

Complaint

IN THE MATTER OF

AIRGAS, INC.

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

Docket C-4029; File No. 0010040

Complaint, December 12, 2001--Decision, December 12, 2001

This consent order addresses the acquisition by Respondent Airgas, Inc., the only North American producer of nitrous oxide – a clear, odorless gas that is mainly used in dental and surgical procedures, as an analgesic or a weak anesthetic – of the Puritan Bennett Medical Gas Business from Mallinckrodt, Inc. The order, among other things, requires the respondent to divest a nitrous oxide business – consisting of two nitrous oxide production plants, customer contracts, and all related assets necessary for distribution and storage – to Air Liquide, a producer of other medical gases such as medical grade oxygen and nitrogen. The order also requires the respondent to supply Air Liquide with a specified amount of bulk liquid nitrous oxide from its Florida nitrous oxide production plant, in order to ensure that Air Liquide has the same volume of nitrous oxide as the respondent did before it acquired Puritan Bennett.

Participants

For the Commission: *Christina R. Perez, James J. Hagarty, Ann Malester, Joseph Eckhaus, Elizabeth A. Piotrowski, Fred C. Martin, and Daniel P. O'Brien.*

For the Respondent: *Stephen Stack, Dechert.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Respondent, Airgas, Inc. ("Airgas"), a corporation subject to the jurisdiction of the Commission, has acquired 100 percent of the Puritan Bennett Medical Gas Business ("the Acquisition") from Mallinckrodt, Inc. ("Mallinckrodt"), 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 Commission Act, as

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

I. RESPONDENT

1. Respondent Airgas is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware with its office and principal place of business located at 259 North Radnor-Chester Road, Suite 100, Radnor, Pennsylvania 19087.

2. Respondent is engaged in, among other things, the production and distribution of nitrous oxide.

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

II. THE ACQUIRED COMPANY

4. Mallinckrodt was a corporation organized, existing, and doing business at the time of the Acquisition under and by virtue of the laws of New York, with its office and principal place of business located at 675 McDonnell Boulevard, St. Louis, Missouri 63134.

5. Puritan Bennett, a subsidiary of Mallinckrodt, was, until the time of its acquisition by Respondent, engaged in, among other things, the business of providing nitrous oxide and other medical gases to a broad spectrum of consumers.

6. Mallinckrodt was at all times relevant herein engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in

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Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE ACQUISITION

7. On January 21, 2000, Respondent Airgas acquired substantially all of the assets of the Puritan Bennett Medical Gas Business, including all of the assets related to its nitrous oxide business, from Mallinckrodt for approximately \$90 million.

IV. THE RELEVANT MARKET

8. For purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the production and sale of nitrous oxide.

9. For purposes of this Complaint, the United States and Canada constitute the relevant geographic area in which to analyze the effects of the Acquisition in the relevant line of commerce.

V. STRUCTURE OF THE MARKET

10. As a consequence of the Acquisition of the Puritan Bennett Medical Gas Business by Airgas, the market for the production and sale of nitrous oxide is a monopoly. At the time of its acquisition, the Puritan Bennett Medical Gas Business was Airgas's only competitor in the production and sale of nitrous oxide.

VI. BARRIERS TO ENTRY

11. Entry into the relevant market identified in Paragraphs 8 and 9 is difficult, costly and unlikely to occur in a timely manner to deter or counteract the adverse competitive effects described in Paragraph 12 because of, among other things, the time needed to build a nitrous oxide production plant and delivery infrastructure and because the expense necessary to acquire a feed source, construct a nitrous oxide production facility, develop a distribution and delivery infrastructure and gain customer acceptance is quite high relative to the size of the market.

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VII. EFFECTS OF THE ACQUISITION

12. The acquisition has substantially lessened or may substantially lessen competition and has created a monopoly in the relevant market 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, by:

- (a) increasing the likelihood that customers requiring nitrous oxide will pay higher prices;
- (b) eliminating actual, direct, and substantial competition in the relevant market between Airgas and the Puritan Bennett Medical Gas Business, both of which had the ability and incentive to compete on price; and
- (c) increasing the likelihood of unilateral anticompetitive effects in the relevant markets.

