

Complaint

IN THE MATTER OF

TYCO INTERNATIONAL LTD.

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

Docket C-3985; File No. 0010208

Complaint, December 1, 2000--Decision, December 1, 2000

This consent order addresses the \$4.2 billion acquisition by Tyco International Ltd. of Mallinckrodt Inc., the two largest producers of endotracheal tubes. The complaint alleges that the proposed acquisition, if consummated, would substantially lessen competition and to tend to create a monopoly in the Endotracheal Tube market in the United States. The order requires Respondent to divest its Sheridan line of endotracheal tube products to Hudson RCI, and to provide employee incentives for employees from the Sheridan line to accept employment and remain employed by Hudson.

Participants

For the Commission: *Michael Moiseyev, Ann Malester, Elizabeth Callison, Daniel P. O'Brien, Daniel P. Ducore, and BE.*

For the Respondents: *Chuck Koob and Brandi Katz, Simpson, Thatcher & Bartlett and Steve Newborn and John Scribner, Clifford, Chance, Rogers & Wells.*

COMPLAINT

The Federal Trade Commission (ACommission@), having reason to believe that Respondent, Tyco International Ltd. (ATyco@), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Mallinckrodt Inc. (AMallinckrodt@), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the Federal Trade

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Commission Act, as amended, 15.U.S.C. ' 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. DEFINITIONS

1. AAcquisition Agreement@ means the Agreement and Plan of Merger By and Among Tyco Acquisition Corp. VI (NV), EVM Merger Corp. and Mallinckrodt Inc. Including Guarantee of Tyco International Ltd., dated June 28, 2000.
2. AEndotracheal Tube@ means a device inserted into the trachea via the nose or mouth and used to maintain an open airway and to administer anesthesia or oxygen, and any related accessories attached to the device used to accomplish those ends.
3. ARespondent@ means Tyco.

II. THE PARTIES

4. Respondent Tyco International Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of Bermuda with its office and principal place of business located at The Zurich Center, Second Floor, 90 Pitts Bay Road, Pembroke HM08, Bermuda. Tyco's principal operating subsidiary in the United States is located at One Tyco Park, Exeter, New Hampshire 03833. Respondent Tyco, among other things, is engaged in the manufacture and sale of Endotracheal Tubes.
5. Mallinckrodt is a corporation organized, existing, and doing business under and by virtue of the laws of the state of New York, with its principal executive offices located at 675 McDonnell Boulevard, St. Louis, Missouri, 63134. Mallinckrodt, among other things, is engaged in the manufacture and sale of Endotracheal Tubes.

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6. Pursuant to the Acquisition Agreement, Tyco will acquire 100 percent of the outstanding voting securities of Mallinckrodt.
7. Respondent and Mallinckrodt are, and at all times relevant herein have been, engaged in commerce, as Acommerce@ is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. ' 12, and are corporations whose businesses are in or affect commerce, as Acommerce@ is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 44.

III. THE ACQUISITION

8. On June 28, 2000, Respondent and Mallinckrodt entered into an Agreement and Plan of Merger, under which Tyco is to acquire 100 percent of the voting securities of Mallinckrodt in a stock-for-stock transaction valued at approximately \$4.2 billion (AAcquisition@).

IV. THE RELEVANT MARKETS

9. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the manufacture and sale of Endotracheal Tubes.
10. For the purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant line of commerce.

V. THE STRUCTURE OF THE MARKET

11. The market for the manufacture and sale of Endotracheal Tubes in the United States is highly concentrated. Tyco accounts for approximately 14% of the Endotracheal Tube market in the United States. Mallinckrodt is the leading supplier of Endotracheal Tubes in the United States with a

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market share of 72%. The proposed acquisition would provide Tyco with a combined market share in the Endotracheal Tube market of over 86%.

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VI. BARRIERS TO ENTRY

12. The United States market for Endotracheal Tubes is characterized by significant barriers to entry. Entry into the endotracheal tube market in the relevant geographic area requires the development of a full line of products in a range of sizes and configurations, procurement of manufacturing equipment and establishment of production practices in conformity with FDA regulations, and development of a track record and customer acceptance. Entry into the Endotracheal Tube market in the United States would be relatively costly and is not likely to occur because sales opportunities would likely be too small to justify the costs and risks associated with new entry.

VII. EFFECTS OF THE ACQUISITION

13. The effects of the Acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the Endotracheal Tube market in the relevant area in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the FTC act, as amended, 15 U.S.C. ' 45, in the following ways, among others:
- a. by eliminating actual, direct and substantial competition between Respondent and Mallinckrodt in the relevant market;
 - b. by increasing the likelihood that the combined Tyco/Mallinckrodt would increase prices of Endotracheal Tubes unilaterally; and
 - c. by reducing innovation in the relevant market.

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VIII. VIOLATIONS CHARGED

14. The Acquisition agreement described in Paragraph 8 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. ' 45.
15. The Acquisition described in Paragraph 8, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. ' 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this first day of December, 2000, issues its Complaint against said Respondent.

By the Commission.

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The Federal Trade Commission ("Commission") having initiated an investigation of the acquisition by Tyco International Ltd. (ATyco@) of Mallinckrodt Inc. (AMallinckrodt@), and Respondent having been furnished thereafter with a copy of a draft of Complaint which the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 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 Consent Order (AConsent Agreement@), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid

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draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondent has violated the said Acts and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. ' 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Decision and Order (AOrder@):

1. Respondent Tyco International Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of Bermuda with its office and principal place of business located at The Zurich Center, Second Floor, 90 Pitts Bay Road, Pembroke HM08, Bermuda. Tyco's principal operating subsidiary in the United States is located at One Tyco Park, Exeter, New Hampshire 03833.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent and the proceeding is in the public interest.

ORDER**I.**

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IT IS ORDERED that, as used in this order, the following definitions shall apply:

- A ATyco@ means Tyco International Ltd., its directors, officers, employees, agents and representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Tyco International Ltd., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B AMallinckrodt@ means Mallinckrodt Inc., its directors, officers, employees, agents and representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Mallinckrodt Inc, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C ARespondent@ means Tyco.
- D AHudson/RCI@ means Hudson Respiratory Care, Inc, a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 27711 Diaz Road, P.O. Box 9020, Temecula, California, 92589.
- E ACommission@ means the Federal Trade Commission.
- F AAquirer@ means Hudson/RCI or the entity approved by the Commission to acquire the Assets To Be Divested pursuant to this order.
- G AAcquisition@ means the proposed acquisition by Tyco of Mallinckrodt pursuant to the Agreement and Plan of Merger By and Among Tyco Acquisition Corp. VI (NV), EVM Merger Corp. and Mallinckrodt Inc. Including Guarantee of Tyco International Ltd., dated June 28, 2000.

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- H AArgyle Facility@ means the facility located at Route 40, Argyle, New York in which Respondent manufactures the Sheridan Product Line.
- I AAssets to Be Divested@ means all of Tyco's assets (excluding receivables) as of the date the Consent Agreement is signed by Respondent, relating to the research, development, manufacture, marketing or sale of the Sheridan Product Line, including, but not limited to, the following assets:
- 1 all assets included in the Divestiture Agreement;
 - 2 all machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;
 - 3 a lease for the Argyle Facility together with appurtenances, licenses and permits;
 - 4 trade names, trademarks, brand names, formulations, contractual rights, Patents, trade secrets, technology, know-how, inventions, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, marketing and distribution information, customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, software, information stored on management information systems, (and specifications sufficient for the Acquirer to use such information) and all data, contractual rights, materials and information regarding Regulatory Approvals relating to the Sheridan Product Line;
 - 5 inventory and storage capacity;

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- 6 all rights under warranties and guarantees, express or implied;
 - 7 all books, records, and files; and
 - 8 all items of prepaid expense.
- J ACost@ means direct cash cost of labor.
- K ACurity Endotracheal Tubes@ means Tyco=s Endotracheal Tube products marketed under the Curity7 brand, manufactured in Thailand, and sold exclusively outside the United States.
- L ADivestiture Agreement@ means the Asset Purchase Agreement dated September 18, 2000, by and between Tyco Healthcare Group LP and Hudson RCI and all exhibits thereof, incorporated by reference into this order and made a part hereof as Confidential Appendix I, regardless of whether the purchase and sale of assets contemplated by such agreement is consummated.
- M ADivestiture Trustee@ means the trustee appointed pursuant to Paragraph IV. of this Order.
- N AEndotracheal Tube@ means a device inserted into the trachea via the nose or mouth and used to maintain an open airway and to administer anesthesia or oxygen, and any related accessories attached to the device to accomplish those ends.
- O AFDA@ means the United States Food and Drug Administration.
- P AGPO Customer@ means a group purchasing organization that negotiates contracts with suppliers of goods or services on behalf of members or customers of the organization.
- Q AGPO Customer Contract@ means any contract between any GPO Customer and Respondent relating to Endotracheal

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Tubes existing as of the date this Order is placed on the public record, excluding any contract between any GPO Customer and Mallinckrodt existing as of the date this Order is placed on the public record.

- R AKey Employees@ means the key employees listed in Confidential Appendix II.
- S ANon-Public Acquirer Information@ means any information obtained by Respondent relating to the Sheridan Product Line and any information obtained by Respondent while providing assistance to the Acquirer as required by Paragraph III. of this Order. Non-Public Acquirer Information shall not include information already in the public domain and information that subsequently falls within the public domain through no violation of this Order by Respondent.
- T APatents@ means: (1) all patents and patent rights, patent applications, patents of addition, re-examinations, reissues, extensions, granted supplementary protection certificates, substitutions, confirmations, registrations, revalidations, revisions, additions and the like, of or to said patent and patent rights and any and all continuations and continuations-in part and divisionals relating exclusively to the Sheridan Product Line; and (2)(a) exclusive licenses to use all other patents and patent rights, patent applications, patents of addition, re-examinations, reissues, extensions, granted supplementary protection certificates, substitutions, confirmations, registrations, revalidations, revisions, additions and the like, of or to said patent and patent rights and any and all continuations and continuations-in part and divisionals relating in any way to the Sheridan Product Line used for the manufacture, sale, research, development, or distribution of Endotracheal Tubes; and (b) non-exclusive licenses to such other patents and patent rights, patent applications, patents of addition, re-examinations, reissues, extensions, granted

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supplementary protection certificates, substitutions, confirmations, registrations, revalidations, revisions, additions and the like, of or to said patent and patent rights and any and all continuations and continuations-in part and divisionals relating in any way to the Sheridan Product Line.

- U ARegulatory Approvals@ means approval by the FDA and any other governmental or regulatory approvals held by Tyco for the Sheridan Product Line as of the date of the Acquisition.
- V ASheridan Earnout Review@ means the receipt, review or auditing of any Non-Public Acquirer Information for the purposes of making payments pursuant to the asset purchase agreement between Tyco (as the successor-in-interest to The Kendall Company), Sheridan Catheter Corp. and David Sheridan, dated September 23, 1994.
- W ASheridan Product Line@ means all of Tyco's Endotracheal Tubes as of the date this Order is placed on the public record, excluding Tyco's Curity Endotracheal Tubes.
- X ASheridan Sales Employees@ means any individuals who have participated in the marketing, sales or promotion of the Sheridan Product Line within twelve (12) months of the date the Consent Agreement is signed by Respondent.
- Y AThird-Party Consents@ means all consents, waivers and approvals from any person, private or public, that are necessary to effect the complete transfer to the Acquirer of the Assets To Be Divested pursuant to this Order and enable the Acquirer to manufacture and sell the Sheridan Product Line.
- Z ATransitional Services@ means any services or assistance provided by Respondent to enable or facilitate the transfer of the Assets To Be Divested to the Acquirer, including, but not limited to, all services identified in the Transition Services Agreement.

