

IN THE MATTER OF

BOSTON SCIENTIFIC CORPORATION

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-3573. Complaint, April 28, 1995--Decision, April 28, 1995*

This consent order permits, among other things, Boston Scientific Corporation, a Massachusetts-based manufacturer and marketer of catheters, to proceed with the proposed acquisitions of Cardiovascular Imaging Systems, Inc., and SCIMED Life Systems, Inc., but requires the respondent to grant a non-exclusive license to a specified package of patents and technology related to the manufacture, production and sale of intravascular ultrasound (IVUS) imaging catheters to the Hewlett-Packard Company or another Commission-approved licensee. In addition, the consent order requires the respondent to obtain Commission approval, for ten years, before acquiring an interest greater than one percent in a company engaged in researching, developing or manufacturing IVUS catheters for sale in the United States.

Appearances

For the Commission: *Howard Morse* and *Robert S. Tovsky*.

For the respondent: *Bruce Montgomery, Arnold & Porter*,
Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Boston Scientific Corporation (Boston Scientific) has entered into agreements with Cardiovascular Imaging Systems, Inc. (CVIS), and with SCIMED Life Systems, Inc. (SCIMED), whereby Boston Scientific will acquire all of the outstanding shares of both CVIS and SCIMED, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisitions, 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, and having reason to believe that Boston Scientific has entered into such agreements in restraint of trade in violation of

Section 5 of the Federal Trade Commission Act, 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. THE RESPONDENT

1. Respondent Boston Scientific is a corporation organized and existing under the laws of Delaware, with its principal place of business at 1 Boston Scientific Place, Natick, Massachusetts.

2. At all times relevant herein, the respondent has been, and is now, engaged in commerce as "commerce" is defined in Section 4 of the FTC Act (15 U.S.C. 44) and Section 1 of the Clayton Act (15 U.S.C. 12), and is a corporation whose business is in or affecting commerce as defined in Section 4 of the Federal Trade Commission Act (15 U.S.C. 44).

II. THE PROPOSED ACQUISITIONS

3. On or about August 31, 1994, Boston Scientific and CVIS executed an Agreement and Plan of Merger and Reorganization ("CVIS Agreement") wherein Boston Scientific agreed to acquire all of the voting securities of CVIS. The transaction is valued at approximately \$88 million.

4. On or about November 8, 1994, Boston Scientific and SCIMED executed an Agreement and Plan of Merger ("SCIMED Agreement") wherein Boston Scientific agreed to acquire all the outstanding shares of SCIMED through a stock swap valued at approximately \$870 million.

III. THE RELEVANT MARKETS

5. One relevant line of commerce within which to analyze the effects of the CVIS and SCIMED acquisitions is the research and development, manufacture, and sale of intravascular ultrasound ("IVUS") catheters, including imaging catheters, imaging cores and imaging guidewires.

6. IVUS catheters are medical devices used as an adjunct to angiography in conjunction with therapeutic procedures such as balloon angioplasty, atherectomy, and stent implantation, to diagnose

and treat cardiovascular disease. IVUS catheters generate an ultrasound image from the inside of arteries, providing detailed information that is not obtainable using other imaging techniques. Use of IVUS catheters may result in more effective use of therapeutic treatments and overall lower health care costs.

7. One relevant geographic area within which to analyze the likely effects of the CVIS and SCIMED acquisitions is the United States. Foreign producers are constrained from selling in the United States, by, among other things, patents and requirements for regulatory approvals.

IV. MARKET STRUCTURE

8. Boston Scientific and CVIS are the two leading competitors in the research and development, manufacture, and sale of IVUS catheters in the United States.

9. The U.S. IVUS catheter market is extremely concentrated as measured by the Herfindahl-Hirschmann Index (HHI). In 1994, CVIS accounted for approximately 50% and Boston Scientific accounted for approximately 40% of sales of IVUS catheters in the United States. Boston Scientific's acquisition of CVIS would increase the HHI by approximately 3850 points, to over 7900.

10. Only one other company, Endosonics Corporation, currently sells IVUS catheters in the United States. Endosonics' IVUS catheters utilize a phased array technology, unlike Boston Scientific's and CVIS' IVUS catheters, which use a mechanical rotating technology. Endosonics' share of the U.S. IVUS catheter market has fallen over recent years.

11. Boston Scientific and CVIS are continuing to compete vigorously while engaged in patent litigation in which CVIS asserts Boston Scientific infringes certain of its patents, and Boston Scientific asserts that certain of CVIS' patents are invalid and that CVIS infringes certain of its patents.

12. The IVUS catheter market has grown rapidly in recent years and is projected to grow substantially over the next several years. Boston Scientific projects that the IVUS catheter market will remain highly concentrated for at least the next several years, and that both its own and CVIS' shares of the market will remain high.

13. SCIMED has conducted substantial research and development with respect to IVUS catheters, and after several years of work, has

developed a prototype imaging guidewire. But for its acquisition by Boston Scientific, SCIMED, which has the capacity, incentives and economic interest for entry, is likely to enter the U.S. IVUS catheter market within two to three years. No other firm has an entry advantage similar to SCIMED. SCIMED was perceived by Boston Scientific and others to be a potential competitor in the manufacture and sale of IVUS catheters in the United States.