VIII. VIOLATIONS CHARGED

13. The Acquisition described in Paragraph 7 constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twelfth day of December, 2001, issues its Complaint against said Respondent.

By the Commission.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the acquisition by certain wholly-owned subsidiaries of Respondent Airgas, Inc. of 100 percent of the Puritan Bennett Medical Gas Business from Mallinckrodt, Inc., and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid 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 had 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 (“Order”):

1. Respondent Airgas is a corporation organized, existing and doing business under and by virtue of the laws of the State of

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Delaware, with its office and principal place of business located at 259 North Radnor-Chester Road, Suite 100, Radnor, Pennsylvania 19087.

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**1.**

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

- a. “Respondent” or “Airgas” means Airgas, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Airgas, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- b. “Mallinckrodt” means Mallinckrodt, Inc., a corporation that was organized, existing and doing business at the time of the Acquisition under and by virtue of the laws of New York, with its office and principal place of business located at 675 McDonnell Boulevard, P.O. Box 5840, St. Louis, Missouri 63134.
- c. “Puritan Bennett Medical Gas Business” means the assets formerly owned by Mallinckrodt, Inc. used to manufacture, sell and distribute gases in the United States and Canada and purchased by Airgas on January 26, 2000.
- d. “Air Liquide” means Air Liquide America Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 2700 Post Oak Blvd, Houston, Texas 77056. Air Liquide also

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includes all of the joint ventures, subsidiaries, divisions, groups and affiliates controlled by Air Liquide America Corporation.

- e. “Acquirer” means either Air Liquide or the entity approved by the Commission to acquire the Assets To Be Divested pursuant to Paragraph II. or Paragraph III. of this Order, as appropriate.
- f. “Acquisition” means the acquisition by Airgas of the Puritan Bennett Medical Gas Business from Mallinckrodt.
- g. “Assets To Be Divested” means the Donora Manufacturing Facility and the Richmond Manufacturing Facility.
- h. “Commission” means the Federal Trade Commission.
- i. “Contract Manufacture Nitrous Oxide” means the annual production of Nitrous Oxide supplied pursuant to the terms of a Divestiture Agreement by Respondent for sale to the Acquirer.
- j. “Divestiture Agreement” means all agreements, including any supply agreement, by and between Respondent and the Acquirer and all exhibits and schedules thereof, incorporated by reference into this Order and made a part hereof as a confidential appendix, that have been approved by the Commission.
- k. “Donora Manufacturing Facility” means all assets, properties, business and goodwill, tangible and intangible, located in Donora, Pennsylvania as of September 24, 2001 used to produce, sell or distribute Nitrous Oxide, including, but not limited to:
 - i. all real property interests, including rights, title and interests in and to owned or leased property, together with all buildings, improvements, appurtenances,

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licenses and permits;

- ii. all inventory, machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property, including distribution equipment, storage containers, filling equipment and cylinders;
- iii. all vendor lists;
- iv. all sales promotion literature and advertising materials; provided, however, that the Acquirer may not use or distribute any items containing the Respondent's name or logo;
- v. rights to research materials, inventions, trade secrets, intellectual property, patents, technology, know-how, management information systems, software and software licenses sufficient to operate the Assets To Be Divested;
- vi. all specifications, designs, drawings, processes and quality control data;
- vii. rights to and in all contracts, including, but not limited to, customer, dealer, distributor, supply and utility contracts; provided, however, the Acquirer may negotiate with the Respondent for rights to certain other customers or other contracts, if the Acquirer deems it necessary to be competitive;
- viii. all assignable regulatory approvals;
- ix. all rights under warranties and guarantees, express or implied;
- x. all books, records and files; and
- xi. all items of prepaid expense.

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- l. “Nitrous Oxide” means the chemical compound comprised of two parts nitrogen and one part oxygen (“N₂O”).
- m. “Richmond Manufacturing Facility” means all assets, properties, business and goodwill, tangible and intangible, located in Richmond, California as of September 24, 2001 used to produce, sell or distribute Nitrous Oxide, including, but not limited to:
 - i. all real property interests, including rights, title and interests in and to owned or leased property, together with all buildings, improvements, appurtenances, licenses and permits;
 - ii. all inventory, machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property, including distribution equipment, storage containers, filling equipment and cylinders;
 - iii. all vendor lists;
 - iv. all sales promotion literature and advertising materials; provided, however, that the Acquirer may not use or distribute any items containing the Respondent’s name or logo;
 - v. rights to research materials, inventions, trade secrets, intellectual property, patents, technology, know-how, management information systems, software and software licenses sufficient to operate the Assets To Be Divested;
 - vi. all specifications, designs, drawings, processes and quality control data;

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- vii. rights to and in all contracts, including, but not limited to, customer, dealer, distributor, supply and utility contracts; provided, however, the Acquirer may negotiate with the Respondent for rights to certain other customers or other contracts, if the Acquirer deems it necessary to be competitive;
- viii. all assignable regulatory approvals;
- ix. all rights under warranties and guarantees, express or implied;
- x. all books, records and files; and
- xi. all items of prepaid expense.

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

- a. Respondent shall divest the Assets To Be Divested, absolutely and in good faith, as a competitively viable, on-going business to Air Liquide 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 (10) days after the date the Order in this matter becomes final. Provided, however, that if Respondent has divested the Assets To Be Divested to Air Liquide prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that Air Liquide is not an acceptable purchaser or that the manner of divestiture is not acceptable, then Respondent shall immediately rescind the transaction with Air Liquide and shall divest the Assets To Be Divested, absolutely and in good faith, within six (6) months from the date the Order becomes final. Respondent shall divest the Assets To Be Divested only to an Acquirer that receives the prior approval of the Commission and only

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in a manner that receives the prior approval of the Commission.

- b. The purpose of the divestiture of the Assets To Be Divested and the Divestiture Agreement is to ensure competition in the production, distribution and sale of Nitrous Oxide in the same manner and of the same quality as was produced, distributed and/or sold by Respondent prior to the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.
- c. Respondent shall not, directly or indirectly, withhold or threaten to withhold Respondent's purchases of oxygen, nitrogen or any other product(s) from any person on the condition that that person also purchase Nitrous Oxide from the Respondent.
- d. Respondent shall comply with all of the terms of the Divestiture Agreement approved by the Commission pursuant to which the Assets To Be Divested are divested to the Acquirer (either Air Liquide or any other entity approved by the Commission to acquire the Assets To Be Divested pursuant to this Order). The Divestiture Agreement with the Acquirer shall be deemed incorporated by reference into this Order, and any failure by Respondent to comply with the terms of the Divestiture Agreement shall constitute a failure to comply with this Order.
- e. Respondent shall Contract Manufacture Nitrous Oxide and deliver it to the Acquirer in a timely manner and under the terms and conditions of the Divestiture Agreement, for a period not to exceed five (5) years from the date of the divestiture.
- f. Pending divestiture of the Assets To Be Divested, Respondent shall take such actions as are necessary to maintain the viability, marketability and competitiveness of the Assets To Be Divested, and to prevent the destruction,

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removal, wasting, deterioration or impairment of any of the Assets To Be Divested except for ordinary wear and tear.

- g. Respondent shall provide the Acquirer with a complete list of all non-clerical, salaried employees at the Assets To Be Divested who have been involved in the production, distribution and/or sale of Nitrous Oxide at any time from January 21, 2000, until the date of the Divestiture Agreement, at the request of the Acquirer any time after the execution of the Divestiture Agreement with the Acquirer. Respondent shall also provide the Acquirer with a complete list of all independent contractors involved in the production, distribution and/or sale of Nitrous Oxide at the Assets To Be Divested at any time from January 21, 2000, until the date of the Divestiture Agreement. The lists shall state each individual's name, position or positions held from January 21, 2000, until the date of the Divestiture Agreement, address, telephone number, and a description of the duties and work performed by the individual in connection with the manufacture, distribution, and/or sale of Nitrous Oxide. Respondent shall provide the Acquirer with the opportunity to enter into employment contracts with such individuals, provided that such contracts are contingent upon the divestiture of the Assets To Be Divested.
- h. Respondent shall provide the Acquirer with an opportunity to inspect the personnel files and other documentation relating to individuals identified in Paragraph II.G. of this Order to the extent permissible under applicable laws, at the request of the Acquirer any time after the execution of the Divestiture Agreement with the Acquirer.

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- i. For a period of one (1) year following the date the divestiture is accomplished, Respondent 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) Respondent advertises for employees in newspapers, trade publications or other media not targeted specifically at the employees of the Commission-approved Acquirer, or (ii) Respondent hires employees who apply for employment with Respondent, as long as such employees were not solicited by Respondent in violation of this Paragraph.
- j. Respondent shall not enforce any confidentiality or non-compete restrictions relating to the Assets To Be Divested that apply to any employee identified in Paragraph II.G. who accepts employment with the Acquirer, but Respondent may enforce all other rights thereunder relating to any other products or services.

3.

IT IS FURTHER ORDERED that:

- a. If Respondent fails to divest, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested within the time frame set forth in Paragraph II. of this Order, the Commission may appoint a trustee to divest the Assets To Be Divested and enter into a supply contract for Nitrous Oxide in a manner that satisfies the requirements of Paragraph II. of this Order.
- b. 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, 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

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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.

- c. If a trustee is appointed by the Commission or a court pursuant to Paragraph III.A. of this Order, Respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
 - i. 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 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.
 - ii. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.
 - iii. 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.
 - iv. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph III.C.3. to accomplish the divestiture, which shall be subject to the prior

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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 this period only two (2) times.

- v. 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 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.
- vi. 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 the manner and to an acquirer as set out in Paragraph II. of this Order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission; provided further, however, that Respondent shall select such entity within five (5) business days of receiving notification of the Commission's approval.

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- vii. 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 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 divesting the Assets To Be Divested.
- viii. 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 losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
- ix. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph III.A. of this Order.

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- x. 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.
- xi. 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.B. of this Order, the trustee may divest additional ancillary assets of Respondent related to the Assets To Be Divested and effect such arrangements as are necessary to satisfy the requirements of this Order.
- xii. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.
- xiii. The trustee shall report in writing to Respondent and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture.

4.

IT IS FURTHER ORDERED that:

- a. 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..A, II.F., II.G., II.H. and III. 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.A, II. F., II.G., II.H. and III. 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.A., II.F., II.G., II.H. and III. of the Order, including a description of all substantive contacts or negotiations for the divestiture

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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 divestiture. The final compliance report required by this Paragraph IV.A. 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.

- b. One (1) year from the date of divestiture of the Assets To Be Divested and annually thereafter until the Order terminates, Respondent shall file a verified written report to the Commission setting forth in detail the manner in which it has complied and is complying with this Order.

5.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate 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.

6.

IT IS FURTHER ORDERED that for the purposes 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 representatives of the Commission:

- a. Access, during office hours of Respondent and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the

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possession or under the control of the Respondent relating to compliance with this Order; and

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

VII.

IT IS FURTHER ORDERED that this Order shall terminate when all of the obligations of the Divestiture Agreement required in Paragraph II. or Paragraph III. of this Order have been accomplished.

By the Commission.

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Confidential Appendix

[Redacted From Public Record Version]

Analysis

**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 Airgas, Inc. (“Airgas”), which is designed to remedy the anticompetitive effects resulting from an acquisition by certain wholly-owned subsidiaries of Airgas of the Puritan Bennett Medical Gas Business (“Puritan Bennett”). Under the terms of the Consent Agreement, Airgas will be required to divest a nitrous oxide business to Air Liquide America Corporation (“Air Liquide”) within ten days of the date the Commission issues the Decision and Order in this matter.

The 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 Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement or make final the Decision and Order.

On January 21, 2000, Airgas acquired Puritan Bennett from Mallinckrodt, Inc. for approximately \$90 million. The Commission's Complaint alleges that the acquisition violated 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 the production and sale of nitrous oxide in the United States and Canada (“North America”).

Nitrous oxide is a clear, odorless gas that is mainly used in dental and surgical procedures as an analgesic or a weak anesthetic. Because nitrous oxide elevates the patient's pain threshold and relieves patient anxiety, it is predominantly used by dentists when a patient is undergoing extensive dental work or by anesthesiologists during many surgical procedures as a supplement to other anesthetics. According to customers of nitrous oxide, other anesthetics and analgesics are far more

Analysis

expensive or have other detriments when compared to nitrous oxide, and thus are not viable substitutes for nitrous oxide.

Currently, Airgas is the only producer of nitrous oxide in North America. However, prior to its purchase by Airgas, Puritan Bennett was also a producer and seller of nitrous oxide in North America. As a result, before the acquisition, Puritan Bennett and Airgas competed against each other for a wide variety of nitrous oxide customers across the country. Therefore, Airgas's acquisition of Puritan Bennett effectively eliminated any competition in the North American market for the production and sale of nitrous oxide.

There are substantial barriers to new entry into the nitrous oxide market. Effective new entry would require a company to build multiple production facilities, which would take well in excess of two years. In addition, a new entrant would have to incur substantial investments, including the acquisition of a source of raw material and the development of an appropriate infrastructure to deliver bulk nitrous oxide to end-users and to distributors for resale. In light of the fact that the nitrous oxide market is relatively small compared to the costs that a new entrant would have to incur, new entry is not likely to occur. Because of the cost and difficulty of accomplishing these tasks, no new entry into the nitrous oxide market is likely to occur within the next two years to deter or counteract the anticompetitive effects resulting from the transaction.

The proposed order effectively remedies the acquisition's anticompetitive effects in the North American nitrous oxide market by requiring Airgas to divest a nitrous oxide business, which consists of two nitrous oxide production plants, customer contracts, and all related assets necessary for distribution and storage to Air Liquide. The order also requires Airgas to supply Air Liquide with a specified amount of bulk liquid nitrous oxide from its Florida nitrous oxide production plant in order to ensure that Air Liquide has the same volume of nitrous oxide as Airgas did before its acquisition of Puritan Bennett.

Analysis

Air Liquide has all of the necessary attributes to restore competition to the relevant market. Not only does it produce other medical gases, such as medical grade oxygen and nitrogen, but it also already has extensive contracts with gas distributors, which are the major customers of nitrous oxide. Indeed, many distributors already buy a wide variety of other gases from Air Liquide. Furthermore, Air Liquide has the financial resources to purchase the assets and operate the business in a competitive manner.

Pursuant to the proposed order, Airgas is required to divest these assets to Air Liquide within ten days of the date the Commission issues the Decision and Order in this matter. If the divestiture to Air Liquide is not accomplished by then, Airgas must divest these nitrous oxide assets to a Commission-approved acquirer within six months. Should Airgas fail to do so, the Commission may appoint a trustee to divest the business.

In order to ensure that the Commission remains informed about the status of the Airgas nitrous oxide business pending divestiture, and about efforts being made to accomplish the divestiture, the Consent Agreement requires Airgas to report to the Commission within 30 days, and every 60 days thereafter until the divestiture is accomplished. In addition, Airgas 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.

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IN THE MATTER OF

ESRIM VE SHEVA HOLDING CORP., ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4030; File No. 0123116**Complaint, December 17, 2001--Decision, December 17, 2001*

This consent order addresses advertising representations that Respondent ESRIM Ve Sheva Holding Corporation, sometimes doing business as Gadget Universe – and its chief executive officer, Respondent Alexander Elnekaveh – made about Super FuelMAX, an automotive fuel-line magnet. The order, among other things, prohibits the respondents from making any claim in connection with any fuel-line magnet, or any purported fuel-saving or emission-reducing product for use with a motor vehicle – including claims that such product improves fuel burn, reduces fuel consumption, or reduces emissions or pollutants; or about the benefits, performance, or efficacy of such product – without possessing and relying on competent and reliable evidence, which, when appropriate, must be competent and reliable scientific evidence, substantiating the claim. The order also prohibits the respondents from misrepresenting (1) that any user testimonial or endorsement of the product reflects the actual and current opinions, findings, beliefs, or experiences of the user, or (2) the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

Participants

For the Commission: *Jonathan Cowen, Angela Floyd, Joni Lupovitz, and Elaine D. Kolish*

For the Respondent: *Bernard Schwam.*

COMPLAINT

The Federal Trade Commission, having reason to believe that ESRIM Ve Sheva Holding Corporation, sometimes doing business as Gadget Universe, and Alexander Elnekaveh, individually and as an officer of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges: