subsidiary of BMS, and certain assets of BMS relating to Drackett’s international business.

E. “*Air freshener products*” means products designed to combat and eliminate offensive odors in the home that applied by aerosol spray, or in liquid, solid, wick or other forms and that are distributed to consumers primarily through grocery, drug, and mass merchandise stores.

F. “*Furniture care products*” means household polishes and dusting aids designed to clean, shine, and protect furniture and other household surfaces, which are applied by aerosol spray or in cream, paste, liquid and other forms and that are distributed to consumers primarily through grocery, drug, and mass merchandise stores.

G. “*Renuzit Assets*” means all of Drackett’s rights, title and interest in and to:

(1) Air freshener products, including, but not limited to, the brands and trademarks “Renuzit”, “Renuzit Adjustable”, “Renuzit Roommate”, “Renuzit Freshell”, “Renuzit Fragrance Jar”, “Renuzit Aerosol”, and “Renuzit Fresh ‘n Dry”;

(2) Furniture care products, including, but not limited to, the brands and trademarks “Endust” and “Behold”, but excluding the brand and trademark “Mr. Muscle” outside the United States; and

(3) All of Drackett's assets and businesses associated with the development, production, distribution, and sale for resale of air freshener products and furniture care products and as further delineated in the subparagraphs of Schedule A, attached hereto and made a part hereof.

II.

It is ordered, That:

A. Johnson shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Renuzit Assets; *provided, however*, Johnson is not required to divest any of the Renuzit Assets identified in Schedule A, Part 2, if such assets are not needed by the acquirer or acquirers ("acquirer(s)") in connection with the development, production, distribution, and sale for resale of air freshener products or furniture care products.

B. Johnson shall divest the Renuzit Assets only to an acquirer or acquirers ("acquirer(s)") 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 Renuzit Assets is to ensure the continuation of the assets as an ongoing, viable enterprise engaged in the same businesses in which the Renuzit Assets presently are employed, and to remedy the lessening of competition resulting from the proposed Acquisition as alleged in the Commission's complaint.

C. At the time of divestiture, Johnson shall make available to the acquirer(s) such Johnson personnel, assistance and training as the acquirer(s) might reasonably need to transfer Drackett technology and know-how included in the Renuzit Assets, and shall continue providing such personnel, assistance and training at Johnson's cost for a period of time (not to exceed six (6) months) sufficient to satisfy the acquirer(s)' management that its personnel are appropriately trained in the technology and know-how. At the time of divestiture, Johnson shall also divest any additional, incidental assets of Drackett and make any further arrangements for

administrative services within the first six (6) months after divestiture that may be reasonably necessary to assure the viability and competitiveness of the Renuzit Assets.

D. Johnson shall ensure that substantially the same services that BMS agreed to provide Johnson pursuant to the Acquisition Agreement dated October 26, 1992, between Johnson and BMS covering Johnson's acquisition of Drackett ("Acquisition Agreement"), shall be provided to the acquirer(s), upon the acquirer's request and on the same terms as such services are provided to Johnson, during the period that BMS has agreed to provide Johnson such services pursuant to the Acquisition Agreement.

E. Johnson will provide and ensure that BMS also provides reasonable cooperation and assistance to the acquirer(s) in obtaining approvals for the transfer of all registrations, leases, licenses, certifications, permits, or similar documents relating to the Renuzit Assets.

F. Johnson shall comply with all terms of the Agreement to Hold Separate, attached hereto and made a part hereof. The Agreement to Hold Separate shall continue in effect until such time as Johnson has divested the Renuzit Assets or until such other time as the Agreement to Hold Separate provides.

G. Johnson shall take such actions as are necessary to maintain the viability and marketability of the Renuzit Assets and to prevent the destruction, removal, wasting, deterioration or impairment of any of the Renuzit Assets except in the ordinary course of business and except for ordinary wear and tear that does not affect the viability and marketability of the Renuzit Assets.

III.

It is further ordered, That:

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

divest the Renuzit 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, Johnson shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Johnson to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, Johnson 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 Johnson, 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, subject to the prior approval of the Commission, have the exclusive power and authority to divest the Renuzit Assets, and in addition, after a period of six (6) months, to divest the trademark "Vanish" along with the Renuzit Assets, together with any additional, incidental assets of Johnson, including those relating to the "Vanish" trademark, and make any further arrangements for administrative services that may be reasonably necessary to assure the viability and competitiveness of the Renuzit Assets and the "Vanish" trademark.

3. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph 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 by the court (in the case of a court-appointed trustee). *Provided,*

however, the Commission may only extend the divestiture period two (2) times.

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

5. Subject to Johnson's absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in paragraph II.B. of this order, 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 set out in paragraph II; *provided, however*, if the trustee receives bona fide offers from more than one acquirer, and if the Commission determines to approve more than one such acquirer, the trustee shall divest to the acquirer(s) selected by Johnson from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of Johnson, 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 Johnson, 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 sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Johnson and the trustee's power shall be terminated. The trustee's

compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Renuzit Assets.

7. Johnson 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, claims, or expenses result from misfeasance, negligence, willful or wanton acts, or bad faith by the trustee.

8. Within thirty (30) 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, Johnson shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture 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 III.A. of this order.

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

11. The trustee shall have no obligation or authority to operate or maintain either the Renuzit Assets or those assets associated with the "Vanish" trademark.

12. The trustee shall report in writing to Johnson and to the Commission every thirty (30) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That Johnson shall maintain the viability and marketability of the "Vanish" trademark together with any

additional, incidental assets of Johnson relating to the "Vanish" trademark, and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair their marketability or viability, pending divestiture without the prior approval of the Commission.

V.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until Johnson has fully complied with the provisions of paragraphs II and III of this order, Johnson 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. Johnson 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, including the identity of all parties contacted. Johnson 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.

VI.

It is further ordered, That, for a ten (10) year period commencing on the date this order becomes final, Johnson shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries, partnerships or otherwise,

(1) Any equity or other interest in, or the whole or any part of the stock or share capital of, any person or business that is engaged in the development, production, distribution, and sale for resale of air freshener products or furniture care products in the United States; *provided, however*, that individual employees of Johnson and each pension, benefit or welfare plan or trust controlled by Johnson may

acquire, for investment purposes only, an interest of not more than two (2) percent of the stock or share capital of such person or business;

(2) Any equity or other interest in, or the whole or any part of the stock or share capital of, any person or business that owns or licenses a brand or trademark used in connection with the sale of air freshener products or furniture care products in the United States; *provided, however*, that individual employees of Johnson and each pension, benefit or welfare plan or trust controlled by Johnson may acquire, for investment purposes only, an interest of not more than two (2) percent of the stock or share capital of such person or business; or

(3) Any assets used or previously used (and still suitable for use) in the manufacture or production of air freshener products or furniture care products; *provided, however*, that Johnson may, in the ordinary course of business, make purchases of used equipment suitable for manufacturing air freshener products and/or furniture care products totaling not more than \$1 million per year.

One (1) year from the date this order becomes final and annually thereafter for nine (9) years on the anniversary date of this order, Johnson shall file with the Secretary of the Federal Trade Commission a verified written report of its compliance with this paragraph.

VII.

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 Johnson, Johnson 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 Johnson relating to any matters contained in this consent order; and

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

VIII.

It is further ordered, That Johnson shall notify the Commission at least thirty (30) days prior to any change that may affect compliance obligations arising out of the order, including but not limited to, any change in Johnson such as dissolution, assignment, or sale resulting in the emergence of a successor, the creation or dissolution of subsidiaries, or any other change.

SCHEDULE A

Johnson shall divest all of the Renuzit Assets pursuant to the terms of this order. The associated assets identified in paragraph I.G.(3) of this order shall include all assets, properties, business and goodwill, tangible and intangible, utilized by Drackett in the development, production, distribution and sale of air freshener products and furniture care products, including, without limitation, the following:

PART 1

(1) All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, marketing information, product development information, research materials, technical information, management information systems, software, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes and quality control data;

(2) Intellectual property rights, patents and patent applications and the formulas, copyrights, trademarks and trade names, service marks;

(3) All rights, title and interest in and to the contracts entered in the ordinary course of business with customers (together with the 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;

(4) All rights under warranties and guarantees, express or implied;

- (5) All books, records, files, financial statements and supporting documents;
- (6) All items of prepaid expense.

PART 2

- (1) The Franklin, Kentucky plant, all machinery, fixtures, equipment, vehicles, furniture, tools and all other tangible personal property;
- (2) Inventory;
- (3) Accounts and notes receivable;
- (4) All Environmental Protection Agency and all other federal and state regulatory agency registrations and applications, and all documents related thereto; and
- (5) All rights, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits.