V. ENTRY CONDITIONS

14. Entry into the IVUS catheter market would not be timely, likely or sufficient to deter or offset reductions in competition resulting from the proposed acquisitions. Designing and manufacturing IVUS catheters requires substantial technological expertise, and would require several years for research and development, product and process design, and establishment of manufacturing facilities. The time required for entry could be extended significantly by the need to obtain regulatory approvals. Entry would require significant sunk investment with uncertain ultimate success because of the technological difficulty. The broad patent positions of CVIS, Boston Scientific, and SCIMED increases the risk of entry, and the combination of the patent portfolios of these three companies would further increase the difficulty of entry.

VI. COMPETITIVE EFFECTS OF THE PROPOSED ACQUISITIONS

15. The acquisition of CVIS by Boston Scientific may substantially lessen competition and tend to create a monopoly in the IVUS catheter market in the United States because, among other things:

- a. It will increase concentration substantially in a highly concentrated market;
- b. It will eliminate substantial head-to-head competition between Boston Scientific and CVIS, who are each other's closest competitors in the research and development, manufacture, and sale of IVUS catheters;
- c. It will allow Boston Scientific unilaterally to exercise market power;

d. It will make coordinated interaction between Boston Scientific and Endosonics, the only other remaining competitor, substantially more likely;

e. It will, by combining the patent portfolios of Boston Scientific and CVIS, make entry into the IVUS catheter market more difficult;

f. It will likely result in diminished product innovation in IVUS catheters; and

g. It will likely result in increased prices for IVUS catheters.

16. The acquisition of SCIMED by Boston Scientific may substantially lessen competition and tend to create a monopoly in the IVUS catheter market in the United States because, among other things:

a. It will eliminate competition between Boston Scientific and SCIMED in the research and development of IVUS catheters;

b. It will eliminate the most likely potential entrant, with a substantial entry advantage over other potential entrants, into the highly concentrated IVUS catheter market;

c. It will eliminate an actual potential competitor whose entry would likely have ultimately produced deconcentration of the IVUS catheter market;

d. It will eliminate a perceived potential competitor into the IVUS catheter market;

e. It will, by combining the patent portfolios of Boston Scientific and SCIMED, make entry into the IVUS catheter market more difficult;

f. It will likely result in diminished product innovation in IVUS catheters; and

g. It will likely result in increased prices for IVUS catheters.

VII. VIOLATIONS CHARGED

17. The acquisition agreement between Boston Scientific and CVIS described in paragraph three violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

18. The proposed acquisition of CVIS by Boston Scientific would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

19. The agreement between Boston Scientific and SCIMED described in paragraph four violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

20. The proposed acquisition of SCIMED by Boston Scientific would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Chairman Pitofsky recused.

DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the proposed acquisitions by Boston Scientific Corporation ("Boston Scientific") of Cardiovascular Imaging Systems, Inc., and SCIMED Life Systems, Inc. ("SCIMED"), which acquisitions are more fully described at paragraphs I.(E) and I.(F) below, and Boston Scientific having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration and which, if issued by the Commission, would charge Boston Scientific with violations of the Clayton Act and Federal Trade Commission Act; and

The respondent, its attorneys, 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 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 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 thirty (30) days, makes the following jurisdictional findings and enters the following order:

1. Respondent Boston Scientific Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1 Boston Scientific Place, Natick, Massachusetts.

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

ORDER

I.

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

A. "*Respondent*" or "*Boston Scientific*" means Boston Scientific Corporation, its predecessors, successors, assigns, subsidiaries, divisions, and groups and affiliates controlled by Boston Scientific, their successors and assigns, and the directors, officers, employees, agents, and representatives of each.

B. "*CVIS*" means Cardiovascular Imaging Systems, Inc.

C. "*SCIMED*" means SCIMED Life Systems, Inc.

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

E. "*CVIS Acquisition*" means the acquisition by respondent of CVIS voting securities that is the subject of an Agreement and Plan of Merger and Reorganization entered into on or about August 31, 1994.

F. "*SCIMED Acquisition*" means the acquisition of SCIMED voting securities that is the subject of an Agreement and Plan of Merger entered into on or about November 8, 1994.

G. "*IVUS Catheters*" means intravascular ultrasound catheters, intracardiac ultrasound catheters, removable imaging cores used in intravascular or intracardiac ultrasound imaging, and intravascular imaging guidewires.

H. "*IVUS Technology Portfolio*" means:

1. All rights of Boston Scientific, CVIS and SCIMED under United States and foreign patents and patent applications filed in any country relating to IVUS Catheters, including rights under patents issued in the future in any country based upon patent applications

filed, or inventor's certificates and invention disclosures made, on or before the License Date, and rights under all substitutions, continuations, continuations-in-part, divisions, renewals, reissues and extensions based on said patents and patent applications, including but not limited to the right to manufacture, use, sell, or offer for sale for any purpose or application any product suitable for use as an IVUS Catheter;

2. All trade secrets, technology and know-how of CVIS and SCIMED relating to IVUS Catheters, including but not limited to, books and records, the results of research and development efforts, filings with the United States Food and Drug Administration, scientific and clinical reports, designs, manuals, drawings, and design, material and equipment specifications and any know-how used by CVIS or SCIMED in conjunction with the research and development, manufacturing or marketing of IVUS Catheters;

3. A copy of the IVUS Catheter customer lists of Boston Scientific and CVIS.

I. "*SCIMED IVUS Technology*" means all assets of SCIMED relating to IVUS Catheters, including but not limited to:

1. United States and foreign patents and patent applications filed in any country relating to IVUS Catheters;

2. All trade secrets, technology, and know-how of SCIMED relating to IVUS Catheters, including but not limited to, books and records, the results of research and development efforts, filings with the United States Food and Drug Administration, scientific and clinical reports, designs, manuals, drawings, and design, material and equipment specifications and any know-how used by SCIMED in conjunction with the research and development, manufacturing or marketing of IVUS Catheters; and

3. All IVUS Catheter prototypes.

J. "*License Date*" means the date on which the IVUS Technology Portfolio is licensed following Commission approval pursuant to paragraph II or paragraph V of this order.

K. "*Licensee*" means the person to whom the IVUS Technology Portfolio is licensed pursuant to paragraph II or paragraph V of this order.

L. *"IVUS Consoles"* means instruments used to deploy IVUS Catheters and to convert into display images signals transmitted by IVUS Catheters.

II.

It is further ordered, That:

A. Within six (6) months of the date this order becomes final, respondent shall, absolutely and in good faith, grant pursuant to paragraph II.b of this order, at no minimum price and with no continuing royalties, a perpetual, non-exclusive license of the IVUS Technology Portfolio, together with the right to grant exclusive sub-licenses to any part of such IVUS Technology Portfolio, the right to grant exclusive sub-licenses to manufacture or sell any product pursuant to such IVUS Technology Portfolio, and the right to have IVUS Catheters manufactured and sold on its behalf by any person.

B. Respondent shall license the IVUS Technology Portfolio

1. To Hewlett-Packard Company, within ten days after the date this order becomes final, pursuant to, and in accordance with, the February 21, 1995, agreement between respondent and Hewlett-Packard Company, which agreement is appended to this order in Appendix II; or

2. To a person that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

The purpose of the license is to create an independent competitor in the development, production and sale of IVUS Catheters and to remedy the lessening of competition resulting from the CVIS Acquisition and the SCIMED Acquisition as alleged in the Commission's complaint.

C. For a period of three (3) years after the date this order becomes final, upon reasonable notice and reasonable request from the Licensee, Boston Scientific shall provide to the Licensee information, technical assistance and advice sufficient to effect the transfer to the Licensee of the IVUS Technology Portfolio, and to enable the Licensee to obtain all necessary United States Food and Drug Administration approvals or certifications obtained by CVIS or

Boston Scientific with respect to, and to enable the Licensee to manufacture, all IVUS Catheters manufactured by CVIS at any time during the period commencing twelve (12) months prior to the date this order becomes final and extending through the License Date. Upon reasonable notice and reasonable request from the Licensee, Boston Scientific shall also provide to the Licensee consultation with knowledgeable employees of Boston Scientific and training at the Licensee's facility for a period of time, not to exceed two (2) years, sufficient to satisfy the Licensee's management that its personnel are adequately trained in the design and manufacture of IVUS Catheters. Respondent may require reimbursement from the Licensee for all its direct out-of-pocket expenses incurred in providing the services required by this paragraph II.C of this order.

D. Respondent shall not restrict any person employed by CVIS or SCIMED prior to the date this order becomes final from accepting employment with the Licensee or, following employment of any such person by the Licensee, communicating to the Licensee any intellectual property included in the IVUS Technology Portfolio.

E. Pending the licensing of the IVUS Technology Portfolio, respondent shall take such actions as are necessary to maintain the viability and marketability of the IVUS Technology Portfolio and to prevent the destruction, removal, wasting, deterioration, or impairment of the IVUS Technology Portfolio.

F. Respondent shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Appendix I. The Agreement to Hold Separate shall continue in effect until such time as specified in the Agreement to Hold Separate.

III.

It is further ordered, That respondent shall supply to the Licensee, for such period as the Licensee may request, up to three (3) years, on reasonable commercial terms and provisions, at Boston Scientific's cost or at such lower price as Boston Scientific and the Licensee may otherwise agree, for distribution and sale by the Licensee, such quantities and types of IVUS Catheters as may be requested by the Licensee, upon reasonable notice, from among the various types manufactured and sold by Boston Scientific during the period of such supply arrangement.

IV.

It is further ordered, That, for a period of five (5) years from the date this order becomes final, respondent shall not offer, renew, extend or enter into any exclusive contract or agreement, or enforce directly or indirectly any exclusivity provision thereof, with any manufacturer of IVUS Consoles, relating to the development, manufacture or distribution of such units or relating to compatibility between the IVUS Consoles produced by such manufacturer and IVUS Catheters produced by any person.

V.

It is further ordered, That:

A. If Boston Scientific has not licensed the IVUS Technology Portfolio as required by paragraph II of this order, the Commission may appoint a trustee to license the IVUS Technology Portfolio and to divest CVIS together with the SCIMED IVUS Technology. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, Boston Scientific shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

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

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions, divestitures, and licensing. If respondent has not opposed, in writing, including the reasons for opposing, the selection

of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent 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 license the IVUS Technology Portfolio and to divest CVIS together with the SCIMED IVUS Technology.

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

4. The trustee shall have:

a. Six (6) months from the date the Commission approves the trust agreement described in paragraph V.B.3. to accomplish the licensing of the IVUS Technology Portfolio, which license shall be subject to the prior approval of the Commission. If, however, at the end of this six (6)-month period, the trustee has submitted a licensing candidate or believes that licensing can be achieved within a reasonable time, the licensing period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; and

b. If the trustee has not licensed the IVUS Technology Portfolio within the six (6)-month period described in paragraph V.B.4.a., above, the trustee shall have an additional twelve (12) months to accomplish the divestiture of CVIS together with the SCIMED IVUS Technology, which divestiture shall be subject to the prior approval of the Commission. If, however, at the end of this twelve (12)-month period, the trustee has submitted a divestiture candidate or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the IVUS Technology Portfolio, CVIS and the SCIMED IVUS Technology and

to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the licensing or divestiture. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to license or divest at no minimum price. The licensing or divestiture shall be made in the manner and to a Licensee or acquirer approved by the Commission; provided, however, if the trustee receives *bona fide* offers from more than one entity, and if the Commission determines to approve more than one such entity, the trustee shall license or divest, as applicable, to the entity selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the licensing or divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondent, 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 licensing the IVUS Technology Portfolio, or divesting CVIS and the SCIMED IVUS Technology.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses

incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph 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 licensing or divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the IVUS Technology Portfolio, CVIS or the SCIMED IVUS Technology.

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

VI.

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

A. Acquire more than one (1) percent of the stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the two years preceding such acquisition engaged in the research, development, or manufacture of IVUS Catheters for sale in the United States;

B. Acquire any assets used for or previously used for (and still suitable for use for) the manufacture of IVUS Catheters for sale in the United States; or

C. Acquire exclusive rights to any patent or other technology relating to the manufacture or sale of IVUS Catheters in the United States.

Provided, however, that this paragraph VI shall not apply to the acquisition of products or services in the ordinary course of business.

VII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs II and V of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraph II of the order, including a description of all substantive contacts or negotiations for the licensing and the identity of all parties contacted. Respondent 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 licensing.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order.

VIII.

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

IX.

It is further ordered, That respondent, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on five day's notice to respondent, shall permit any duly authorized representative(s) of the Commission:

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

B. Without restraint or interference from respondent, to interview respondent's officers, directors, or employees, who may have counsel present, regarding such matters.

X.

It is further ordered, That this order shall terminate twenty (20) years from the date this order becomes final.

Chairman Pitofsky recused, and Commissioner Azcuenaga concurring in part and dissenting in part.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Hold Separate") is by and among the Boston Scientific Corporation ("Boston Scientific"), a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal office and place of business at 1 Boston Scientific Place, Natick, Massachusetts, 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 August 31, 1994, Boston Scientific entered into an agreement with Cardiovascular Imaging Systems, Inc. ("CVIS") providing for the acquisition (hereinafter the "CVIS Acquisition") of the voting securities of CVIS; and

Whereas, CVIS, with its principal office and place of business at 595 North Pastoria Avenue, Sunnyvale, California, manufactures and sells intravascular ultrasound catheters and high frequency imaging units for use with such catheters; and

Whereas, on November 8, 1994, Boston Scientific entered into an agreement with SCIMED Life Systems, Inc. ("SCIMED") providing for the acquisition (hereinafter the "SCIMED Acquisition") of the voting securities of SCIMED; and

Whereas, SCIMED, with its principal office and place of business at One SCIMED Place, Maple Grove, Minnesota, is conducting research and development with respect to IVUS Catheters; and

Whereas, if the Commission accepts the agreement containing consent order ("consent order"), the Commission will place it on the public record for a period of at least thirty (30) 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 CVIS, during the period prior to the final acceptance and issuance of the consent order by the Commission (after the thirty (30)-day public comment period), divestiture resulting from any proceeding challenging the legality of the CVIS Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the CVIS Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of CVIS and the Commission's right to seek a viable competitor to Boston Scientific; and

Whereas, the Commission has filed suit in the United States District Court for the District of Columbia (Civil Action No. 1:95 CV00198) seeking a preliminary injunction with respect to the CVIS Acquisition pending an administrative trial, and the Commission has authorized its staff to seek a preliminary injunction with respect to the SCIMED Acquisition pending an administrative trial; and



Whereas, the purpose of the Hold Separate is to:

(i) Preserve CVIS as a viable and competitive business, independent of Boston Scientific, and engaged in the research and development, manufacture and sale of IVUS Catheters and IVUS Consoles, pending final acceptance or withdrawal of acceptance of the consent order by the Commission pursuant to the provisions of Section 2.34 of the Commission's Rules;

(ii) Preserve CVIS as a viable and competitive business, independent of Boston Scientific, and engaged in the research and development, manufacture and sale of IVUS Catheters and IVUS Consoles, pending licensing of the IVUS Technology Portfolio pursuant to paragraph II of the consent order or pending licensing of the IVUS Technology Portfolio or divestiture of CVIS and the SCIMED IVUS Technology pursuant to paragraph V of the consent order; and

(iii) Remedy any anticompetitive effects of the CVIS Acquisition; and

Whereas, Boston Scientific's entering into this Hold Separate shall in no way be construed as an admission by Boston Scientific that the CVIS Acquisition or the SCIMED Acquisition is illegal or would have any anticompetitive effects; and

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

Now, therefore, the Parties agree, and in consideration of the Commission's agreement that, unless it determines to reject the consent order, it will not seek further relief from Boston Scientific with respect to the CVIS Acquisition or the SCIMED Acquisition, except that the Commission may exercise any and all rights to enforce this Hold Separate and the consent order, once it becomes final, and in the event that the required licensing is not accomplished, to appoint a trustee to seek divestiture of CVIS and the SCIMED IVUS Technology, pursuant to the consent order, as follows:

1. Boston Scientific agrees to execute and be bound by the attached consent order.

2. If the Commission accepts the consent order for public comment, Boston Scientific and the Commission will move to stay the action for preliminary injunction pending in United States District Court with respect to the CVIS Acquisition until such time as the Commission withdraws such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules or finally accepts and issues the consent order; and, in the event the Commission finally accepts the consent order, the Commission will move to dismiss the preliminary injunction action.

3. The terms "IVUS Catheters," "IVUS Consoles," "IVUS Technology Portfolio," and "SCIMED IVUS Technology" have the same definitions as in the consent order;

4. Boston Scientific agrees that from the date this Hold Separate is accepted until the earliest of the dates listed in subparagraph 4.a, 4.b, 4.c or 4.d, it will comply with the provisions of paragraph 5 of this Hold Separate:

a. May 26, 1995, if the Commission has not made the consent order final or withdrawn its acceptance of the consent order by that date;

b. 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;

c. The date the licensing required under paragraph II or V of the consent order is completed;

d. The date the divestiture required under paragraph V of the consent order is completed.

5. Boston Scientific shall hold CVIS as it is constituted on the date the CVIS Acquisition is consummated, separate and apart on the following terms and conditions:

a. CVIS, as defined in paragraph I.B. of the consent order, shall be held separate and apart and shall be operated independently of Boston Scientific (meaning here and hereinafter, Boston Scientific excluding CVIS and excluding all personnel connected with CVIS as of the date this Hold Separate is signed) except to the extent that Boston Scientific must exercise direction and control over CVIS to assure compliance with this Hold Separate or with the consent order.

b. Boston Scientific shall not exercise direction or control over, or influence directly or indirectly, CVIS, the New Board (as defined in subparagraph 5.d), or any of its operations or businesses; provided, however, that Boston Scientific may exercise only such direction and control over CVIS as is necessary to assure compliance with this Hold Separate or with the consent order and provided further that Boston Scientific may (a) direct CVIS to consent that patent litigation between Boston Scientific and CVIS be stayed; (b) direct CVIS to consent to acceptance of SCIMED's position in the arbitration proceeding pending between CVIS and SCIMED; and (c) direct that Boston Scientific and CVIS enter into a non-exclusive, royalty-free cross-license of all their IVUS Catheter patents, provided however no such cross-license shall limit rights conferred to CVIS except to the extent it imposes identical limits on rights conferred to Boston Scientific, and provided further that no such cross-license shall exclude any Boston Scientific patents relating to IVUS Catheters; and following execution of such cross-license, direct that the patent litigation between Boston Scientific and CVIS be dismissed.

c. Boston Scientific shall maintain the marketability, viability and competitiveness of CVIS, and shall not take such action that will cause or permit the destruction, removal, wasting, deterioration or impairment of CVIS, except in the ordinary course of business and except for ordinary wear and tear, and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of CVIS.

d. Boston Scientific shall elect a three-person Board of Directors for CVIS (the "New Board"). The New Board shall consist of two persons knowledgeable about IVUS Catheters, one of whom shall be named Chairman of the New Board, and who shall remain independent of Boston Scientific and competent to assure the continued viability and competitiveness of CVIS, and one New Board Member who is also an officer, agent or employee of Boston Scientific (the "Boston Scientific New Board Member"). Except for the Boston Scientific New Board Member, Boston Scientific shall not permit any director, officer, employee or agent of Boston Scientific also to be a director, officer, employee or agent of CVIS. Each New Board member shall enter into a confidentiality agreement agreeing to be bound by the terms and conditions of this Hold Separate.

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

consummating the CVIS Acquisition, defending investigations or litigation, obtaining legal advice, or complying with this Hold Separate or the consent order, Boston Scientific shall not receive or have access to, or the use of, any material confidential information of CVIS or the activities of the New Board, not in the public domain. Boston Scientific may receive on a regular basis from CVIS aggregate financial information necessary and essential to allow Boston Scientific to file financial reports, tax returns and personnel reports. Boston Scientific and CVIS may also exchange confidential information, subject to appropriate confidentiality agreements, pursuant to agreements between CVIS and Boston Scientific for joint research or contract manufacture, on arms-length commercial terms, to the extent such agreements would be permissible between competitors under the antitrust laws. Any such information that is obtained pursuant to this subparagraph shall only be used for the purposes set out in this subparagraph. ("Material confidential information," as used in this Hold Separate, means competitively sensitive or proprietary information not independently known to Boston Scientific from sources other than CVIS or the New Board, as applicable, and includes but is not limited to customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets).

f. Except as permitted by this Hold Separate, the New Board member appointed by Boston Scientific ("Boston Scientific New Board Member") who is also an officer, agent, or employee of Boston Scientific shall not receive any CVIS material confidential information and shall not disclose any such information obtained through his or her involvement with CVIS to Boston Scientific or use it to obtain any advantage for Boston Scientific. The Boston Scientific New Board Member shall participate in matters that come before the New Board only for the limited purpose of considering any capital investment of over one million dollars (\$1,000,000), approving any proposed budget and operating plans, authorizing dividends and repayment of loans consistent with the provisions hereof, reviewing any material transactions described in paragraph 5.g, and carrying out Boston Scientific's responsibilities under the Hold Separate and the consent order. Except as permitted by the Hold Separate, the Boston Scientific New Board Member shall not participate in any other matter.

g. All material transactions, out of the ordinary course of business and not precluded by paragraph five hereof, shall be subject to a majority vote of the New Board (as defined in paragraph 5.d hereof).

h. Boston Scientific shall not change the composition of the New Board unless the Chairman of the New Board consents, or unless it is necessary to do so in order to assure compliance with this Hold Separate or with the consent order. The Chairman of the New Board shall have the power to remove members of the New Board for cause and to require Boston Scientific to appoint replacement members of the New Board. Boston Scientific shall not change the composition of the management of CVIS except that the New Board shall have the power to remove management employees for any legal reason. If the Chairman ceases to act or fails to act diligently, a substitute Chairman shall be appointed in the same manner as provided in paragraph 5.d. Boston Scientific shall circulate to the management employees of CVIS and appropriately display a notice of the Hold Separate and the Consent Agreement at a conspicuous place at all CVIS offices and facilities.

i. All earnings and profits of CVIS shall be retained separately by CVIS. If necessary, Boston Scientific shall provide CVIS with sufficient working capital to operate at current rates of operation, upon commercially reasonable terms.

j. Should the Federal Trade Commission seek in any proceeding to compel Boston Scientific to divest itself of CVIS or SCIMED or to compel Boston Scientific to divest any assets or businesses of CVIS and SCIMED that it may hold, or to seek any other injunctive or equitable relief, Boston Scientific shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the CVIS Acquisition or the SCIMED Acquisition. Boston Scientific also waives all rights to contest the validity of this Hold Separate.

6. For the purpose of determining or securing compliance with this Hold Separate, subject to any legally recognized privilege, and upon written request and five day's notice to Boston Scientific, Boston Scientific shall permit any duly authorized representative(s) of the Commission:

a. Access during the office hours of Boston Scientific 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 Boston Scientific or CVIS relating to compliance with this Hold Separate;

b. Without restraint or interference from Boston Scientific, to interview Boston Scientific's or CVIS' officers, directors or employees, who may have counsel present, regarding any such matters.

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

APPENDIX II

February 21, 1995 Agreement Between Boston Scientific Corporation and Hewlett-Packard Company

AGREEMENT

Agreement this 21st day of February, 1995 between Boston Scientific Corporation ("BSC") and Hewlett-Packard Company ("HP"). This Agreement supersedes and replaces the Agreement of February 17th, 1995 which is of no further effect. The terms "HP" and "BSC" include all their subsidiaries and successors throughout the term of this Agreement.

1. The Parties desire to enter into this Agreement to establish their respective rights in IVUS (intravascular ultrasound)-related patents and technology upon the acquisition by BSC of Cardiovascular Imaging Systems, Inc. ("CVIS") and SCIMED Life Sciences, Inc. ("SCIMED"). BSC will promptly submit this Agreement to the Federal Trade Commission ("FTC") in conjunction with and as a confidential exhibit to BSC's submission of a proposed consent order in contemplated settlement of FTC proceedings relating to the CVIS and SCIMED acquisitions. Both parties hereto will be bound by this Agreement as of the date of its execution; provided, however, that the licenses granted herein below will be effective upon their approval by the FTC (the "Effective Date"). In the event the FTC does not provisionally accept said consent order for public comment, this

Agreement shall be null and void and of no further effect. In the event the FTC provisionally accepts said consent order for public comment, BSC will not solicit, entertain or negotiate with any other party concerning any other such agreement or proposal relating to said contemplated settlement at any time during the public comment period or prior to final FTC action upon said consent order. In the event the FTC does not finally accept said consent order, and thereupon approve said licenses, BSC agrees that it will negotiate in good faith exclusively with HP during the first [] days following such FTC action in an effort to arrive at license terms satisfactory to HP and the FTC.

2. BSC hereby grants to HP, as of the Effective Date, a license to certain patents and technology (the "Licensed Technology") for use in the manufacture and sale of Licensed Products, as defined below. The Licensed Technology shall include all issued patents of BSC, SCIMED and CVIS used for the development, manufacture and sale of Licensed Products, including but not limited to, those listed on Exhibit A and all existing know-how of SCIMED and CVIS that is used or intended for use in the development, manufacture and sale of Licensed Products. BSC further agrees that it will not in perpetuity assert any of its rights (including but not limited to patents derived from CVIS and SCIMED) under issued patents and patents which subsequently issue on presently pending applications and continuations thereof, or patent rights arising from inventions disclosed to BSC, CVIS or SCIMED prior to the Effective Date, in a way that would prevent HP from practicing any of the Licensed Technology to manufacture, use or sell Licensed Products. "Licensed Products" are ultrasound imaging catheters, imaging cores and imaging guidewires which are designed for diagnostic or therapeutic use, or both, in the human coronary and peripheral vascular system. This definition includes and is no narrower than the collective claims of the patents (for coronary and peripheral vascular applications) listed on Exhibit A.

3. (a) BSC hereby grants to HP as of the Effective Date a co-exclusive, irrevocable, worldwide license to the Licensed Technology to make, use and sell the Licensed Products, under the terms set forth in paragraph six, below. HP shall have the right to have Licensed Products made on its behalf by a third party, so long as for a period of [] HP does not directly or indirectly sell such Licensed Product back to such third party or its affiliates or use sales support services

of such third party or its affiliates with respect to such Licensed Product. Commencing on the [], HP may not directly or indirectly contract with the same third party for both the manufacture and sale of all or substantially all of the Licensed Products.

(b) HP hereby grants to BSC as of the Effective Date a non-exclusive, irrevocable, worldwide, royalty-free license to make, use and sell in any field of use under the SIVUS patents listed on Exhibit B.

4. Within [] after the Effective Date, BSC will deliver to HP originals or copies of such tangible IVUS and IVUS-related property of CVIS and/or SCIMED as HP may at its option, with reasonable notice to BSC, designate, including, but not limited to, invention disclosures, product specifications, design drawings, works in process, inventory, process sheets and IVUS customer lists of BSC and CVIS. BSC will provide to HP assistance in acquiring the capability to manufacture such Licensed Products as HP may at its option, with reasonable notice to BSC, designate, including manufacturing planning and start up, which will include reasonable access to CVIS's, BSC's and SCIMED's IVUS production facilities and personnel, during the [] period commencing with the Effective Date.

5. The provisions of this paragraph five shall become effective on the Effective Date. If HP markets a product which BSC considers to infringe BSC's patent rights (a "Questioned Product") based on patents relating to inventions made during the period beginning on the Effective Date and ending on the [] of the Effective Date (the "Patent Rights"), and BSC gives notice to HP to that effect, then HP shall have the right to elect in writing within [] of such notice to invoke this paragraph for such Questioned Product. For each Questioned Product for which such election has been made, HP shall have [] from the date of such election (the "Amnesty Period") to design around such patent rights. BSC agrees not to bring suit during the Amnesty Period for such alleged infringement. If HP discontinues the marketing of such Questioned Product within the Amnesty Period, BSC agrees to waive any claim for damages based on infringement of [] Patent Rights by such Questioned Product. At any time during said Amnesty Period for a Questioned Product, HP shall have the right to elect to negotiate with BSC for a license to permit manufacture, use and sale of such Questioned Product under the respective [] Patent Rights, and the parties agree to negotiate

forthwith in good faith with respect thereto. Such license shall be [] All Questioned Products so licensed which are manufactured, used or sold by HP, including those sold during the respective Amnesty Period, shall be subject to such royalty.

6. As and for its total compensation to BSC for the licenses and technology set forth herein, HP agrees:

- (a) To pay to BSC a one-time license fee of [] within [] of the Effective Date; and
- (b) To pay to BSC the sum of [] on []
- (c) To pay to BSC the sum of [] on []; and
- (d) To pay to BSC [] before the end of the month following the dates on which [] exceeds the following amounts: [] provided that none of the payments provided for by this subparagraph shall be due if the sales threshold requiring such payment has not been reached on or before the []

7. The provisions of this paragraph seven shall become effective on the Effective Date. The parties agree that during a period commencing with FDA regulatory approval or product introduction of each device released, whichever first occurs, and ending on the [] each party will provide on all of its IVUS consoles offered to its customers open interfaces to the IVUS products of the other party, whether currently owned or acquired in the future, provided the native console for such device is compatible with the Licensed Technology. For products already in existence, each party shall cooperate as requested by the other party in furthering this open interface objective. Each party has the option of upgrading its own consoles. Each party will take all reasonable and appropriate steps to assure that in interfacing such party's devices to the other party's consoles, the other party suffers no delay times or other disadvantage. These time-to-market safeguards will mean that, in interfacing such party's devices to the other party's consoles, no later than [] prior to such party's commercial introduction of any new device, all necessary technical specifications, regulatory information and the like shall be provided to the other party for the purpose of interface. Each party agrees to restrict use of confidential information identified as such and provided by the other party pursuant to this paragraph for the purpose of enabling interface design. Nothing herein shall restrict the receiving party from employing information already in its possession,

information subsequently developed independently by the receiving party, information provided by third parties without violating a confidentiality obligation, or, for interface information, more than [] from disclosure and, for other information, as set forth at the time of disclosure.

8. The provisions of this paragraph eight shall become effective on the Effective Date.

(a) BSC agrees that, at HP's option, BSC shall make available to HP all BSC IVUS Catheters (as defined below) at a price which does not exceed []

(b) BSC will supply to HP as demonstration units at [] of all BSC IVUS Catheters purchased by HP, and shall mark such demonstration units as samples.

(c) BSC shall begin accepting regular orders from HP within [] of the Effective Date [] provided in paragraph one. The parties shall define and prepare to implement an orderly transition from the relationship of the parties pursuant to the agreement dated June 22, 1992 between them to the relationship defined by this Agreement.

(d) No later than [] after the Effective Date, and [] to the beginning of each [] calendar year thereafter, HP shall provide BSC with a forecast of its expected requirements of BSC IVUS Catheters. Such forecasts shall be updated by HP on a [] basis. HP shall be obligated to purchase the quantity of BSC IVUS Catheters forecast as its projected requirements for the [] immediately following each such forecast, provided that in each forecast HP may [] BSC shall make all best efforts to meet HP's requirements [], and HP shall make all best efforts to purchase the forecasted volumes in each such year.

(e) After the [] anniversary of the Effective Date, HP's purchases of BSC IVUS Catheters in [] ending on an anniversary of such effective date shall be restricted in the [] to no more than [], and in to no more than [], in order to accommodate residual customer demand for such catheters.

(f) "*BSC IVUS Catheters*" means all IVUS catheters listed by BSC on any price list, and, to the extent otherwise marketed by BSC to the public, any intravascular ultrasound catheter; provided, however, that BSC IVUS Catheters does not include removable imaging cores or removable imaging guidewires, and does not include products acquired or licensed by BSC from a third party

subsequent to the Effective Date. Current BSC and CVIS IVUS catheters are listed on Exhibit C.

(g) []

9. HP may, without the consent of BSC, grant exclusive sublicenses, assignments, sales or other [] transfers effective any time beginning [] after the Effective Date to the Licensed Technology for use in the manufacture and sale of Licensed Products; provided that HP shall not grant such sublicenses to a single person the effect of which grant would be to cause HP, together with other current or future HP sublicensees, to retain less than substantial rights to the Licensed Technology, except as part of a sale of all or substantially all of HP's IVUS console and IVUS catheter business. BSC agrees that in the event of such a transfer of rights by HP, the benefit of BSC's obligation not to assert its intellectual property rights pursuant to paragraph two above shall be transferable therewith and in the event of such a transfer of rights by BSC, such rights shall be transferred subject to such obligation.

EXHIBIT A

[Non-public information]

EXHIBIT B

[Non-public information]

EXHIBIT C

[Non-public information]

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

I have reason to believe that the proposed acquisitions by Boston Scientific of CVIS and SciMed would be unlawful, and the consent agreement appears likely to provide an appropriate remedy for the violations. I disagree with the willingness of the Commission, at the behest of the respondent, to bargain away its standard processes. In particular, although Boston Scientific proffered no justification, the Commission agreed to curtail the public comment period from 60 days, as provided in the Commission's Rules of Practice, to 30 days. It should go without saying that the requirements of the Commission's Rules of Practice are not a proper subject for negotiation.¹ To the extent that the Commission agreed to reduce the length of the period for public comment and no good cause for that departure from the Commission's rules having been shown, I dissent.

In addition, the Commission acceded to a date certain for expiration of the hold separate agreement, the effect of which is to ensure completion of the Commission's review by that time.² It is appropriate that the Commission conduct its review of proposed mergers, indeed, all its business, expeditiously, consistent with a careful review of the merits and, on a proper showing, the Commission also should grant expedited treatment for particular matters.³ The Commission's interest in completing its review of this case expeditiously is commendable, but its agreement to the date certain, in my view, is not. On occasion during the public comment period, the Commission receives information or identifies issues that warrant further investigation. Any such investigation should be conducted expeditiously, but it may not be possible to complete it by the date certain to which the Commission originally agreed. A

¹ The Commission's Rules of Practice have the force and effect of law and should not be taken lightly. Departing from the rules without justification leads to inequality of treatment and leaves the Commission open to charges of arbitrary and capricious decision making. Cf. the Tunney Act, 15 U.S.C. 16 (60-day public comment period for Department of Justice antitrust consent orders not to be shortened except by the court on a showing of extraordinary circumstances and that such "shortening is not adverse to the public interest." 15 U.S.C. 16(d).

² A hold separate agreement preserves a viable and competitive business, independent of the acquirer, in part to ensure the Commission's ability to require a divestiture. When the hold separate agreement expires, the parties are free to combine their assets and businesses, making it more difficult for the Commission to obtain effective relief different from that provided in the proposed consent agreement.

³ Expedited treatment for one respondent means moving that matter to the front of the queue. The Commission ordinarily has required a showing that such treatment is warranted.

willingness to act expeditiously is quite different from acquiescing in advance to a "drop dead date" that potentially leaves the Commission unable fully to consider new issues, conditions or information that may arise between the time it commits to the date certain and the time that date arrives.

IN THE MATTER OF

ORCHID TECHNOLOGY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3574. Complaint, May 1, 1995--Decision, May 1, 1995*

This consent order prohibits, among other things, a California-based company from falsely representing that any of its computer peripheral products had been rated, reviewed or endorsed by any person or publication, and from misrepresenting the results of any test, study or evaluation in connection with marketing its computer peripheral equipment. The consent order also requires the respondent to possess competent and reliable evidence to substantiate performance claims.

Appearances

For the Commission: *Matthew D. Gold* and *Jeffrey A. Klurfeld*.

For the respondent: *Timothy Roake, Fenwick & West*, Palo Alto, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Orchid Technology, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Orchid Technology is a California corporation, with its principal office or place of business at 45365 Northport Loop West, Fremont, California.

PAR. 2. Respondent has manufactured, labelled, advertised, offered for sale, sold, and distributed peripheral products for personal computers. Among respondent's products is the "Celsius/VLB Windows accelerator" ("Celsius"), which is a graphics accelerator board. A graphics accelerator board increases the speed at which a personal computer displays complex graphical images and improves the quality of the graphics. The Celsius is powered by the AGX015 graphics accelerator chip, which respondent does not manufacture.