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AA ATransition Services Agreement@ means the Transition Services Agreement entered into by and between Tyco and Hudson RCI, attached as Exhibit E to the Divestiture Agreement.

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II.**IT IS FURTHER ORDERED** that:

- A Respondent shall divest the Assets To Be Divested to Hudson/RCI pursuant to and in accordance with the Divestiture Agreement (which agreement shall not vary from or contradict or be construed to vary from or contradict the terms of this Order). The divestiture shall be made no later than ten days after Respondent consummates the Acquisition. Failure to comply with the Divestiture Agreement shall constitute a failure to comply with this Order; *provided, however*, that if Respondent has divested the Assets To Be Divested to Hudson/RCI prior to the date the Order becomes final, and if, at the time the Commission determines to make the Order final, the Commission notifies Respondent that Hudson/RCI is not an acceptable acquirer or that the Divestiture Agreement is not an acceptable manner of divestiture, then Respondent shall immediately rescind the transaction with Hudson/RCI and shall divest the Assets To Be Divested within six (6) months of the date the Order becomes final. Respondent shall divest the Assets To Be Divested only to an Acquirer(s) that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.
- B Respondent shall obtain all Third-Party Consents prior to the closing of the divestiture required by Paragraph II.A; *provided, however*, that Respondent need not obtain novations of supply contracts with the Veterans Administration and the Department of Defense prior to the closing of the divestiture; provided further, however, that Respondent shall provide the Acquirer any assistance necessary to obtain such novations.
- C If the Assets To Be Divested are divested to an Acquirer other than Hudson/RCI, Respondent shall comply with all the terms of the resulting agreement with the Acquirer and such agreement shall be deemed incorporated by reference into this Order. Any failure by Respondent to comply with the terms

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of such agreement(s) shall constitute a failure to comply with this Order.

- D The purpose of the divestiture of the Assets To Be Divested is to ensure the continued use of the assets in the same business in which they were engaged at the time of the announcement of the proposed Acquisition and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

- A No later than ten (10) days prior to the divestiture, Respondent shall provide the Acquirer with a complete list of all non-clerical, salaried employees of Tyco who are engaged, or have been engaged, in the research, development, or manufacture of the Sheridan Product Line at any time during the period from June 28, 2000 until the date of the divestiture. The list shall state each individuals' name, position or positions held from June 28, 2000 until the date of the divestiture, address, telephone number, and a description of the duties and work performed by the individual in connection with the Sheridan Product Line. Respondent shall provide the Acquirer the opportunity to enter into employment contracts with such individuals, provided that such contracts are contingent upon the Commission's approval of the divestiture.
- B Respondent shall provide the Acquirer with an opportunity to inspect, at any time, the personnel files and other documentation relating to the individuals identified pursuant to Paragraph III.A. of this order to the extent permissible under applicable laws, at the request of the Acquirer any time after the execution of the agreement between Acquirer and Respondent.

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- C Respondent shall not enforce any confidentiality or non-compete restrictions relating to the Assets To Be Divested that apply to any employee identified pursuant to Paragraph III.A. who accepts employment with the Acquirer that would interfere with the Acquirer=s ability to interview or hire any employee identified pursuant to Paragraph III.A.
- D Respondent shall provide all employees identified pursuant to Paragraph III.A. with financial incentives to continue in their positions until the date the divestiture is accomplished. Such incentives shall include a continuation of all employee benefits offered by Tyco until the date the divestiture of the Assets to Be Divested is accomplished, including regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law). In addition, Respondent shall provide Key Employees incentives to accept employment with the Acquirer at the time of the divestiture. Such incentives shall include a bonus for each Key Employee, equal to 10% of the employee=s current annual salary and commissions (including any annual bonuses) as of the date this Order is accepted by the Commission for public comment (AStay On Bonus@), who accepts an offer of employment on or prior to the date the divestiture is accomplished from the Acquirer and remains employed by the Acquirer for a period of one (1) year, payable by Respondent one (1) year after the commencement of the employee=s employment by the Acquirer.
- E For a period of one year following the date the divestiture is accomplished, Tyco shall not, directly or indirectly, solicit or otherwise attempt to induce any employees to terminate their employment relationship with the Acquirer; *provided, however*, it shall not be deemed to be a violation of this provision if: (i) Tyco advertises for employment opportunities in newspapers, trade publications or other media not targeted specifically at the employees, or (ii) Tyco hires employees who apply for employment with Tyco, as long as such employees were not solicited by Tyco in violation of this

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Paragraph III E. During the one-year period following the divestiture, Tyco shall not, directly or indirectly, hire or enter into any arrangement for the services of any employees employed by the Acquirer, unless the individual's employment has been terminated by the Acquirer.

- F Respondent shall not transfer, without the consent of the Acquirer, any of the individuals identified in Paragraph III.A. of this Order to any other position until the divestiture is accomplished.
- G For the period beginning on the date the Divestiture Agreement is signed by Respondent and ending two years following the divestiture required by Paragraph II. of this Order (AExtended Restricted Period@), Respondent shall not:
 - 1 solicit, induce or attempt to induce any GPO Customer to terminate or modify any GPO Customer Contract or, in the case of any GPO Customer Contract which by its terms expires or terminates within two (2) years of the date this Consent Agreement is signed by Respondent, solicit, induce or attempt to induce the GPO Customer which is a party to such GPO Customer Contract to not renew such GPO Customer Contract; or
 - 2 solicit, induce, or attempt to induce any GPO Customer to transfer to Respondent any business that is subject to any GPO Customer Contract during the term of such GPO Customer Contract.

Nothing in this paragraph shall prevent Respondent from responding to an unsolicited invitation to bid on a contract from any GPO Customer during the Extended Restricted Period.

- H Respondent shall, at the request of the Acquirer, at Cost to the Acquirer, provide: (a) for a period not to exceed six months

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after the divestiture is accomplished, such Transitional Services as are necessary to enable the Acquirer to manufacture and distribute the Sheridan Product Line in substantially the same manner and quality employed or achieved by Respondent; and (b) until all necessary government approvals have been obtained, such assistance, personnel and training as are reasonably necessary to enable the Acquirer to obtain any necessary governmental approvals to manufacture the Sheridan Product Line and sell the Sheridan Product Line in each of the locations in which Respondent currently sells the Sheridan Product Line.

- I Respondent shall not provide, disclose or otherwise make available to any of its employees not involved in providing Transitional Services or Sheridan Earnout Review any Non-Public Acquirer Information, nor shall Respondent use any Non-Public Acquirer Information obtained or derived by Respondent in its capacity as provider of assistance pursuant to Paragraph III.H. or through Sheridan Earnout Review, except for the sole purpose of providing assistance pursuant to Paragraph III.H. or engaging in Sheridan Earnout Review. Respondent shall cause each individual involved in providing assistance pursuant to Paragraph III.H. and Sheridan Earnout Review and having access to Non-Public Acquirer Information to sign a statement that the individual will maintain the confidentiality of any Non-Public Acquirer Information as required by the terms and conditions of this Paragraph. No such individuals shall be involved in any way in the management, sales, marketing, or financial operations of the competing products of Respondent.
- J Respondent shall not utilize any Sheridan Sales Employees to market, sell or promote Endotracheal Tube products to any customer in North America, European Union countries, or Japan for a period of one year beginning on the date the divestiture is accomplished.
- K Pending divestiture of the Assets To Be Divested, Respondent shall take such actions as are necessary to maintain the

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

- L During the period in which the Acquirer operates the Assets To Be Divested in the Argyle Facility, Respondent shall maintain the Argyle Facility in accordance with past practice (including regular repair and maintenance efforts) and shall use its best efforts to preserve existing relationships with suppliers, employees and others related to maintaining the entire Argyle Facility.

IV.

IT IS FURTHER ORDERED that:

- A If Respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested within the time required by Paragraph II. of this order, the Commission may appoint a trustee to divest the Assets To Be Divested.
- B In the event that the Commission 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, Respondent 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 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.

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- C If a trustee is appointed by the Commission or a court pursuant to Paragraph IV.A. 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 and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of 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 divest the Assets To Be Divested.
 - 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 divestiture required by this order.
 - 4 The trustee shall have twelve (12) months from the date the Commission or court approves the trust agreement described in Paragraph IV.C.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be 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 the period for no more than two (2) additional periods.

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- 5 The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Assets To Be Divested or to any other relevant information as the trustee may request. Respondent shall develop such financial or other information as the trustee may reasonably request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the 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 divest expeditiously at no minimum price. The divestiture shall be made in a manner that receives the prior approval of the Commission and to an Acquirer that receives the prior approval of the Commission; *provided, however*, if the trustee receives bona fide offers for the Assets To Be Divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest such assets to the acquiring entity or entities selected by Respondent from among those approved by the Commission; provided further, however, that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.
- 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

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consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of 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 divesting the Assets To Be Divested.

- 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 claims 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 IV.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.

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- 11 In the event that the trustee determines that he or she is unable to divest the Assets To Be Divested in a manner consistent with the Commission's purpose as described in Paragraph II., the trustee may divest assets similar and corresponding to the Assets To Be Divested of Respondent as necessary to achieve the remedial purposes of this order.
- 12 The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.
- 13 The trustee shall report in writing to Respondent and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture required by this order.

V.**IT IS FURTHER ORDERED** that:

- A. After the date this Order becomes final, the Commission may appoint a monitor trustee to assure that Respondent fully performs its responsibilities in a timely manner as required by this Order.
- B. If a monitor trustee is appointed by the Commission, Respondent shall consent to the following terms and conditions regarding the monitor trustee's powers, duties, authority and responsibilities:
 1. The Commission shall select the monitor trustee, the identity of the monitor trustee being subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Monitor trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of the proposed monitor trustee, Respondent shall

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be deemed to have consented to the selection of the proposed monitor trustee.

2. Within ten (10) days after appointment of the monitor trustee, Respondent shall execute a trust agreement, subject to the prior approval of the Commission, that authorizes and permits the monitor trustee to perform the duties set forth in this Order.
3. The monitor trustee shall have the power and authority to monitor Respondent's compliance with the terms of this Order and shall exercise such power and authority and carry out the duties and responsibilities of the monitor trustee in a manner consistent with the purposes of this Order and in consultation with the Commission.
4. The monitor trustee shall prepare a written report and recommendation, if appropriate, with respect to Respondent's compliance with this Order.
5. The monitor trustee shall maintain the confidentiality of all confidential or proprietary information of Respondent and Acquirer, except that the monitor trustee may disclose to the Commission any confidential and proprietary information when reporting to the Commission on any matter bearing on compliance with the trust agreement and Order or bearing on the monitor trustee's performance of his or her duties.
6. The monitor trustee shall serve pursuant to the trust agreement from the time it is approved by the Commission for the term of the trust agreement.
7. Respondent shall give the monitor trustee full and complete access to the personnel, facilities, computers, books, and records related to the performance of his or her duties under this Order. The monitor trustee shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Respondent's operations.

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8. The monitor trustee shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The monitor trustee shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the monitor trustee's duties and responsibilities. The monitor trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.
9. Respondent shall indemnify the monitor trustee and hold the monitor trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the monitor 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 losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the monitor trustee.
10. The Commission may on its own initiative or at the request of the monitor trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.
11. The monitor trustee may recover his or her costs of collection, including reasonable attorneys fees, if Respondent fails to pay compensation pursuant to Paragraph V.B.8. herein.
12. If at any time the Commission determines that the monitor trustee ceases to act or fails to act diligently, or is unwilling to serve, a substitute monitor trustee may be

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appointed by the Commission in the same manner as provided in this Paragraph.

VI.

IT IS FURTHER ORDERED that within thirty (30) 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. through IV., excluding Paragraph III.L. 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 Paragraphs II. through IV. of 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 Paragraphs II. through IV. of the Order, including a description of all substantive contacts or negotiations relating to the divestiture and the approval. Respondent shall include in its compliance reports copies, other than of privileged materials, of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture and approval. The final compliance report required by this Paragraph VI. shall include a statement that the divestiture has been accomplished in the manner approved by the Commission and shall include the date the divestiture was accomplished.

VII.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the Respondent, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of this Order in the corporation.

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VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel to all facilities and access to inspect and copy all non privileged books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matter contained in this Order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from it, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding any such matters.

By the Commission.

CONFIDENTIAL APPENDIX I**CONFIDENTIAL**
APPENDIX II

Analysis to Aid Public Comment

**Analysis of Agreement Containing Consent Order to Aid
Public Comment**

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from Tyco International, Ltd. ("Tyco"), which is designed to remedy the anticompetitive effects resulting from Tyco's acquisition of Mallinckrodt, Inc. Under the terms of the agreement, Tyco will be required to divest its endotracheal tube business within ten days of the date the Consent Agreement is placed on the public record to Hudson RCI, or to another Commission-approved buyer no later than six (6) months from the date Tyco signed the Consent Agreement. If the sale of Tyco's endotracheal tube business is not made within six (6) months, the Commission may appoint a trustee to divest it.

The proposed Consent Agreement has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement or make final the Decision & Order.

Pursuant to a July 28, 2000 Agreement and Plan of Merger, Tyco agreed to acquire Mallinckrodt in a stock-for-stock transaction valued at approximately \$4.2 billion. The Commission's Complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45, in the market for endotracheal tubes.

Analysis to Aid Public Comment

Tyco, through its Kendall Division, and Mallinckrodt are the largest providers of endotracheal tubes in the United States. Endotracheal tubes are devices that are inserted through the nose or mouth into the trachea to provide oxygen or anesthesia. Hospitals and emergency personnel use endotracheal tubes to maintain a secure airway during surgical procedures and emergency situations.

The United States endotracheal tube market is highly concentrated, and the proposed acquisition would produce a firm controlling approximately 86% of the market. Mallinckrodt is the largest supplier of endotracheal tubes, claiming that its products are used in over 70% of the surgical procedures performed in the United States each year. Tyco is the next largest supplier. Both companies have product lines consisting of over one hundred different types of endotracheal tubes and related accessories, and have long track records of customer acceptance. As the two largest suppliers in the market, Tyco and Mallinckrodt frequently bid against each other for important hospital group purchasing organization contracts. Tyco and Mallinckrodt are the only two firms that have won contracts to supply members of the largest and most important group purchasing organizations. By eliminating competition between the two most significant competitors in this highly concentrated market, the proposed acquisition would allow the combined Tyco/Mallinckrodt to exercise market power unilaterally, thereby increasing the likelihood that purchasers of endotracheal tubes would be forced to pay higher prices and that innovation and service levels in the market would decrease.

Substantial barriers to new entry exist in the endotracheal tube market. Effective new entry would require the development of a full line of endotracheal tube products, obtaining approvals from the Food and Drug Administration, procurement of several million dollars worth of specialized manufacturing equipment, and the establishment of a sales and marketing force. Entry is further hampered by the fact that endotracheal tubes are critically

Analysis to Aid Public Comment

important to customers, though relatively inexpensive, so customers would be reluctant to consider new, unproven products even in the face of higher prices. In light of the fact that the endotracheal tube market is relatively small compared to the costs that a new entrant would have to incur, new entry is not likely to occur. Additionally, new entry into the endotracheal tube market is made more unlikely because of long-term hospital group purchasing organization contracts that may reduce the amount of sales opportunities available to new entrants. Because of the difficulty of accomplishing these tasks, new entry into the United States endotracheal tube market is unlikely to deter or counteract the anticompetitive effects resulting from the transaction

The Consent Agreement effectively remedies the acquisition's anticompetitive effects in the United States endotracheal tube market by requiring Tyco to divest its Sheridan line of endotracheal tube products. Pursuant to the Consent Agreement, Tyco is required to divest the Sheridan Line to Hudson RCI within ten days of the date the Commission places the Order on the public record. If the divestiture to Hudson RCI is not accomplished, Tyco must divest the Sheridan Line to a Commission-approved acquirer within six months. Should Tyco fail to do so, the Commission may appoint a trustee to divest the business.

The Consent Agreement includes a number of provisions that are designed to ensure that the transition of Tyco's endotracheal tube business to the acquirer is successful. The Consent Agreement requires Tyco to provide incentives to certain key employees to accept employment, and remain employed, by the acquirer. Tyco employees who had been involved with selling the Sheridan endotracheal tube line are prohibited from selling the Mallinckrodt endotracheal tube products for a period of one year. Tyco is also prohibited from inducing key hospital group purchasing organizations from terminating their contracts with the acquirer for a period of two years. Finally, Tyco employees involved with the endotracheal tube business are prohibited from disclosing any confidential information to employees involved with the Mallinckrodt line.

Analysis to Aid Public Comment

In order to ensure that the Commission remains informed about the status of the Tyco endotracheal tube business pending divestiture, and about efforts being made to accomplish the divestiture, the Consent Agreement requires Tyco to report to the Commission within 30 days, and every thirty days thereafter until the divestiture is accomplished. In addition, Tyco is required to report to the Commission every 60 days regarding its obligations to provide transitional services and facilities management.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the Consent Agreement or to modify in any way its terms.

Complaint

IN THE MATTER OF

ALBERTSON=S, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT*Docket C-3986; File No. 9810339**Complaint, December 6, 2000--Decision, December 6, 2000*

This consent order addresses the \$13 billion acquisition by Albertson=s, through its wholly owned subsidiary Abacus Holding, Inc., of American Stores Company. The complaint alleges that the proposed acquisition of all of the outstanding securities of American Stores, if consummated, would substantially lessen competition in the market for retail food and grocery items in supermarkets across the United States. The order requires Respondent to divest 144 individually identified stores and 5 identified supermarket sites to five different identified buyers. In 37 of the 57 proposed markets Respondent will divest all of either the Albertson or American stores, and in the remaining markets they will divest some combination. The order specifically requires Respondent to (1) maintain the viability, competitiveness and marketability of the assets to be divested; (2) not cause the wasting or deterioration of the assets to be divested; (3) not sell, transfer, encumber, or otherwise impair their marketability or viability; (4) maintain the supermarkets consistent with past practices; (5) use best efforts to preserve existing relationships with suppliers, customers and employees; and (6) keep the supermarkets open for business and maintain the inventory of products in each store consistent with past practice.

Participants

For the Commission: *Kenneth A. Libby, Phillip L. Broyles, Daniel P. Ducore, Geary A. Gessler, and Daniel P. O=Brien.*

For the Respondents: *Andrew G. Berg and Daniel F. McInnis, Akin, Gump, Strauss, Hauer & Feld L.L.P. and Robert Ling, Unified Western Grocers, Inc.*