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Hold Separate") is by and among S.C. Johnson & Son, Inc. ("Johnson," as defined in paragraph I of the proposed order contained in the Agreement Containing Consent Order), a corporation organized, existing, and doing business under and by virtue of the laws of Wisconsin, with its office and principal place of business at 1525 Howe Street, Racine, Wisconsin; and the Federal Trade Commission ("the Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

Premises

Whereas, on October 26, 1992, Johnson entered into an agreement with Bristol-Myers Squibb Company ("BMS") to acquire all the voting securities of The Drackett Company ("Drackett"), a wholly-owned subsidiary of BMS, and certain assets of BMS relating to Drackett's international business (hereinafter "Acquisition"); and

Whereas, BMS, with its principal office and place of business located at 345 Park Avenue, New York, New York, produces and

markets, among other things, air freshener products and furniture care products, as defined in paragraph I of the proposed order; and

Whereas, Drackett, with its principal office and place of business located at 201 East Fourth Street, Cincinnati, Ohio, produces and markets household products; and

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

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

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the Renuzit Assets, as defined in paragraph I of the proposed order, during the period prior to the final acceptance and issuance of the order by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Renuzit Assets defined in paragraph I of the proposed order and the Commission's right to have the Renuzit Assets continue as a viable competitor; and

Whereas, the purpose of the Hold Separate and the Consent Agreement is to:

1. Preserve the Renuzit Assets pending the divestiture as a viable, independent, ongoing enterprise, and
2. Remedy any anticompetitive effects of the Acquisition; and

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

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

Now, therefore, the parties agree, upon the understanding that the Commission has not yet determined whether the acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Agreement for public comment it will grant early termination of the Hart-Scott-Rodino waiting period, and unless the Commission determines to reject the proposed order, it will not seek further relief from Johnson with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Hold Separate and the Consent Agreement to which it is annexed and made a part thereof, and in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Renuzit Assets pursuant to the order, as follows:

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

2. Johnson agrees that from the date this Hold Separate is accepted until the earlier of the dates listed below in subparagraphs 2.a and 2.b, it will comply with the provisions of paragraph 3 of this Hold Separate:

- a. Three (3) business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's rules; or

- b. The day after the divestiture required by the Consent Agreement has been completed.

3. Johnson agrees to hold the Renuzit Assets separate and apart on the following terms and conditions:

- a. The Renuzit Assets, as defined in paragraph I of the proposed order, shall be held separate and apart and shall be operated independently of Johnson (as employed here and hereinafter, the

term "Johnson" shall exclude the Renuzit Assets and exclude all personnel directly connected with the Renuzit Assets) except to the extent that Johnson must exercise direction and control over the Renuzit Assets to assure compliance with this Hold Separate or the order, and except as otherwise provided in this Hold Separate; *provided, however*, that all assets at the Urbana, Ohio plant used to manufacture Renuzit air freshener products shall be transferred to the Franklin, Kentucky plant, and the Urbana, Ohio plant shall not be considered part of the Renuzit Assets.

b. Prior to, or simultaneously with, its acquisition of Drackett, Johnson shall separately incorporate the Renuzit Assets ("Renuzit Company") and adopt new Articles of Incorporation and By-laws that are not inconsistent with any provisions of this Hold Separate or the order.

c. Johnson shall elect a five-person board of directors for the Renuzit Company ("New Board"). The New Board shall consist of the existing Renuzit General Manager and the existing Renuzit Financial Manager (provided they agree, or comparable, knowledgeable persons among the managers of the Renuzit Assets independent of Johnson); two Johnson employees whose responsibilities with Johnson do not involve direct management of Johnson's North American Consumer Products Business; and a chairman who will be independent of Johnson and competent to assure the continued viability and competitiveness of the Renuzit Assets. Except for the two Johnson directors serving on the New Board, Johnson shall not permit any director, officer, employee, or agent of Johnson also to be a director, officer, or employee of the Renuzit Company.

d. Johnson shall not exercise direction or control over, or influence directly or indirectly, the Renuzit Company, the independent chairman, or the New Board, or any of its operations or businesses; *provided however*, that Johnson may exercise only such direction and control over the Renuzit Company as is necessary to assure compliance with this Hold Separate or the order.

e. Johnson shall maintain the viability and marketability of the Renuzit Assets and shall not cause or permit the destruction, removal, wasting, deterioration, or impairment of any assets or

businesses it may have to divest except in the ordinary course of business and except for wear and tear. Johnson shall not sell, transfer, or encumber the Renuzit Assets except in the ordinary course of business.

f. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or defending or prosecuting litigation, or negotiating agreements to divest assets, Johnson shall not receive or have access to, or the use of, any material confidential information not in the public domain about the Renuzit Company or the activities of the New Board, nor shall the Renuzit Company receive or have access to, or use of, any material confidential information not in the public domain about Johnson's air freshener products and furniture care product businesses, or the activities of Johnson in managing its air freshener products and furniture care products businesses. Johnson may receive on a regular basis from the Renuzit Company aggregate financial information necessary and essential to allow Johnson to prepare United States consolidated financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in the paragraph. ("Material confidential information" as used herein, means competitively sensitive or proprietary information not independently known to Johnson from sources other than the New Board including, but not limited to, customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.)

g. Except as is permitted by this Hold Separate, the two directors of the Renuzit Company appointed by Johnson and who are also directors, officers, agents, or employees of Johnson ("Johnson New Board members"), shall not receive any Renuzit Company material confidential information and shall not disclose any such information obtained through their involvement with the Renuzit Company to Johnson or use it to obtain any advantage for Johnson. The two Johnson New Board members shall participate in matters that come before the New Board only for the limited

purposes of considering any capital investment of over \$250,000, approving any proposed budget and operating plans, authorizing dividends and repayment of loans consistent with the provisions of subparagraph 3.1 hereof, and carrying out Johnson's responsibilities under the Hold Separate and the order. Except as permitted by the Hold Separate, the two directors shall not participate in any matter, or attempt to influence the votes of other directors of the New Board with respect to matters that would involve a conflict of interest between Johnson and the Renuzit Company. Meetings of the New Board during the term of the Hold Separate shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of the Hold Separate.

h. The Renuzit Company shall be staffed with sufficient employees to maintain the viability and competitiveness of the Renuzit Aseets, which employees shall be selected from Drackett's existing employee base and may also be hired from sources other than Johnson. Each director, officer and management employee of the Renuzit Company shall execute a confidentiality agreement prohibiting the disclosure of any Renuzit Company confidential information.

i. All material transactions, out of the ordinary course of business and not precluded by subparagraphs 3.a - 3.1 hereof, shall be subject to a majority vote of the New Board.

j. Johnson shall not change the composition of the New Board unless the independent chairman consents. The independent chairman shall have the power to remove members of the New Board for cause. Johnson shall not change the composition of the management of the Renuzit Company except that the New Board shall have the power to remove management employees for cause.

k. If the independent chairman ceases to act or fails to act diligently, a substitute chairman shall be appointed in the same manner as provided in paragraph 3.c of this Hold Separate. Any

replacement for independent chairman shall be appointed with the consent of the Commission.

1. Johnson shall make available for use by the Renuzit Company each year until divestiture an amount not less than \$32 million (\$32,000,000), unless a smaller amount is requested or required by the Renuzit Company, in its sole discretion, for advertising and consumer and trade promotion of the Renuzit Business products, and shall pay all direct product costs and indirect overheads for the Renuzit Company, to the extent that the Renuzit Company, in its sole discretion, deems such payment to be necessary. Johnson shall also provide all working capital deemed necessary for the Renuzit Company by a vote of a majority of the New Board.

4. Should the Federal Trade Commission seek in any proceeding to compel Johnson to divest itself of the Renuzit Assets or any additional assets, as provided in the proposed order, Johnson shall not raise any objection based on the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Johnson also waives all rights to contest the validity of this Hold Separate.

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

6. For the purpose of determining or securing compliance with this Hold Separate, subject to any legally recognized privilege, and upon written request with reasonable notice to Johnson made to its principal office in the United States, Johnson shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Johnson 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 Johnson relating to compliance with this Hold Separate; and

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

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

Complaint

116 F.T.C.

IN THE MATTER OF

CC POLLEN COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3419. Complaint, March 16, 1993--Decision, March 16, 1993

This consent order prohibits, among other things, a Phoenix-based firm, and its owners, from making false claims about the effect consumption of their bee pollen products has in regard to allergies, aging, impotence, sexual dysfunction, weight loss and antibiotic treatment, and requires that they have scientific evidence to support any other health-benefit claims they make about any food or other product for human consumption, in the future. In addition, the respondents are prohibited from producing or distributing any advertisement that is represented to be something other than a paid ad, and are required to prominently disclose in all future infomercials they create that the programs are paid ads. Finally, the respondents are required to pay \$200,000 as disgorgement of profits.

Appearances

For the Commission: *Brinley H. Williams, Michael Milgrom and Melissa R. Sternlicht.*

For the respondents: *Daniel C. Smith, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that CC Pollen Company, a corporation, and Bruce R. Brown, Carol M. Brown, and Royden Brown, individually and as officers and/or directors of said corporation ("respondents") have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges: