

Complaint

126 F.T.C.

IN THE MATTER OF

FAIR ALLOCATION SYSTEM, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3832. Complaint, Oct. 22, 1998--Decision, Oct. 22, 1998*

This consent order prohibits, among other things, the Montana-based association of franchised automobile dealerships from participating in, suggesting, encouraging, or assisting any boycott or threatened boycott of, or refusal to deal with, any automobile manufacturer or consumer. In addition, the consent order requires the respondent to amend its by-laws to incorporate the provisions of this order and to distribute copies of the amended by-laws to each of its members.

Participants

For the Commission: *Shane Woods, Charles Harwood, William Baer, William Layher, and Jonathan Baker.*

For the respondent: *R. J. Sewell, Smith Law Firm, Helena, MT.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Fair Allocation System, Inc. (hereafter "respondent") has violated the provisions of Section 5 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, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Fair Allocation System, Inc. is an incorporated association of franchised automobile dealerships (primarily Chrysler, Plymouth, Dodge, Jeep and Eagle), existing and doing business under and by virtue of the laws of the State of Montana, with a mailing address at P.O. Box 1691, Helena, Montana.

PAR. 2. Respondent was formed by its member dealers as an entity through which its members could communicate with Chrysler Corp. ("Chrysler") concerning Chrysler policies and how those policies might affect respondent's members. Respondent's members were initially concerned about the practices of a competing dealer

whose low prices and Internet advertising were attracting car buyers from a broad geographic area and taking sales from respondent's members. Respondent's members had previously asked Chrysler to reduce the number of vehicles it allocates to this dealer, but Chrysler had refused. Respondent has approximately 25 members, who are generally engaged in the retail sale of new Chrysler, Plymouth, Dodge, Jeep and Eagle automobiles. In addition to new car sales, respondent's members provide service on Chrysler, Plymouth, Dodge, Jeep and Eagle automobiles, including warranty work. Member dealerships are located principally in eastern Washington, northern Idaho and western Montana, where they constitute a substantial percentage of the Chrysler, Plymouth, Dodge, Jeep and Eagle dealerships. In cities and towns along Interstate 90 between Ellensburg, Washington, and Missoula, Montana, for example, seven of 11 such dealerships are members of respondent. Except to the extent that competition has been restrained as alleged herein, respondent's members have been and are now in competition among themselves and with other automobile dealerships.

PAR. 3. Respondent's acts and practices, including the acts and practices alleged herein, are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 4. Respondent is organized for the purpose of guarding and fostering the interests of its members. Respondent engages in activities that further its members' pecuniary interests. By virtue of its purposes and activities, respondent is a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 5. Respondent has been and is acting, or has attempted to act, in agreement, combination or conspiracy with some of its members to restrain trade in the sale of new Chrysler, Plymouth, Dodge, Jeep and Eagle automobiles by threatening to boycott particular models and limit warranty service to particular customers unless Chrysler modifies its system for allocating vehicles to its dealers. Instead of allocating vehicles based on each dealer's total sales volume, as Chrysler does now, respondent demanded that Chrysler allocate vehicles based on each dealer's sales volume from within its local area.

PAR. 6. The purposes or effects of respondent's agreement, combination or conspiracy, or attempted agreement, combination or conspiracy, as described in paragraph five, have been and are, or would be, to restrain competition unreasonably and to deprive consumers of the benefits of competition in one or more of the following ways, among others:

A. By foreclosing, reducing and restraining competition among automobile dealers, including Chrysler, Plymouth, Dodge, Jeep and Eagle dealers;

B. By depriving consumers of local access to particular models of new Chrysler, Dodge, Plymouth, Jeep and Eagle automobiles; and

C. By depriving consumers of local access to warranty work on their Chrysler, Plymouth, Dodge, Jeep or Eagle automobiles.

PAR. 7. The aforesaid acts and practices herein alleged were and are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of respondent Fair Allocation System, Inc. ("FAS"), and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. FAS is an incorporated association of franchised automobile dealerships (primarily Chrysler, Plymouth, Dodge, Jeep and Eagle), organized, existing and doing business under and by virtue of the laws of the State of Montana, and has a mailing address at P.O. Box 1691, Helena, Montana.

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 "*FAS*" means Fair Allocation System, Inc., its officers, directors, employees, agents and representatives, successors, and assigns, its subsidiaries, divisions, groups and affiliates controlled by FAS, and the respective officers, directors, employees, agents and representatives, successors, and assigns of each.

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

II.

It is further ordered, That respondent, directly or indirectly, or through any person or any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from carrying out, participating in, inducing, suggesting, urging, encouraging, or assisting any boycott or threatened boycott of, or concerted refusal to deal or threatened concerted refusal to deal with, any automobile manufacturer or consumer.

III.

It is further ordered, That respondent shall:

A. Within thirty (30) days after the date this order becomes final, distribute by first-class mail a copy of this order and the complaint to each of its members;

B. Within sixty (60) days after the date this order becomes final, amend its by-laws to incorporate by reference paragraph II of this order, and distribute by first-class mail a copy of the amended by-laws to each of its members;

C. For a period of ten (10) years after the date this order becomes final, provide each new member with a copy of this order, the complaint, and the amended by-laws within thirty (30) days of the new member's admission to FAS; and

D. Within sixty (60) days after the date this order becomes final, and annually thereafter for a period of ten (10) years on the anniversary of the date this order becomes final, file with the Secretary of the Commission a verified written report setting forth in detail the manner and form in which FAS has complied with and is complying with this order.

IV.

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

V.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondent shall permit any duly authorized representative 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. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

VI.

It is further ordered, That this order shall terminate on October

IN THE MATTER OF
EXXON CORPORATION, ET AL.

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-3833. Complaint, Oct. 30, 1998--Decision, Oct. 30, 1998

This consent order, among other things, requires Exxon to sell its viscosity index improver (an essential motor oil additive) business to Chevron Chemical Company or another Commission-approved buyer.

Participants

For the Commission: *Philip Eisenstat, Joseph Krauss, William Baer, Leslie Farber, and Jonathan Baker.*

For the respondents: *Robert Paul, White & Case, Washington, D.C. and Jim Egan, Rogers & Wells, Washington, D.C.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents Exxon Corporation, The Shell Petroleum Company Limited, and Shell Oil Company, all corporations subject to the jurisdiction of the Commission, have agreed to form a joint venture, in violation of the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. THE RESPONDENTS

1. Respondent Exxon Corporation ("Exxon") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, having its principal offices at 5959 Las Colinas Boulevard, Irving, Texas.

2. Respondent The Shell Petroleum Company Limited is a corporation organized, existing and doing business under and by virtue of the laws of England, having its principal offices at Shell Centre, London SE1 7NA, England.

3. Respondent Shell Oil Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, having its principal offices at One Shell Plaza, Houston, Texas.

II. JURISDICTION

4. At all times relevant here, respondents have been, and are now, corporations as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. 44; and at all times relevant herein, the respondents have been, and are now, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and in Section 4 of the FTC Act, 15 U.S.C. 44.

III. THE PROPOSED JOINT VENTURE

5. On or about July 10, 1996, Exxon Chemical Company, a division of Exxon, The Shell Petroleum Company Limited, and Shell Oil Company announced an intention to form a joint venture to own and operate the businesses of Exxon Chemical Company, The Shell Petroleum Company Limited, and Shell Oil Company, engaged in the development, manufacture, marketing and sale of additives used in the production of fuels and lubricants (the "Joint Venture"). The value of the businesses to be combined in the Joint Venture is around \$1.5 billion.

IV. THE RELEVANT MARKETS

A. *Relevant Product Market*

6. The development, manufacture, marketing and sale of viscosity index improver or viscosity modifiers for motor oil for automobiles and trucks ("VI improver") is the relevant line of commerce within which to analyze the competitive effects of the proposed acquisition.

7. VI improvers are synthetic rubber compounds, either polymers or styrenics, that are blended with refined oil to enhance the viscosity properties of the oil for use in motor oil.

8. The viscosity of a fluid is its internal resistance to flow. The higher the viscosity, the more resistance to flow. Lubricating oils must have enough viscosity to maintain a film of the proper thickness on the surfaces that they are intended to protect. Temperatures affect the viscosity of oil, higher temperatures lowering the viscosity. Motor oil, which is used to lubricate the interior of an engine, must

have sufficient viscosity to adhere to the internal surfaces of the engine even after the engine gets hot and reduces the oil's viscosity. At the same time, motor oil must have low enough viscosity to flow through the engine when the engine is cold, particularly in winter weather.

9. Refined oil by itself does not have both the needed high viscosity when the engine is warm and the low viscosity when the engine is cold. An oil with low viscosity which will flow well at low temperatures will lack the required viscosity to protect the engine at high temperatures. An oil with a high viscosity which will protect the engine at high temperatures will not flow well at low temperatures. The "viscosity index" of an oil is the relationship between the viscosity of the oil at two different temperatures, one low and one high. The higher the viscosity index, the smaller the relative change in viscosity with temperature. VI improvers are added to refined oil by companies that blend and market motor oil to give the resulting motor oil more consistent viscosity across changes in temperature and increase the viscosity index.

10. Consumers rely on motor oil containing VI improver to protect their car engines. There are no economic substitutes for VI improver.

11. Exxon Chemical Company and The Shell Petroleum Company Limited and Shell Oil Company develop, manufacture, market, and sell VI improver.

B. Relevant Geographic Market

12. The relevant geographic area in which to analyze the effects of the Joint Venture in the relevant line of commerce is North America.

13. Automobile and truck engine manufacturers, oil companies that produce motor oil, and companies that produce chemical additives to enhance the performance of motor oil jointly develop industry standards for the minimum performance of motor oil. These industry standards vary in different parts of the world. The VI improver marketed in North America is designed so that when combined with motor oil and other chemical additives, the motor oil will meet industry minimum standards for North America. VI improver marketed in other parts of the world may not allow motor oil to meet the minimum industry standards for North America.

14. The relatively low value to weight ratio of VI improver makes it generally uneconomic to transport VI improver from other parts of the world to North America for use in motor oil.

V. MARKET STRUCTURE

15. As measured by current sales to customers in North America, the relevant market is highly concentrated, whether measured by the Herfindahl-Hirschmann Index (or "HHI") or by two-firm or four-firm concentration ratios. Exxon Chemical Company, The Shell Petroleum Company Limited, and Shell Oil Company collectively account for over one-half of the sales of VI improver for use in motor oil in North America. The proposed Joint Venture, if consummated, would significantly increase the HHIs in an already highly concentrated market.

VI. ENTRY CONDITIONS

16. Entry into the development, manufacture, marketing, and sale of VI improver requires more than two years. Entry into the VI improver market is difficult and would not be timely to prevent anticompetitive effects in the relevant markets.

17. The development of a VI improver that will enable motor oil to meet the applicable industry standards is very difficult and time consuming. It takes over two years to develop a marketable VI improver product.

18. The economies of scale in the manufacturing of synthetic rubbers of the type that can be used for VI improver require a manufacturing facility that is much larger than is needed to compete in the VI improver market. A new entrant into the market for VI improver must either build a plant for the production of synthetic rubber many times the size that is needed to compete in the VI improver market and simultaneously enter other markets to market the remaining production of the plant, or find an existing supplier of synthetic rubbers who will provide a supply of synthetic rubber of the design needed to make VI improver. Many of the current producers of VI improver have exclusive supply arrangements with suppliers of synthetic rubber to manufacture the synthetic rubber that the producer of the VI improver uses.

19. Building a new manufacturing facility for the production of synthetic rubber of the type that can be used in the production of VI improver is time consuming. It would take over two years to build a new synthetic rubber facility. There are few, if any, producers of

synthetic rubber of the types that can be used for VI improver that do not already have an exclusive supply arrangement with a producer of VI improver that precludes that producer of synthetic rubber from supplying another VI improver producer.

VII. ACTUAL COMPETITION

20. Exxon Chemical Company, The Shell Petroleum Company Limited, and Shell Oil Company are actual competitors in the relevant lines of commerce in the relevant area.

VIII. EFFECTS OF THE PROPOSED MERGER ON COMPETITION

21. The effect of the Joint Venture, if consummated, may be substantially to lessen competition and to tend to create 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:

A. By eliminating actual, direct, and substantial competition between Exxon Chemical Company, The Shell Petroleum Company Limited, and Shell Oil Company in the relevant markets;

B. By increasing the likelihood of or facilitating collusion or coordinated interaction between the Joint Venture and the remaining competitors;

C. By increasing the likelihood that customers of VI improver would be forced to pay higher prices; and

D. By reducing innovation, quality, service, and product availability in the relevant markets.

IX. VIOLATIONS CHARGED

22. The proposed formation of a joint venture by Exxon Chemical Company, The Shell Petroleum Company Limited, and Shell Oil Company violates Section 5 of the FTC Act, as amended, 15 U.S.C. 45, and would, if consummated, violate 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.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed formation of a joint venture between Exxon Chemical Company, a division of Exxon Corporation, The Shell Petroleum Company Limited and Shell Oil Company, hereinafter sometimes referred to as the "respondents," and having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents 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 respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Exxon Corporation is a corporation organized and existing under the laws of the State of New Jersey, having its principal offices at 5959 Las Colinas Boulevard, Irving, Texas.
2. Respondent The Shell Petroleum Company Limited is a corporation organized under the laws of England, having its principal offices at Shell Centre, London SE1 7NA, England.
3. Respondent Shell Oil Company is a corporation organized and existing under the laws of the State of Delaware, having its principal offices at One Shell Plaza, Houston, Texas.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, 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. "*Exxon Corporation*" means Exxon Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Exxon Corporation, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each. For purposes of this order, Exxon Corporation does not include the Joint Venture (as defined below).

B. "*The Shell Petroleum Company Limited*" means The Shell Petroleum Company Limited, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by The Shell Petroleum Company Limited, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "*Shell Oil Company*" means Shell Oil Company, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Shell Oil Company, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "*Respondents*" means Exxon Corporation, The Shell Petroleum Company Limited, and Shell Oil Company, individually and collectively.

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

F. "*Chevron*" means Chevron Chemical Company LLC, a subsidiary of Chevron Oil Company. Chevron is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 6001 Bollinger Canyon Road, San Ramon, California.

G. "*Chevron Agreement*" means the *Purchase and Sale Agreement By And Between Chevron Chemical Company LLC, As Purchaser, And Exxon Chemical Company, A Division Of Exxon Corporation, As Seller, Regarding The Crankcase OCP VII Business of ECC's Paramins Division*, dated May 14, 1998.

H. "*Assets Identified in the Chevron Agreement*" means the assets that Exxon Chemical Company, a division of Exxon Corporation, has agreed to sell, and Chevron has agreed to buy, as embodied in the Chevron Agreement.

I. "*Vistalon*" means the business unit of Exxon Chemical Company whose principal business is the design, manufacture, marketing, and sale of polymers, including, among other products, OCP Polymer for Viscosity Index Improver Applications.

J. "*Joint Venture*" means the joint venture or ventures to be formed between Exxon Corporation, The Shell Petroleum Company Limited and Shell Oil Company pursuant to the *Additives Joint Venture Agreement Among Exxon Chemical Company, A Division of Exxon Corporation, the Shell Petroleum Company Limited, and Shell Oil Company*, dated May 15, 1998.

K. "*Consummation of the Joint Venture*" means the earlier of (1) the closing date of the Joint Venture in the United States or (2) the commencement of joint manufacturing by the Joint Venture anywhere in the world.

L. "*Viscosity Index Improver*" means products made from polymers or styrenics, including olefin co-polymers, that are added to lubricants, including motor oils, to modify the impact of changes in temperature on the viscosity of the lubricants.

M. "*OCP-based Viscosity Index Improver*" means Viscosity Index Improver products for crankcase applications that are made from olefin co-polymers (OCP).

N. "*OCP Polymer for Viscosity Index Improver Applications*" means commercially viable grades of olefin co-polymer manufactured by Vistalon, a business unit of Exxon Chemical Company, a division of Exxon Corporation, which have utility in Viscosity Index Improvers, including, without limitation, current grades of olefin co-polymers designated Vistalon grades 457, 785, 703, 878P, and 878, MDV 91-9, and Exxelor grades 8900 and 8950.

O. "*Paramins*" means the business unit of Exxon Chemical Company, whose principal business is in the design, manufacture,

marketing, and sale of fuel and lubricant additive products, including without limitation, Viscosity Index Improvers.

P. "*Paratone*" means the OCP-based Viscosity Index Improvers designed, manufactured, marketed and sold by Paramins.

Q. "*Non-public Information*" means material proprietary commercial or technical information related to Chevron's Oronite Division, Vistalon products for OCP-based Viscosity Index Improvers, OCP-based Viscosity Index Improvers, or OCP Polymer for Viscosity Index Improver Applications. Non-public Information does not include: (1) information that falls within the public domain through no violation of this order by any respondent, (2) information to be retained by Exxon Corporation or to be transferred to the Joint Venture as permitted by the Chevron Agreement, (3) the residual knowledge of former Paramins employees who become employees of the Joint Venture, or (4) information relating to OCP polymer to the extent the polymer is used for applications other than Viscosity Index Improver.

R. "*Chevron's Oronite Division*" means the division of Chevron Chemical Company LLC that manufactures and markets lubricant additives worldwide, with principal offices in Houston, Paris, and Singapore.

S. "*Viscosity Index Improver Business*" means Exxon Corporation's business of developing and selling OCP-based Viscosity Index Improvers, and includes all assets used by Paramins in the research, development, manufacturing, marketing and sale of OCP-based Viscosity Index Improvers in North America and Europe, regardless of where the assets are located in the world, and regardless of whether included in the Chevron Agreement, including, without limitation, the following:

1. All trademarks, including the Paratone trademark, brand names, customer lists, vendor lists, catalogs, sales promotion literature, and advertising materials;
2. All research materials, technical information, management information systems, software, inventions, trade secrets, intellectual property, patents, technology, know-how, specifications, designs, drawings, processes and quality control data;
3. All inventory of raw materials and finished goods;
4. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with

associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees to the extent that they apply to the Viscosity Index Improver Business;

5. All rights under warranties and guarantees, express or implied;
6. All books, records, files;
7. All items of prepaid expense; and
8. A supply of OCP Polymer for Viscosity Index Improver Applications on commercially reasonable terms;

provided that the Viscosity Index Improver Business shall not include (1) any manufacturing facilities owned and operated by either Vistalon or Paramins or (2) Paramins Lube Oil Flow Improver ("Paraflow") and stabilizer ("Parabar") products.

II.

It is further ordered, That:

A. Exxon Corporation shall divest, within 6 months from the signing of this Agreement, absolutely and in good faith, either:

1. The Assets Identified in the Chevron Agreement, to Chevron, in accordance with the Chevron Agreement, prior to the Consummation of the Joint Venture; or
2. The Viscosity Index Improver Business to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, prior to the Consummation of the Joint Venture.

The Joint Venture may be consummated upon the closing of the Chevron Agreement in the United States and in Europe.

B. Pending divestiture of the Viscosity Index Improver Business, Exxon Corporation shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the Viscosity Index Improver Business and to prevent the destruction, removal, wasting, deterioration, or impairment of any assets or business of the Viscosity Index Improver Business except for ordinary wear and tear.

C. In the event that the Commission notifies respondents that Chevron is not an acceptable acquirer or that the Chevron Agreement is not an acceptable manner of divestiture, Exxon Corporation must

rescind the Chevron transaction as provided in paragraph ten of this Agreement, and shall:

1. Divest the Assets Identified in the Chevron Agreement to Chevron in a manner approved by the Commission;
2. Divest the Viscosity Index Improver Business to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission; or
3. Abandon Consummation of the Joint Venture pursuant to paragraph VIII.B.

D. In the event that the Commission notifies respondents that Chevron is not an acceptable acquirer or that the Chevron Agreement is not an acceptable manner of divestiture, and the respondents consummate the Joint Venture, Exxon Corporation 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 Exxon Corporation has divested all the Viscosity Index Improver Business as required by this order or until such other time as the Agreement to Hold Separate provides.

E. If Exxon Corporation complies with its obligations under this part by selling the assets identified in the Chevron Agreement to Chevron, Exxon Corporation shall comply with all the terms of the Chevron Agreement, including all the ancillary agreements thereto. Respondents shall assure that the Joint Venture complies with the ancillary agreements that purport to bind the Joint Venture.

F. Except as permitted pursuant to the Chevron Agreement or the agreement between Exxon Corporation and the acquirer of the Viscosity Index Improver Business, as approved by the Commission, Exxon shall not sell OCP Polymer for Viscosity Index Improver Applications to other customers including the Joint Venture.

III.

It is further ordered, That:

A. If Exxon Corporation has not divested, absolutely and in good faith and with the Commission's prior approval, the Viscosity Index Improver Business within 6 months of the signing of this Agreement, then the Commission may appoint a trustee to divest the Viscosity Index Improver Business. The trustee shall have all rights and powers

necessary to permit the trustee to effect the divestiture of the Viscosity Index Improver Business and to divest such ancillary assets, and to effect such arrangements, as necessary to assure the viability, competitiveness, and marketability of the Viscosity Index Improver Business so as to expeditiously accomplish the remedial purposes of this order. In the event 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, Exxon Corporation 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 (including, but not limited to, a court-appointed trustee) pursuant to the Federal Trade Commission Act or any other statute enforced by the Commission, for any failure by any of the respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A of this order, Exxon Corporation 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 Exxon Corporation, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Exxon Corporation 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 Exxon Corporation of the identity of any proposed trustee, Exxon Corporation 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 Viscosity Index Improver Business, and shall have the power to divest such ancillary assets, and to effect such arrangements, as necessary to assure the viability, competitiveness, and marketability of the Viscosity Index Improver Business so as to expeditiously accomplish the divestiture required by this order.

3. Within ten (10) days after appointment of the trustee, Exxon Corporation 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 approves the trust agreement described in paragraph III.B.3 to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) 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) for an additional period not to exceed twelve (12) months; provided, however, the Commission may extend this period for no more than two (2) additional periods.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Viscosity Index Improver Business, or to any other relevant information, as the trustee may request. Exxon Corporation shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondents shall extend the time for divestiture under this paragraph III in an amount equal to the delay, as determined by the Commission (or, in the case of 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 Exxon Corporation's absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner, and to the acquirer or acquirers, as set out in paragraph II.A.2 of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission approves more than one such acquiring entity, then the trustee shall divest to the acquiring entity or entities selected by Exxon Corporation from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of Exxon Corporation, 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 Exxon Corporation, 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 Exxon Corporation 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 accomplishing the divestiture required by this order.

8. Exxon Corporation 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, recklessness, 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 III of this order.

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

11. In the event that the trustee determines that he or she is unable to divest the Viscosity Index Improver Business in a manner consistent with the Commission's purpose as described in paragraph II, the trustee may divest additional ancillary assets of Exxon Corporation and effect such arrangements as are necessary to satisfy the requirements of this order.

12. The trustee shall have no obligation or authority to operate or maintain the Viscosity Index Improver Business.

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

IV.

It is further ordered, That:

A. Exxon Corporation shall not provide, disclose, or otherwise make available to The Shell Petroleum Company Limited, Shell Oil Company, or the Joint Venture, any Non-public Information.

B. Exxon Corporation shall use any Non-public Information only for the purpose of fulfilling its obligations to supply current and future OCP Polymer for Viscosity Index Improver Applications to the Viscosity Index Improver Business, to Chevron under the Chevron Agreement, or to a purchaser of the Viscosity Index Improver Business; provided that such information may be used internally by Exxon Corporation for analyzing the business performance of Vistalon.

C. The Shell Petroleum Company Limited and Shell Oil Company shall not seek, obtain, or use, directly or indirectly, through the Joint Venture or otherwise, any Non-public Information that originates with Vistalon, Chevron, or the acquirer of the Viscosity Index Improver Business.

Provided that nothing in this order shall prohibit the Joint Venture, Chevron and its successors and assigns, or the acquirer of the Viscosity Index Improver Business and its successors and assigns, from selling Viscosity Index Improver to respondents' finished oil manufacturing and marketing business units, or from exchanging information, as is necessary for such sales, with those business units regarding respondents' use of such viscosity index improver products.

Provided further that nothing in this order shall prohibit Exxon Corporation from selling OCP Polymer for Viscosity Index Improver Applications pursuant to paragraph II.F.

V.

It is further ordered, That within thirty (30) days after the date this order becomes final, and every thirty (30) days thereafter until the divestiture has occurred, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which respondents intend to comply, are complying, and have complied with their individual obligations, if any, under paragraphs II, III, and IV of this order. Respondents shall include in their compliance reports, among other things that are required from

time to time, a full description of the efforts being made to comply with their individual obligations, if any, under paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties that have contacted respondents or that have been contacted by respondents. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture.

VI.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents, 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 Exxon Corporation that may affect compliance obligations arising out of the order.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondents shall permit any duly authorized representatives of the Commission:

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

B. Upon five (5) days' notice to respondents, and without restraint or interference, to interview officers, employees, or agents of respondents.

VIII.

It is further ordered, That this order shall terminate upon the earliest of:

A. October 30, 2018;

B. Thirty (30) days after respondents (a) abandon the Consummation of the Joint Venture, (b) gives the Commission written notification that respondents have abandoned the Consummation of

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Decision and Order

the Joint Venture, and (c) withdraw their notification under 16 CFR 803.1 with respect to the Joint Venture; or

C. At any time following ten (10) years after the date on which the order becomes final if Chevron or the purchaser of the Viscosity Index Improver Business has ceased its purchases of OCP Polymer for Viscosity Index Improver from Exxon Corporation.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Hold Separate Agreement") is by and between Exxon Corporation ("Exxon"), a corporation organized, existing, and doing business under and by virtue of the laws of New Jersey, having its principal offices at 5959 Las Colinas Boulevard, Irving, Texas, 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 July 10, 1996, Exxon Chemical Company, a division of Exxon Corporation, The Shell Petroleum Company Limited, and Shell Oil Company announced an intention to form a joint venture to own and operate the businesses of Exxon Chemical Company, The Shell Petroleum Company Limited, and Shell Oil Company engaged in the development, manufacture, and sale of additives used in the production of fuels and lubricants (the "Joint Venture"); and

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

Whereas, if the Commission accepts the attached Agreement Containing Consent Order, which would require the divestiture of either the Assets Identified in the Chevron Agreement to Chevron or the Viscosity Index Improver Business, the Commission must place the Consent Order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if Exxon Corporation does not sell the Assets Identified in the Chevron Agreement to Chevron, and that if an understanding is not reached, preserving the

status quo ante of the Viscosity Index Improver Business as defined in paragraph I of the Consent Order during the period prior to the final acceptance and issuance of the Consent Order by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the Joint Venture might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Joint Venture is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Viscosity Index Improver Business, as described in paragraph I of the Consent Order, and the Commission's right to have the Viscosity Index Improver Business continue as a viable competitor independent of the Joint Venture; and

Whereas, if pending a divestiture acceptable to the Commission, it is necessary to hold separate the Viscosity Index Improver Business to protect interim competition pending divestiture or other relief; and

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

1. Preserve, pending a divestiture acceptable to the Commission, the Viscosity Index Improver Business as an ongoing, viable, competitive, and independent entity engaged in the same business in which it is presently engaged;

2. Prevent interim harm to competition pending divestiture and other relief; and

3. Remedy any anticompetitive effects of the formation of the Joint Venture; and

Whereas, Exxon Corporation's entering into this Hold Separate Agreement shall in no way be construed as an admission by Exxon Corporation that the formation of the Joint Venture is illegal; and

Whereas, Exxon Corporation understands that no act or transaction contemplated by this Hold Separate Agreement 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 Agreement.

Now, therefore, upon the understanding that the Commission has not yet determined whether the formation of the Joint Venture will be challenged, and in consideration of the Commission's agreement that at the time it accepts the Consent Order for public comment it will

grant early termination of the Hart-Scott-Rodino waiting period, Exxon Corporation agrees as follows:

1. Exxon Corporation agrees to execute and be bound by the attached Consent Order.

2. Exxon Corporation agrees that from the date Exxon Corporation, The Shell Petroleum Company Limited and Shell Oil Company consummate the Joint Venture ("Acquisition Date"), Exxon Corporation and the Viscosity Index Improver Business each will comply with the provisions of this Agreement until the day after the divestiture required by the Consent Order has been completed.

3. Exxon Corporation agrees to execute and be bound by the attached Consent Order and to comply, from the date this Hold Separate Agreement is accepted by the Commission for public comment, with the provisions of the Consent Order as if it were final.

4. The terms capitalized herein shall have the same definitions as in the Consent Order.

5. To assure the complete independence and viability of the Viscosity Index Improver Business, and to assure that no Material Confidential Information ("Material Confidential Information," as used herein, means competitively sensitive or proprietary information not independently known to an entity from sources other than the entity to which the information pertains, and includes, but is not limited to, customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.) is exchanged between the Viscosity Index Improver Business and Exxon Corporation, The Shell Petroleum Company Limited, Shell Oil Company, or the Joint Venture, Exxon Corporation shall hold the Viscosity Index Improver Business separate and apart on the following terms and conditions:

- a. The Viscosity Index Improver Business shall be held separate and apart and shall be managed and operated independently of Exxon Corporation (meaning here and hereinafter, Exxon Corporation and the Joint Venture, excluding the Viscosity Index Improver Business), except to the extent that Exxon Corporation must exercise direction and control over such assets to assure compliance with this Hold Separate Agreement or the Consent Order, and except as otherwise provided in this Hold Separate Agreement.

- b. Exxon Corporation will appoint, prior to the Consummation of the Joint Venture, an individual to manage and maintain the Viscosity Index Improver Business who will make no changes to the Viscosity Index Improver Business other than changes in the ordinary course of business. This individual ("Manager") shall manage the Viscosity Index Improver Business independently of the management of Exxon Corporation's other businesses. The Manager shall not be involved in any way in the operations or management of any other Exxon Corporation business.
- c. The Manager shall have exclusive control over the Viscosity Index Improver Business with responsibility for the management of the Viscosity Index Improver Business and for maintaining the independence of that business.
- d. Exxon Corporation shall not exercise direction or control over, or influence directly or indirectly the Manager relating to the operation of the Viscosity Index Improver Business; provided, however, that Exxon Corporation may exercise only such direction and control over the Manager and the Viscosity Index Improver Business as is necessary to assure compliance with this Hold Separate Agreement and with all applicable laws.
- e. Exxon Corporation shall maintain the marketability, viability, and competitiveness of the Viscosity Index Improver Business, and shall not sell, transfer, encumber it (other than in the normal course of business or to assure compliance with the Consent Agreement), or otherwise impair its marketability, viability or competitiveness.
- f. Exxon Corporation shall continue to provide the same support services to the Viscosity Index Improver Business as are being provided to such assets by Exxon Corporation as of the date this Hold Separate Agreement is signed by Exxon Corporation.
- g. Except for the Manager, employees of the Viscosity Index Improver Business, and support service employees involved in the Viscosity Index Improver Business, such as Human Resources, Legal, Tax, Accounting, Insurance, and Internal Audit employees, Exxon Corporation shall not permit any other Exxon Corporation employee, officer, or director to be involved in the management of the Viscosity Index Improver

- Business. Employees of the Viscosity Index Improver Business shall not be involved in any other Exxon Corporation business.
- h. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Joint Venture, defending investigations or litigation, or negotiating agreements to divest the Viscosity Index Improver Business, Exxon Corporation, other than employees of the Viscosity Index Improver Business, or support services employees involved in the Viscosity Index Improver Business, shall not receive or have access to, or the use of, Non-public Viscosity Index Improver Business information or any Material Confidential Information about the Viscosity Index Improver Business or the activities of the Manager or support service employees involved in the Viscosity Index Improver Business, not in the public domain.
 - i. Exxon Corporation shall circulate to all of its Vistalon and Paramins employees involved in the Viscosity Index Improver Business, and appropriately display, a copy of this Hold Separate Agreement and Consent Agreement.
 - j. If the Manager ceases to act or fails to act diligently and consistently with the purposes of this Hold Separate Agreement, Exxon Corporation shall appoint a substitute Manager.
 - k. Exxon Corporation shall require the Manager to sign a confidentiality agreement prohibiting the disclosure of any Material Confidential Information gained as a result of his or her role as the Manager to anyone other than the Commission or, as required in managing the Viscosity Index Improver Business, to the Viscosity Index Improver Business' employees, customers, or suppliers.
 - l. The Manager shall report in writing to the Commission every thirty (30) days concerning his or her efforts to accomplish the purposes of this Hold Separate Agreement.
6. Should the Commission seek in any proceeding to compel Exxon Corporation to divest any of the Viscosity Index Improver Business, as provided in the Consent Order, or seek any other injunctive or equitable relief for any failure to comply with the Consent Order or this Hold Separate Agreement, or in any way relating to the Joint Venture, as defined in the draft complaint, Exxon

Corporation shall not raise any objection based upon the fact that the Commission has permitted the Consummation of the Joint Venture. Exxon Corporation also waives all rights to contest the validity of this Hold Separate Agreement.

7. To the extent that this Hold Separate Agreement requires Exxon Corporation to take, or prohibits Exxon Corporation from taking, certain actions that otherwise may be required or prohibited by contract, Exxon Corporation shall abide by the terms of this Hold Separate Agreement or the Consent Order and shall not assert as a defense such contract requirements in a civil action brought by the Commission to enforce the terms of this Hold Separate Agreement or Consent Order.

8. For the purposes of determining or securing compliance with this Hold Separate Agreement, and subject to any legally recognized privilege, and upon written request with reasonable notice to Exxon Corporation made to its principal office, Exxon Corporation shall permit any duly authorized representatives of the Commission:

- a. During the office hours of Exxon Corporation, and in the presence of counsel, access to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Exxon Corporation relating to compliance with this Agreement; and
- b. Upon five (5) days' notice to Exxon Corporation and without restraint or interference from it, to interview officers or employees of Exxon Corporation, who may have counsel present, regarding any such matters.

9. This Hold Separate Agreement shall not be binding on the Commission until it is approved by the Commission.

IN THE MATTER OF

KALVIN P. SCHMIDT

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3834. Complaint, Nov. 3, 1998--Decision, Nov. 3, 1998*

This consent order, among other things, prohibits a Minnesota resident, that promoted and distributed computer software and pyramid marketing programs, from participating in any chain letter schemes, pyramid sales schemes or ponzi schemes, and from assisting or providing others with the means to participate in these prohibited schemes.

*Participants*For the Commission: *Tara Flynn.*For the respondent: *Thomas Hagen, Patton, Hoversten & Berg,*
Waseca, MN.

COMPLAINT

The Federal Trade Commission, having reason to believe that Calvin P. Schmidt, individually, and doing business as DKS Enterprises, DS Productions, DES Enterprises, www.mkt-america.com, and www.mkt-usa.com ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Calvin P. Schmidt is a Minnesota resident who does business as DKS Enterprises, DS Productions, DES Enterprises, www.mkt-america.com, and www.mkt-usa.com. He conducts his business activities out of his home, 911 3rd Street, N.W., Waseca, Minnesota.

2. At all times relevant to this complaint, respondent has promoted, offered for sale, sold, and distributed via the Internet and U.S. Mail, computer software, and computer disks containing the software, designed to perpetuate chain or pyramid marketing programs, such as Mega\$Nets and MegaResource.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

MEGA\$NETS and MEGARESOURCE

4. Since July 1997 or earlier, respondent has induced consumers to participate in Mega\$Nets and MegaResource, two chain or pyramid marketing programs. Respondent promises consumers that by participating in these programs they can earn substantial profits. Respondent promotes the Mega\$Nets and MegaResource programs on web sites, such as www.mkt-america.com, and in unsolicited electronic mail he sends or causes to be sent via the Internet.

5. Consumers who visit one of respondent's web sites can download copies of software programs that form the basis of the Mega\$Nets and MegaResource chain or pyramid marketing programs. Contained within the Mega\$Nets software program is a list of five (5) names and addresses. The software program and web sites direct a consumer to send twenty dollars to each of five people listed in the software in order for the consumer to get his or her name placed at the top of the list of names. According to the respondent, upon receiving the money, the five people on the list will send "access codes" to the consumer. These "access codes" then allow the consumer to "unlock" the software, delete the last name on the list, and insert his or her name on the top of the list.

6. The Mega\$Nets software program and the respondent's promotional materials instruct the consumer who follows this procedure to perpetuate the scheme by providing the software to others for free. To help the consumer provide the software to others for free, respondent, in his materials, urges the consumer to duplicate the software containing the consumer's name onto disks and then to distribute these disks through the mails. Respondent also urges the consumer to make the software available at a web site that the respondent creates and hosts for the consumer, and that is almost identical to the respondent's own web site. Moreover, respondent encourages the consumer to send unsolicited electronic mail to other persons, referring these persons to the consumer's Mega\$Nets web site.

7. MegaResource operates similarly to Mega\$Nets. Consumers can download a copy of the MegaResource software from one of the respondent's web sites. When a consumer sends twenty dollars to each of six persons on the list contained in the MegaResource software, the consumer receives "access codes" which "unlock" information contained in the software. The software purportedly

contains information relating to marketing, such as lists of newspapers in which to advertise. Once all the information in the software is "unlocked," a consumer can place his or her name on the list contained in the MegaResource software and duplicate the software for distribution.

8. Respondent leases computer server space from a third party and "hosts" the Mega\$Nets and MegaResource web sites he creates for others on this server space -- *i.e.*, the computer files for the web sites are physically located on the computer hard drive of the third party from whom the respondent leases the space.

9. Respondent also composed and sent or caused to be sent hundreds of thousands of unsolicited electronic mail messages via the Internet to consumers directing them to web sites promoting the Mega\$Nets and MegaResource programs. These web sites promoting Mega\$Nets and MegaResource contained the statements alleged in paragraph 10, below.

10. Respondent has disseminated or has caused to be disseminated advertisements for the Mega\$Nets and MegaResource programs, including, but not necessarily limited to, the attached Exhibits A-C. The respondent's web sites contain the following representations:

A. "Mega\$Nets is an easy to use yet sophisticated software program to help the average person get in on the fabulous profits being made in the computer networking age. . . . The potential for you to receive a tremendous income within a remarkably short period of time is to [sic] good to refuse!" (Exhibit A).

B. "The potential earnings so far could total \$15,000!" (Exhibit B)

C. "The Multiplier Effect

HERE IT BECOMES AWESOME! Your next payment in the 4th position could be \$20 times 3125 which is \$62,500. Add that to your previous \$15,000, and the grand total is \$77,500. When the fifth and final position is reached, your name disappears from future duplicated disks. By then your TOTAL INCOME COULD BE \$312,500!!" (Exhibit B)

D. "We know people who are making money with MegaResource. Imagine what you can do wirth [sic] an extra \$20 or \$200 or \$2,000 per month -- everyone can use extra money!!" (Exhibit C)

11. Respondent has also created, designed, and disseminated World Wide Web sites for others to promote Mega\$Nets and MegaResource. These sites contain the Mega\$Nets and MegaResource software programs. A Mega\$Nets web site designed by the respondent states:

FREE!! FREE!! FREE!! Get a **FREE** webpage just like this one. Just be one of the first 25 people to take advantage of our **MEGA\$NETS** program. We will personalize a site for you.... for **FREE!!** (Exhibit A)

A MegaResource web site designed by the respondent states:

"Thanks for visiting the MEGARESOURCE webpage. We are making money -- the EASY WAY!! If you have any questions Please contact me ASAP - We are listed as your agent on your disk you can download for FREE HERE

Email us HERE to reserve your FREE webpage, like this one, and the ability to give out FREE webpages to anyone you want to." (Exhibit C)

FALSE AND UNSUBSTANTIATED EARNINGS CLAIMS

12. Through the means described in paragraphs 4-11, respondents have represented, expressly or by implication, that all or virtually all consumers who participate in the Mega\$Nets and MegaResource programs earn substantial amounts of money.

13. In truth and in fact, most consumers who participate in the Mega\$Nets and MegaResource programs do not earn substantial amounts of money. Therefore, the representation set forth in paragraph 12 was, and is, false or misleading.

14. Through the means described in paragraphs 4-11, respondent has represented, expressly or by implication, that he possessed and relied upon a reasonable basis that substantiated the representation set forth in paragraph 12, at the time the representation was made.

15. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation set forth in paragraph 12, at the time the representation was made. Therefore, the representation set forth in paragraph 14 was, and is, false or misleading.

MEANS AND INSTRUMENTALITIES

16. By creating and designing for others web sites containing copies of the Mega\$Nets and MegaResource software programs, hosting these web sites on the server he leases, and composing and sending unsolicited electronic mail messages to consumers directing them to these web sites promoting Mega\$Nets and MegaResource, respondent provided the means and instrumentalities to others, and thereby acted in concert with others or knowingly and substantially assisted others, to engage in the deceptive acts or practices alleged in

paragraphs 4-14, above, in violation of Section 5(a) of the Federal Trade Commission Act.

17. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

NEW DOCUMENT

<http://www.mkt-america.com/>

[CLICK HERE for FREE \\$\\$\\$\\$ Software](#)

Exhibit A

Complaint

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EXHIBIT A

Mega\$Nets Home Page

<http://www.mkt-america.com/mega/>

Visitors have decided to change their Financial Future...SSSFREESSS

Mega\$Nets

BR> The **FREE!** Software that Pays You Money!

FREE !! FREE !! FREE!!

Get a **FREE** webpage just like this one. Just be one of the first 25 people to take advantage of our **MEGASNETS** program. We will personalize a site for you...for **FREE!!** If you are one of these first 25 people - you will also receive 25 **FREE** webpages to give away to your first 25 people too - **WOW!!** This will assure total and maximum duplication. Email me **HERE** to reserve your spot and check the availability of the "Top 25" spots. **HURRY** - Reserve your spot NOW!

MEGASNETS Step-by-Step Instructions from our Autoresponder **HERE**

If you Weren't Born Rich,

Didn't Marry Money,

Haven't Won The Lottery...

Here's How To Make It On Your Own!

You are now reading information on an important home-based business concept of the next century! This is a networking breakthrough of enormous proportions! And it is here now and ready to help you earn the kind of income you deserve!

Mega\$Nets combines 3 of the most powerful income opportunities of our time ...

- Computers
- Mail Order
- Network Marketing

Together, they offer you a home-based business you can work full or part-time. **Mega\$Nets** is an easy to use yet sophisticated software program to help the average person get in on the fabulous profits being made in the computer networking age.

Most of us know that the future is in computers. An estimated 150,000 new people are getting on the **INTERNET** each **WEEK!** **MEGA-PROFITS** will be earned with computers whether you and I are involved or not. So why not get involved **NOW?** The IBM compatible **Mega\$Nets** software disk normally costs \$20 to receive, but for a limited time we are offering the disk for **FREE!** The potential for you to receive a tremendous income within a remarkably short period of time is too good to refuse! Please

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Complaint

EXHIBIT A

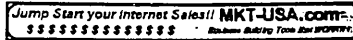
as7'ets Home Page

<http://www.mkt-america.com/mega/>

click on the buttons below for more detailed information.



MEGASNETS Step-by-Step Instructions from our Autoresponder [HERE](#)



Welcome to MKT-AMERICA.com

Webpace for immediate rent - Email us [HERE](#).

Complaint

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EXHIBIT B

Mega\$Nets Home Page

<http://www.equishare.com>**Mega\$Nets***The **FREE!** Software that Pays You Money!***If you Weren't Born Rich,****Didn't Marry Money,****Haven't Won The Lottery...****Here's How To Make It On Your Own!**

You are now reading information on an important home-based business concept of the next century! This is a networking breakthrough of enormous proportions! And it is here now and ready to help you earn the kind of income you deserve!

Mega\$Nets combines 3 of the most powerful income opportunities of our time ... computers, mail order and network marketing. Together, they offer you a home-based business you can work full or part-time. Mega\$Nets is an easy to use yet sophisticated software program to help the average person get in on the fabulous profits being made in the computer networking age.

Most of us know that the future is in computers. An estimated 150,000 new people are getting on the INTERNET each month! MEGA-PROFITS will be earned with computers whether you and I are involved or not. So why not get involved NOW? The IBM compatible Mega\$Nets software disk normally costs \$20 to receive, but for a limited time we are offering the disk for FREE! The potential for you to receive a tremendous income within a remarkably short period of time is too good to refuse! Please click on the buttons below for more detailed information.



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Exhibit B

08/01/07 10:44:07

EXHIBIT B

ga\$Nets - How it Works

<http://www.equishare.com/works.html>

Mega\$Nets

How it Works!

Here's How it Works

You receive the MEGASNETS software for FREE (normally you are charged \$20 for this) from the person sharing this opportunity with you. Load it into your PC. You will be impressed with the professional appearance of the software and how easy it is to operate! The menu includes access to a complete set of instructions. You also receive separate written and step-by-step instructions, so you do not even need to be familiar with computers!

- Step 1. The computer will ask you to type in your own name and address. Be sure this information is correct. Once you click to the next screen, your information will be permanently locked into the program. No one can remove it!
- Step 2. Next you will see the names and addresses of 5 vendors on your screen. Now move to the next screen and click on "Purchase Orders". Your printer will automatically produce a separate Purchase Order for each of those 5 vendors. Simply mail the orders, enclosing a money order for \$20 with each. In return for your order and payment, the 5 vendors will each send you a different code number. Your total expenditure is \$100; \$0 for your original disk and \$100 (5 x \$20) for your codes.
- Step 3. Enter these codes into the computer program where it tells you to do so, and now you are able to make copies of your disk. You cannot make copies without these 5 codes. The program will not let you.
- Step 4. Once you enter the 5 codes, you can now duplicate the disk and sell each duplicated disk to other people who own or have access to a compatible PC. They will want to buy because of the profit potential they too will have! Selling is not difficult. Just show them a copy of the Mega\$Nets Software or flyer!

What do buyers do?

When your customers load your duplicated disk, they will be instructed to do the same as you. They will purchase the computer codes they need to unlock their program (just like you did) and begin to duplicate the disk, as many times as they wish!

Before they duplicate, your name and address will have automatically been added into the system as an additional code vendor and one name will have been deleted. This is no different than removing a name from your rolodex. One name is added, one is removed.

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aSNets - How it Works

<http://www.equishare.com/works.html>



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EXHIBIT B

aSNets - Detailed Information

<http://www.equishare.com/info.html>

Mega\$Nets

Detailed Information

Money Maker

If you sell a minimum of 5 disks for \$20 each, you will have back your original \$100. (Except for the cost of some blank disks, envelopes and stamps, you're even). If those 5 people sell 5, each one of those 25 disks will list your name and address as a code vendor. 25 people will now send you \$20 each along with Purchase Orders generated by their disk (total potential \$500). All you do is enter the Purchase Order information into your program and your computer will automatically print out the codes they have purchased from you. (This takes about 30 seconds). Mail the codes to your customers right away! Remember, the sooner they get their codes, the sooner your name will be duplicated again and again!

Now, when those 25 people sell to 5 people each your name will automatically move to the next position on the screen. As one of the five code vendors, 125 people (25 x 5) will each be sending you \$20 for your code (which they must have to let them make copies they can sell). That's \$2,500 to add to your first \$500 . . . which adds up to \$3,000 so far. And that's only the start! If the 125 people sell to 5 others each, and your name moves to the 3rd position on everyone's screen, potentially 625 people will be sending you \$20 . . . which is \$12,500 PLUS the \$2,500 you received earlier. The potential earnings so far could total \$15,000!

The Multiplier Effect

HERE IT BECOMES AWESOME! Your next payment in the 4th position could be \$20 times 3125, which is \$62,500. Add that to your previous \$15,000, and the grand total is \$77,500. When the fifth and final position is reached, your name disappears from future duplicated disks. By then your TOTAL INCOME COULD BE \$312,500!!

Do not forget, people must send you \$20; otherwise, you will not send them their code. You cannot make up a code. The code they are buying from you is generated by your computer program. Without the code, people CANNOT duplicate their disk. The design of the software will not let them. Also, they cannot generate their own codes. The system is tamper proof; so there is no way people can "break in" without the codes they receive from the 5 people shown on their screen.

You may be asking, "If 5 people sell to 5 people, and those people sell to 5 others and so on, it will not be long before we run out of people. If you earn a half million dollars as a MEGA\$NETS computer code vendor, your duplicated and reduplicated disks will have only reached 15,625 people. That's not many when you consider there are millions of people who own or have access to computers in this country alone. That's not even considering the number of computer users there are on a global scale!

Computer Code Vendor

Let's take a minute and truly understand what this business is all about. First of all, it is not an investment. You are purchasing a product; a computer software program with a 100% money back guarantee. Next, you can buy codes that will unlock the program so you can make duplicate disks and sell them. Soon, customers will be requesting codes from you. You become a vendor. You have something your customers need. That's real sales! That's real business! Isn't that what American businesses do every day of the week? Don't they get paid for selling someone a product, a service or just some information?

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EXHIBIT B

iSNets - Detailed Information

<http://www.equishare.com/info.html>*You don't even have to own a computer!*

MEGASNETS is your entry into the profitable world of computer software mail order! Although it is much easier, you do not have to own a computer to get started. If you don't have access to a computer, there is a popular chain of copy and print stores in most areas offering rental time on their computers for pennies a minute. (You can always buy a computer later with any earnings, right)? The great thing about MEGASNETS is the program is so "user friendly" most school age children can run it with ease.

Getting Started

For free you will receive the MegaSNets software on either a 3.5" disk which we mail to you or e-mail or simply download it from this site. Your computer should have at least a 3.5" disk drive (usually known as "A" drive) and of course your hard drive (or "C" drive). Any printer will suffice providing it will print plain text (not PostScript). The easiest way you to "get the ball rolling" and sell 5 disks (which must be your first goal) is to hand out copies of this flyer to people you know who have computers and are interested in starting their own business. Personal contacts are always the most effective and have little or no costs connected with them. But keep in mind, as in any sales business, never promise anyone they will earn a specific income. You can only project potential income as no one knows what anyone else can earn. It's an individual effort.

Can you sell more than 5 Disks?

YES! MEGASNETS allows you to make as many disks as you wish. The 5 codes you buy have in effect "licensed" you to duplicate as many disks as you want. Need more income? Sell more disks. It is your business. You own the software. You're the BOSS! Remember, if you sell 5 disks and everyone else does the same, you could eventually handle 15,625 MEGASNETS Purchase Orders in which you send the code they need. MEGASNETS software makes everything easy for you. It prints out all the codes in a Sales Receipt format with addresses positioned for window envelopes, so you don't even need to type envelopes. Similarly, when you first order your own 5 codes at the start, MEGASNETS automatically prints out the 5 Purchase Orders with your name and address on them, plus the name and address to whom you are sending it.

No One Can Cheat You!

That's right, it's impossible to cheat MEGASNETS software. And why would anyone want to try? No names and addresses can be erased to put in the names of "friends", and the software is programmed to generate constantly changing codes that cannot be "guessed". Without the correct codes, nothing works. You are a true computer software vendor and provider of valuable computer information codes that only you can provide for your customers.

The MEGASNETS Business Systems disk was developed by a professional commercial computer programmer. It looks professional and works professionally. (Some of today's best whiz-kids have tried to break the system and failed). In addition, MEGASNETS checks itself for viruses. If it finds any modifications, it will simply refuse to run, so your system is fully protected without damaging your files. The distribution process is similarly safeguarded. By holding a duplicate of the software within itself, MEGASNETS makes absolutely sure that each copy is the same as the original, but with your personalized information added to it.

Your very own legal Computer Software Company

As we have seen, MEGASNETS is like any other legal information-driven company. First, you sell the software program which includes valuable marketing information your customers can use for any business. Secondly, as an information vendor, you will be selling valuable computer codes to your

EXHIBIT B

SNets - Detailed Information

<http://www.equishare.com/info.html>

customers. Thirdly, you will be developing a mailing list out of your customers that can help you in promoting other income opportunities you may want to offer. Huge multi-billion dollar worldwide companies do this every hour of the day. MEGASNETS is no different. We just use network marketing to get the job done. Plus, there are no meetings to attend and no corporate headquarters or hot-shot executives who can change the plan or grab your earnings.

In effect, you are the owner and CEO of your own computer software network marketing company! All you have to do now is purchase your disk and you are on your way to an earnings potential that could bring you 11 financial independence! Just be ready to handle the volume! You are now in the computer software mail order business. Treat this like a real business and it can earn you the income of a real business! MEGA-INCOME!

Don't Wait. Do It NOW!!!

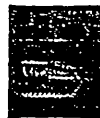


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MegaResource

The Professional Approach....beats the rest "hands down"
The 21st Century way to Financial Freedom

THE



Money-Making Software

Look at this.....

- It is NOT an MLM company that may or may not survive.
- NO monthly purchases, inventory or applications to fill out
- NO sales volume to accumulative, or computer glitches.
- NO matrix to fill or binary to balance.
- NO pre-launch hype or meetings to attend.
- NO waiting to get paid.
- NO company to share your bonuses and commissions with.
- NO preordained pay periods.
- NO company to change policy and procedures midstream.
- NO company to go bankrupt, change their compensation plan, raise the price of their products, hold your commission checks.
- Unlike the "rest" - we have real products that are useful for everyone
- We have a "failsafe" method to deliver codes to unlock disks if anyone drops out or disappears
- MegaResource is updated regularly through a website download - no more outdated information or programs
- You can chose just to purchase the information or you can chose to become a distributor and retail products
- Everyone gets a FREE webpage like this to
- This is a professional system with live contacts - available for Windows environments
- START TODAY!!

YOU ARE THE SOFTWARE COMPANY!
ANYONE... ANY COUNTRY can participate!

NO U.S. address is required!

You are in the Direct Sales business for *YOURSELF*. You get to manufacture unique computer software in a Windows platform and retail products if you chose. It is very sophisticated, yet very *USER FRIENDLY*. The software is extremely *EASY* to operate and has an impressive graphic interface and provides complete turnkey business management support. It performs *ALL* the paperwork for your business complete with Purchase Orders and Sales Receipts. You will have an immaculate paper trail on your business.

You are investing in *YOURSELF* and you earn 100% (not 10%) of the profits.

People are receiving a real product and real value for their dollar - No purchase is required to view the MegaResource system

You don't need to have a computer to do this, just access to one. You don't have to be in business to do this! However if you are, you'll find no better way to promote your program, product or service.



Quick



Download

Exhibit

EXHIBIT C

This Software Disk has a huge information library built in with hundreds of dollars of useful information PLUS MegaResource creates Thousands of *LEADS* for your Primary program. It doesn't compete with any other program ...it enhances and compliments it! And the added Bonus is that you will also have Orders in your mailbox *EVERY DAY*, because Each of the multitudes of Qualified Leads generated by this Software System *PAYS YOU* to send them the info about your Networking program and to provide the valuable information contained on this disk.

HERE'S HOW IT WORKS:

MegaResource is a business that distributes computer software and information. The Author hereby freely offers and agrees to its sale and reproduction through your business. The price for the software is nothing. You have therefore been granted complete copyright and reproduction rights to duplicate and distribute disks.

Everything you need to get started is right here on this page. You hold in your hands the network marketing concept of the next century! This is a networking breakthrough of enormous proportions! It's ready to go and in simple terms, is no different to any other mail order business.

You have **NOTHING TO LOSE** by checking this out. Download the **FREE** software below and see for yourself.

Have some **FUN!** See all the exciting information that will be available - **SEE** for yourself what MegaResource holds for you and why people are flocking to get this valuable software.

Download the **FREE** MegaResource software and while you are it, fill out the form and join us in this tremendous program.....see if it's for you.

The software will prompt you to type in your own name and address. Be sure this information is correct. Once you click to the next screen, your information will be permanently locked into the program. No one can remove it!

Check out all the different areas and if you decide to get involved - follow the easy and fast instructions to get started ASAP.

HOW MUCH MONEY CAN I MAKE?

As with any program - any earnings are solely dependent upon your efforts and contacts. We never make income claims - but we know many people who are making money with MegaResource. Imagine what you can do with an extra \$20 or \$200 or \$2,000 per month - everyone can use extra money!!

YOU get paid directly for the information contained on this disk - people will be sending you money orders to access the valuable information on this disk. The **NICE** thing

Remember - **YOU** can sell as **MANY** disks as you want, at **ANY** time! Once you have purchased the information, it is **YOURS FOREVER!** **YOU NEVER HAVE TO PAY AGAIN!**

(NOTE: no income claims or figures are represented - any income is purely derived from your efforts)

To help you, here are some of the most frequently asked questions:

IS IT LEGAL?

YES?? ... You are setting up 2 genuine trading companies, both buying and selling services and products of value. The products are valuable and are in demand. You open up many helpful and exciting information resources. The software itself will help you by printing all the paperwork, orders and sales receipts. . . It's just like paying a registration fee for shareware or

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paying for information that will help you.

CAN I CHEAT?

NO! MegaResource has constantly shifting codes and algorithms, encrypting the software and Java from tampering. Tampering with the disk results in destruction of the program. There is NO WAY TO SWITCH NAMES. Without the correct codes, nothing works. You are a true Computer Software Vendor and provider of valuable Registration Codes that only YOU can provide for your customers. By holding a duplicate of the software within itself, each program requires registration codes generated from the individual program from which it was spawned.

WHAT ABOUT COMPUTER VIRUSES?

As with any download - we recommend having a Virus Protection Program to check each and every program. MegaResource has been designed to eliminate Virus's.

CAN YOU GIVE OUT MORE THAN 5 DISKS?

YES! MegaResource allows you to make as many disks as you wish. The codes you have in effect "licensed" you to duplicate as many disks as you want. Need more income? Give away more disks. It is your business. You own the software. You're the BOSS! MegaResource software makes everything easy for you. It prints out all the Codes in a Sales Receipt format with addresses positioned for window envelopes, so you don't even need to type envelopes. Similarly, when you first order your own codes at the start, MegaResource automatically prints out the Purchase Orders with your name and address on them, plus the name and address to whom you are sending it. I recommend building at least 10 people wide for starters. The information products are real.

PROGRAM SUMMARY

This program works exactly like every other computer software company. You are generating and selling a software program which is also a valuable lead generation program your customers can use for any business PLUS a valuable information resource product. You also provide Registration Codes to your customers. You will also be developing a marketing list of customers to help you in promoting other income opportunities. Huge multi-billion dollar companies do this every day. This program is no different. It is a unique opportunity to do what the big boys have done for years. Sell software and include flyers for other products. This time the Money Orders come straight to YOU and not through ANYONE else! You don't merely get a "commission"... You get the Whole amount directly before you deliver product.

This is a complete Business on a Disk.

MegaResource is a simple sales and information based business. The program produces all the "paper work" you'll ever need to use. Simple Purchase Orders and product delivery tickets... NO records to keep. It EVEN puts the addresses on the orders so you can use window envelopes and not have to address them!

Your very own Computer Software Mail Order Company and Information products. Effectively a "business on a disk".

Plus, there are no meetings to attend and no corporate headquarters or hot-shot executives who can change the plan or grab your earnings.

You could promote your favorite humanitarian or fund raising cause or charity. You can even use MegaResource ITSELF AS A FUND RAISER... using the MegaResource response system to include information about the charity or cause to thousands of people WHO WILL NOT ONLY SOON HAVE A LOT OF MONEY TO SPEND (and possibly contribute) ... but the cause or charity itself could reap a SUBSTANTIAL FINANCIAL REWARDS as a direct result of distributing the software and information products.

MegaResource combines 4 of the most powerful income opportunities of our time ... COMPUTERS, MAIL ORDER, INFORMATION RESOURCES, and NETWORKING.

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The launch of this revolutionary business is right NOW!! This means you are at the very top of a new computer networking mail order business that is going international! And there are no meetings to attend and the whole process takes very little time or expense. MegaResource is Brand new within the last few weeks.

It does not matter what company you are in, everyone needs leads, and EVERYONE will take CASH DAILY over checks on occasion! It is WORKING RIGHT NOW!!!

There is no company to mess this up. Everyone who participates BECOMES THE COMPANY. That is powerful in itself! You are selling a Information product and service.

OPEN TO ANYONE AND EVERYONE WORLD-WIDE!

This computerized system ensures that YOU or ANYONE can restart the plan at ANY time, thus avoiding the normal chain of events that makes just a few at the top of the plan extremely rich at the expense of everyone else. Profits are returned directly in line with effort. People will always need information and this business information is in demand.

Remember also that helping your customers ACTUALLY SPEEDS UP the rate at which YOU RECEIVE MONEY! The disk you provide to your customer has YOUR details in the AGENTS box and YOU become a vendor when THEY sell the disk to someone else.

Take control of the situation NOW! You have nothing to lose and everything to gain by downloading the FREE software NOW!

Thanks for visiting the MEGARESOURCE webpage. We are making money - the EASY WAY!! If you have any questionsPlease contact me ASAP - We are listed as your agent on the disk you can download for FREE HERE

Email us [HERE](#) to reserve your FREE webpage, like this one, and the ability to give out FREE webpages to anyone you want to.



Download the FREE disk here and check it out - what have you got to lose??

PowerPage *The online*

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DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, his attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent for purposes of the order of all the jurisdictional facts set forth in the aforesaid draft 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, 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 Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Calvin P. Schmidt is a Minnesota resident who does business as DKS Enterprises, DS Productions, DES Enterprises, www.mkt-america.com, and www.mkt-usa.com. He conducts his business activities out of his home, 911 3rd Street, N.W., Waseca, Minnesota.

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

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. "*Prohibited Marketing Program*" means a pyramid sales scheme, ponzi scheme, chain marketing scheme, or other marketing plan or program in which a person who participates makes a payment and receives the right, license or opportunity to derive income as a participant primarily from: (i) the recruitment of additional recruits by the participant, program promoter or others; (ii) sales made to or by such recruits or their recruits; or (iii) any other payments made by recruits. A "Prohibited Marketing Program" does not include a marketing plan or program in which the program promoter demonstrates that it has instituted and enforced rules that have the actual effect of insuring that a participant derives income primarily from the sale of goods or services to persons who do not recruit participants into the program.

For purposes of this order, the phrase "goods or services" does not include a membership or opportunity to participate in a sales or marketing program, or access codes or numbers which allow participation in a sales or marketing program.

2. "*Clearly and prominently*" shall mean as follows:

A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. Provided, however, that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation.

B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in

print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.

C. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

3. Unless otherwise specified, "*respondent*" shall mean Calvin P. Schmidt, individually and doing business as DKS Enterprises, DS Productions, DES Enterprises, www.mkt-america.com, and www.mkt-usa.com; and, his agents, representatives, and employees.

4. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, shall cease and desist from engaging, participating, or assisting in any manner or capacity whatsoever in any Prohibited Marketing Program.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with any marketing plan or program, or with the promotion, offering for sale, sale or distribution of any good or service, shall not:

A. Represent, expressly or by implication:

1. The income, profits, or sales volume that has been achieved by participants in any marketing program or purchasers of any good or service;

2. The income, profits, or sales volume that may be achieved by participants in any marketing program or purchasers of any good or service; or

3. Any other fact material to a consumer's decision to participate in such marketing plan or program or purchase such good or service

unless such representation is true and, at the time it is made, respondent possesses and relies upon competent and reliable evidence that substantiates the representation.

B. Make any representation in any manner, expressly or by implication, of specific earnings, profits or sales volume that have been achieved or may be achieved by participants in any marketing program or purchasers of any good or service without also clearly and prominently disclosing (1) the number of persons who earned at least the amount represented, and (2) the percentage of total participants or purchasers who earned at least the amount represented.

III.

It is further ordered, That respondent Calvin P. Schmidt, in connection with any business owned or controlled, in whole or in part, by him, for five (5) years after the date of issuance of this order, shall maintain and upon request make available to the Federal Trade Commission, for inspection and copying, business records demonstrating his compliance with the terms and provisions of this order, including:

A. All advertisements and promotional materials containing representations concerning actual or possible earnings by participants in any marketing plan or program or by purchasers of any good or service;

B. All materials that were relied upon in disseminating representations concerning actual or possible earnings by participants in any marketing plan or program or by purchasers of any good or service;

C. The income, disbursements, transactions, and use of money by any such business;

D. The name, address, telephone number, and social security number of each person employed by any such business in any capacity;

E. The name, address, and telephone number of each person whom respondent has recruited to participate in any marketing plan or program, or to whom respondent has sold any good or service;

F. All complaints and other communications between respondent and any consumer or any governmental or consumer protection organization; and

G. All documents relating in any way to any conduct subject to this final order.

IV.

It is further ordered, That respondent Calvin P. Schmidt shall deliver a copy of this order to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

It is further ordered, That respondent Calvin P. Schmidt, for a period of seven (7) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VI.

It is further ordered, That Calvin P. Schmidt shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order.

VII.

This order will terminate on November 3, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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Decision and Order

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF
EMERSON ELECTRIC CO., ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3291. Consent Order, June 22, 1990—Set Aside Order, Nov. 4, 1998

This order reopens a 1990 consent order -- which required the respondents to divest McGill Manufacturing Company's mounted ball bearing business to a Commission approved acquirer -- and sets aside the prior approval provision and related reporting requirements of the order pursuant to the Commission's Prior Approval Policy Statement.

ORDER SETTING ASIDE ORDER

On July 24, 1998, Emerson Electric Co. and its wholly-owned subsidiary Emerson Power Transmission Corp. (collectively "Emerson"), the respondents named in the above-referenced consent order ("Order") issued by the Commission on June 22, 1990, filed its Petition to Reopen and Modify Consent Order ("Petition") in this matter. Emerson asks that the Commission reopen and modify the Order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Concerning Prior Approval and Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement").¹ The Petition requests that the Commission reopen and modify the Order to eliminate the prior approval provision and related reporting requirements set forth in paragraph IX of the Order. The thirty-day public comment period on the Petition ended on September 24, 1998. No comments were received. For the reasons discussed below, the Commission has determined to grant Emerson's Petition.

The Complaint in this matter alleges that Emerson's agreement with McGill Manufacturing Co., Inc. ("McGill") to acquire substantially all of McGill's voting securities violated Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, by lessening

¹ 60 Fed. Reg. 39,745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

competition and tending to create a monopoly in the production and distribution of mounted ball bearings in the United States.²

The Order required Emerson to divest McGill's Mounted Ball Bearings Business, as defined in paragraph I.F of the Order.³ On June 14, 1991, the Commission approved Emerson's application to divest McGill's Mounted Ball Bearings Business to VMB, Inc., an affiliate of The Brenlin Group. Under the Order, Emerson is prohibited for a ten-year period from acquiring, without the prior approval of the Commission, more than 1% of the stock or share capital of, or interest in, any concern engaged in the manufacture or sale of mounted ball bearings in the United States; or from acquiring, except in the ordinary course of business, any assets used in any company engaged in the manufacture or sale of mounted ball bearings in the United States.⁴

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement.⁵ The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements."⁶

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to

² Complaint ¶¶ II-V.

³ Order ¶¶ I.F and II.

⁴ Order ¶ IX.

⁵ Prior Approval Policy Statement at 2.

⁶ *Id.*

engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger."⁷ As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order."⁸ The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement.⁹

The presumption is that setting aside the general prior approval requirement of paragraph IX is in the public interest. There is no evidence in the record that suggests that this matter presents any of the circumstances identified by the Prior Approval Policy Statement as appropriate for retaining a narrow prior approval provision, nor is there any indication of the circumstances that would warrant the substitution of a prior notice provision for the prior approval provision. There is nothing to suggest that the respondent would attempt the same or essentially the same merger that gave rise to the original complaint. In addition, it appears likely that future mergers within the relevant market would be HSR reportable. Emerson completed the divestiture required by the Order. Nothing to overcome the presumption having been presented, and because the only remaining obligation under the Order is the prior approval

⁷ *Id.* at 3.

⁸ *Id.* at 4.

⁹ *Id.*

requirement in paragraph IX and the attendant reporting requirements, the Commission has determined to reopen the proceeding in Docket No. C-3291 and set aside the Order.

Accordingly, *It is hereby ordered*, That this matter be, and it hereby is, reopened, and that the Commission's order issued on June 22, 1990, be, and it hereby is, set aside as of the effective date of this order.

Complaint

126 F.T.C.

IN THE MATTER OF

COMMONWEALTH LAND TITLE INSURANCE COMPANY

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

Docket C-3835. Complaint, Nov. 10, 1998--Decision, Nov. 10, 1998

This consent order requires, among other things, Commonwealth Land Title Insurance Company, a Pennsylvania-based corporation, to relocate its operations and to maintain them as a fully functional title plant in competition with First American Title Insurance Company. In addition, the consent order requires that Commonwealth, for ten years, provide prior notice to the Commission before it merges, combines or consolidates its operations with any other title plant serving the District of Columbia.

Participants

For the Commission: *Patrick Roach, Michael Antalics, William Baer, John Simpson, and Jonathan Baker.*

For the respondent: *John Graybeal, Parker, Poe, Adams & Bernstein, Raleigh, N.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondent Commonwealth Land Title Insurance Company ("Commonwealth"), a corporation subject to the jurisdiction of the Commission, has engaged in certain conduct that constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and of Section 7 of the Clayton Act, as amended (15 U.S.C. 18); and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act, (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions apply:

a. "*Respondent*" or "*Commonwealth*" means Commonwealth Land Title Insurance Company, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its direct and indirect parents, subsidiaries, divisions, groups and affiliates controlled by or under common control with Commonwealth Land Title Insurance Company, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

b. "*First American*" means First American Title Insurance Company, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its direct and indirect parents, subsidiaries, divisions, groups and affiliates controlled by or under common control with First American Title Insurance Company, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

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

d. "*Title plant*" means a privately owned collection of records and/or indices regarding the ownership of and interests in real property. The term includes such collections that are regularly maintained and updated by obtaining information or documents from the public records, as well as such collections of information that are not regularly updated.

e. "*Title plant services*" means providing selected information contained in a title plant to a customer or user or permitting a customer or user to have access to information contained in a title plant.

f. "*Commonwealth Washington DC Title Plant*" means the title plant owned by Commonwealth containing information pertaining to real property in the District of Columbia, which was located prior to November 1997 at 1828 L Street, N.W., Washington, DC, including all updates of such information.

g. "*First American Washington DC Title Plant*" means the title plant owned by First American containing information pertaining to real property in the District of Columbia.

h. "*First American Capitol Hill Premises*" means the premises owned or leased by First American at or adjacent to 605 Pennsylvania Avenue, S.E., Washington, DC.

II. THE RESPONDENT

2. Commonwealth is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located at 1700 Market Street, Philadelphia, Pennsylvania.

3. Commonwealth is, and at all times relevant herein has been, a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended (15 U.S.C. 44).

III. TRADE AND COMMERCE

4. The relevant market is the production and sale of title plant services in the District of Columbia. Title plant services are used by abstractors, title insurers, title insurance agents, and others to determine ownership of and interests in real property in connection with the underwriting and issuance of title insurance policies and for other purposes.

5. The relevant market is highly concentrated.

6. There are no commercially reasonable substitutes for title plant services in the relevant market.

7. Entry into the relevant markets is difficult or unlikely to occur at a sufficient scale to deter or counteract the effect of the conduct that is the basis of the complaint.

IV. THE CONDUCT AT ISSUE

8. At all times relevant herein, Commonwealth has been the owner of a title plant containing information pertaining to real property in the District of Columbia and has been engaged in providing title plant services for its own use and for customers and users including abstractors, title insurers and title insurance agents.

9. At all times relevant herein, First American has been the owner of a title plant containing information pertaining to real property in the District of Columbia and has been engaged in providing title plant services for its own use and for customers and users including abstractors, title insurers and title insurance agents.

10. Commonwealth and First American are direct competitors in the production and sale of title plant services in the District of Columbia. There exists no other privately-owned collection of title records for the District of Columbia that is comparable in

completeness, accuracy and ease of use to the title plants of Commonwealth and First American.

11. Beginning as early as 1996 and continuing in 1997, Commonwealth and First American engaged in discussions concerning the consolidation of their title plants in the District of Columbia. In September 1997, Commonwealth and First American executed a letter setting forth their understanding that they would consolidate their respective title plant operations at the First American Capitol Hill Premises. In late November 1997, Commonwealth relocated the Commonwealth Washington DC Title Plant to the First American Capitol Hill Premises, which was also the location of the First American Washington DC Title Plant.

12. Over a period of several months prior to the relocation of the Commonwealth Washington DC Title Plant to the First American Capitol Hill Premises, Commonwealth acted to terminate existing contracts with customers and users of its title plant. Customers and users of both Commonwealth and First American wishing to obtain title plant services after the relocation of the Commonwealth Washington DC Title Plant were required to execute a form "Interim Plant Use Agreement" setting prices, terms and conditions for such services and reciting that the title plant services were jointly provided by Commonwealth and First American pending formation of a joint title plant entity.

13. The prices, terms and conditions for title plant services set in the Interim Plant Use Agreement were the same for customers and users of both Commonwealth and First American. For many users, the price for title plant services was significantly higher under the Interim Plant Use Agreement than under their prior contracts for title plant services. The Interim Plant Use Agreement did not permit some forms of title plant access which had been available to customers and users under their prior contracts for title plant services. Customers and users began to be charged for title plant services under the terms of the Interim Plant Use Agreements beginning in early December 1997.

V. EFFECTS

14. By engaging in the conduct at issue Commonwealth and First American have acted to increase prices and restrict output in the relevant market.

15. The conduct at issue has had the effect of raising, fixing, and maintaining the price, terms and conditions of compensation paid for title plant services in the District of Columbia, in violation Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

16. As demonstrated by the actual effects of the conduct at issue in the relevant market, the effect of a consolidation of the Commonwealth Washington DC Title Plant and the First American Washington DC Title Plant described in paragraph 11, if consummated, may be substantially to lessen competition and to tend to create 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 Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

- a. By eliminating direct actual competition between Commonwealth and First American in the relevant market; and
- b. By increasing the likelihood that Commonwealth and First American, acting in concert, can exercise market power in the relevant market.

VI. VIOLATIONS CHARGED

17. The conduct at issue constitutes a combination, agreement, or understanding between competitors to raise, fix, and maintain the price, terms and conditions of compensation paid for title plant services in the District of Columbia, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

18. The consolidation of the Commonwealth Washington DC Title Plant and the First American Washington DC Title Plant described in paragraph 11, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the respondent, Commonwealth Land Title Insurance Company ("Commonwealth"), a subsidiary of LandAmerica Financial Group, Inc. ("LandAmerica") (formerly known as Lawyers Title Corporation); and the respondent and LandAmerica having been furnished thereafter with a copy of a

draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act and the Clayton Act; and

The respondent, LandAmerica and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent and LandAmerica 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 or LandAmerica that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Commonwealth is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located at 1700 Market Street, Philadelphia, Pennsylvania.

2. LandAmerica, formerly known as Lawyers Title Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia with its office and principal place of business located at 6630 West Broad Street, Richmond, Virginia. LandAmerica is the parent corporation of Commonwealth and has agreed to be bound by the order herein as the parent corporation of Commonwealth.

3. 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 "*Commonwealth*" means Commonwealth Land Title Insurance Company, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its direct and indirect parents, subsidiaries, divisions, groups and affiliates controlled by or under common control with Commonwealth Land Title Insurance Company, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

B. "*First American*" means First American Title Insurance Company, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its direct and indirect parents, subsidiaries, divisions, groups and affiliates controlled by or under common control with First American Title Insurance Company, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

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

D. "*Title plant*" means a privately owned collection of records and/or indices regarding the ownership of and interests in real property. The term includes such collections that are regularly maintained and updated by obtaining information or documents from the public records, as well as such collections of information that are not regularly updated.

E. "*Title plant services*" means providing selected information contained in a title plant to a customer or user or permitting a customer or user to have access to information contained in a title plant.

F. "*Commonwealth Washington DC Title Plant*" means the title plant owned by Commonwealth containing information pertaining to real property in the District of Columbia, which was located prior to November 1997 at 1828 L Street, N.W., Washington, DC, including all updates of such information.

G. "*First American Washington DC Title Plant*" means the title plant owned by First American containing information pertaining to real property in the District of Columbia.

H. "*First American Capitol Hill Premises*" means the premises owned or leased by First American at or adjacent to 605 Pennsylvania Avenue, S.E., Washington, DC.

I. "*Interim Plant Use Agreement*" means an agreement entered into with any customer or user of the Commonwealth Washington DC Title Plant or the First American Washington DC Title Plant, pursuant to which Commonwealth and First American would jointly provide title plant services to such customer or user pending formation of a joint plant entity by Commonwealth and First American.

II.

It is further ordered, That:

A. Respondent shall, no later than the date the agreement containing consent order is signed by respondent, physically segregate all contents of the Commonwealth Washington DC Title Plant located at the First American Capitol Hill Premises from all contents of the First American Washington DC Title Plant.

B. Respondent shall, no later than thirty days after the date the agreement containing consent order is signed by respondent, relocate the Commonwealth Washington DC Title Plant to premises within the District of Columbia that are separate and distinct from the First American Washington DC Title Plant, the First American Capitol Hill Premises, and any other premises in which First American has any direct or indirect interest of any kind. Following such relocation respondent shall operate and maintain the Commonwealth Washington DC Title Plant as a fully functional title plant providing title plant services in competition with the First American Washington DC Title Plant.

C. Respondent shall, no later than the date the agreement containing consent order is signed by respondent, cause to be rescinded all Interim Plant Use Agreements and any other agreements under which respondent purported to or did provide title plant services in the District of Columbia jointly with First American, and shall cease and desist from claiming any right, title or interest pursuant to any such agreements.

D. Respondent shall, for a period of no less than one year after the agreement containing consent order is signed by respondent, provide title plant services in the District of Columbia to all customers or users of the Commonwealth Washington DC Title Plant on the most

recent prices, terms and conditions applicable to such customer or user prior to the relocation of the Commonwealth Washington DC Title Plant in November 1997 to the First American Capitol Hill Premises.

E. Respondent shall refund to all customers or users of the Commonwealth Washington DC Title Plant all amounts paid for title plant services provided during the period when the Commonwealth Washington DC Title Plant was located at the First American Capitol Hill Premises, to the extent such payments exceed the amount which would have been payable by each such customer or user under the most recent prior prices, terms and conditions applicable to such customer or user. Respondent shall conduct a review of its own files and all other relevant information available to it to determine to whom and in what amount such refunds are or may be payable and shall, no later than fourteen days after the agreement containing consent order is signed by respondent, pay the full amount of such refunds. Respondent, as part of its reports submitted pursuant to paragraph 6 of the agreement containing consent order and paragraph VI of this order, shall state each person or entity as to whom it has made a determination that such a refund is or is not payable, and the date and amount of any refund paid, and shall provide copies of all documents and all other information in its possession pertaining to payments by or amounts due from each such person or entity for title plant services provided during and for six months prior to the period when the Commonwealth Washington DC Title Plant was located at the First American Capitol Hill Premises. Respondent shall, no later than fourteen days after the agreement containing consent order is signed by respondent, notify in writing each customer or user of the Commonwealth Washington DC Title Plant of the availability of refunds and of the customer's or user's rights under this paragraph. In the event that the respondent shall receive (from the customer or user or from any other source) further evidence that a refund is payable under the terms of this paragraph, it shall pay such refund to any customer or user no later than seven days after receiving such evidence. In the event of any dispute between respondent and any customer or user concerning a refund pursuant to this paragraph, respondent shall immediately pay to the customer or user any portion of such refund that is not in dispute, and shall negotiate in good faith with the customer or user in an attempt to resolve the dispute. If the dispute is not resolved within fourteen days, respondent shall offer

the customer or user the option of referring such dispute to the Commission for resolution, whose determination shall be binding on Commonwealth.

III.

It is further ordered, That:

A. If respondent has not complied absolutely and in good faith with all of the requirements set forth in paragraph II, within three months from the date the agreement containing consent order is signed by respondent, the Commission may appoint a trustee to accomplish the required actions. 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 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 III. 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. 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 carry out the actions specified in paragraph II that have not been accomplished by the respondent.

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 accomplish the actions required by this order.

4. The trustee shall have three (3) months from the date the Commission approves the trust agreement described in paragraph III.B.3 to accomplish the actions specified by paragraph II. If, however, at the end of the three-month period, the trustee has submitted a plan of action or believes that the required actions can be accomplished within a reasonable time, the period for accomplishing the required actions 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 properties specified in paragraph II and to any other relevant information as the trustee may request. Respondent shall develop such financial or other information as such 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 required actions. Any delays in the required actions caused by respondent shall extend the time for accomplishing the required actions 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. To the extent consistent with the terms of paragraph II, the trustee shall use his or her best efforts to negotiate expeditiously the most favorable price and terms available in connection with each required action, subject to respondent's absolute and unconditional obligation to accomplish the required actions.

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 expenses incurred and monies received in connection with the required actions. 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 amounts due to the trustee shall be paid by 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 promptly accomplishing the actions required by paragraph II.

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 III.A of this order.

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

11. The trustee shall have no obligation or authority to operate or maintain the properties specified in paragraph II.

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

IV.

It is further ordered, That:

A. For a period of ten (10) years from the date this order becomes final, respondent shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

1. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, that has any direct or indirect ownership interest in a title plant serving the District of Columbia; or

2. Acquire any assets (other than in the ordinary course of business) or ownership interest in a title plant serving the District of Columbia; or

3. Sell or transfer any stock, share capital, equity or other interest in, or any assets of, the Commonwealth Washington DC Title Plant to any person or concern, corporate or non-corporate, that has any direct or indirect ownership interest in a title plant serving the District of Columbia; or

4. Merge, combine or otherwise consolidate the Commonwealth Washington DC Title Plant with any other title plant serving the District of Columbia; or

5. Enter into any contract, venture or arrangement to provide title plant services for the District of Columbia jointly with any person or concern, corporate or non-corporate, that has any direct or indirect ownership interest in a title plant serving the District of Columbia.

Notification is not required to be made pursuant to this paragraph IV with respect to any acquisition by respondent of a copy of title records or other information from a person or entity which thereafter retains the original information in its ownership and control, and where competition in the ordinary course between the parties is not otherwise restrained.

B. Notification pursuant to this paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction.

C. Respondent shall provide the Notification to the Commission at least thirty days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 CFR 803.20), respondent shall not consummate the transaction until twenty days after submitting such additional information or documentary material. Early termination of the waiting periods in

this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

V.

It is further ordered, That, for a period extending until November 10, 2018, respondent, directly or indirectly or through any corporate or other device in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, shall forthwith cease and desist from entering into, attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, or continuing or attempting to continue, any combination, agreement, or understanding, express or implied, for the purpose or with the effect of raising, lowering, fixing, maintaining or stabilizing the price, terms or other forms or conditions of compensation paid for title plant services in the District of Columbia; or encouraging, advising, pressuring, assisting, inducing, or attempting to induce any person to engage in any action prohibited by this order.

VI.

It is further ordered, That:

A. Within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until respondent has fully complied with the provisions of paragraphs II or 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 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 and III of the order, including a description of all substantive contacts or negotiations for the accomplishment of the required actions 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.

B. One year (1) 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 paragraphs IV and V of this order.

VII.

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 the order.

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondent shall permit any duly authorized representative 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. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

IN THE MATTER OF
TOYS "R" US, INC.

Docket 9278. Interlocutory Order, Dec. 1, 1998

ORDER GRANTING PARTIAL STAY

Upon considering respondent's application to stay enforcement of the Commission's order, issued October 13, 1998,

It is ordered, That enforcement of paragraphs II.C and II.E of the Commission's Final Order of October 13, 1998, be stayed upon the filing of a timely petition for review of Commission's order in an appropriate court of appeals and until the court issues a ruling disposing of the petition for review.

OPINION OF THE COMMISSION ON RESPONDENT'S
APPLICATION FOR STAY OF THE COMMISSION'S FINAL ORDER

On November 2, 1998, respondent Toys "R" Us, Inc. ("TRU") applied for a stay pending appeal of the Commission's order of October 13, 1998. TRU's application for a stay was received by the Commission on November 3, 1998. Complaint counsel opposes the granting of a stay. For the reasons stated below, the Commission stays the enforcement of paragraphs II.C and II.E of its order, effective upon the filing of a timely petition for review of that order in an appropriate court of appeals and until the court of appeals issues a ruling disposing of the petition for review. The Commission denies the application of TRU in all other respects.

APPLICABLE STANDARD

Section 5(g) of the Federal Trade Commission Act (the "FTC Act") provides that Commission adjudicatory orders (except divestiture orders) shall take effect "upon the sixtieth day after" the date of service, unless "stayed, in whole or in part and subject to such conditions as may be appropriate by . . . the Commission" or "an appropriate court of appeals." 15 U.S.C. 45(g)(2). A party seeking a stay must first apply for such relief to the Commission. TRU has done so in its November 2 application.

Pursuant to Commission Rule 3.56(c), 16 CFR 3.56(c), an application for a stay must be supported with sworn facts and relevant record excerpts. Additionally, an applicant for a stay must address the following considerations: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties if a stay is granted; and (4) why the stay is in the public interest. Each such factor is discussed below.

ANALYSIS

TRU objects to the provisions of paragraph II.E of the order, which prohibit TRU, for a period of five years, from (1) announcing that it may discontinue purchasing from a supplier who sells toys to a discounter, and (2) refusing to purchase toys or related products from a supplier because, in whole or in part, that supplier offered to sell or sold toys and related products to any discounter. TRU alleges that these provisions, *inter alia*, deprive TRU of its rights to decide "with whom, and on what terms, it will do business with a supplier" and to "inform suppliers of reasons why it may refuse to purchase a product sold to a competitor." Mem. in Supp. of App. for Stay at 7, 10.

TRU also protests paragraph II.C, which prohibits "[r]equiring, soliciting, requesting or encouraging any supplier to furnish information to [TRU] relating to any supplier's sales or . . . shipments to any toy discounter," and (2) paragraph II.D, which prohibits TRU from facilitating or attempting to facilitate agreements or understandings among suppliers "relating to limiting the sale of toys and related products to any retailer." Finally, TRU objects to various definitional provisions of the Commission's order. Specifically, TRU alleges that paragraphs I.A, I.B, and I.C are overbroad because they cover non-toy items; encompass the activities of the divisions of TRU that are not toy retailers (*i.e.*, Kids "R" Us and Babies "R" Us); and, together with the substantive provisions of the order, would effectively regulate TRU's ability to communicate with its suppliers about the business activities of all major toy retailers. Although TRU seeks a stay of the order in its entirety, it does not specifically mention paragraphs II.A or II.B (which prohibit agreements with suppliers to limit sales to discounters, and coercion of suppliers to limit sales to discounters) and provides no justification for a stay of those provisions.

I. LIKELIHOOD OF SUCCESS ON THE MERITS

TRU's primary arguments in favor of their likelihood of success on the merits merely revisit arguments that the Commission has already considered and rejected in its October 13, 1998 opinion.¹ The renewal of these arguments, alone, is insufficient to justify the grant of a stay. *See, e.g., In re Detroit Auto Dealers Ass'n, Inc.*, 1995 FTC LEXIS 256, at *4 (Aug. 23, 1995).

Nevertheless, "it can scarcely be maintained that the Commission must harbor doubt about its decision in order to grant the stay." *In re California Dental Ass'n*, 1996 FTC LEXIS 277, at *9. The difficulty inherent in applying the applicable law to a complex set of facts is a relevant factor in determining whether a stay applicant has made a substantial showing on the merits. *See, e.g., In re KVG Coffee Shop*, 1995 U.S. Dist. LEXIS 15617 (S.D.N.Y. 1995) (recognizing significance of factual issues in analyzing likelihood of success); *Supermarket Services, Inc. v. Hartz Mountain Corp.*, 382 F. Supp. 1248, 1255 (S.D.N.Y. 1974) (same). In the instant case, TRU argues that the provisions of paragraphs II.C and E sweep too broadly, and present serious potential issues of enforceability in distinguishing truly unilateral conduct or legitimate business activities from improper conspiratorial activities that restrain competition.

The Commission's principal opinion detailed the reasons for our disagreement with this argument. We explained the legal basis for ordering fencing in relief in antitrust cases:

It is well settled that once a respondent engages in illegal conduct, the Commission's order need not prohibit merely unlawful conduct, but may "close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). The order may also include such additional provisions as are necessary to "preclude the revival of the illegal practices." *FTC v. National Lead Co.*, 352 U.S. 419, 430 (1957). Indeed, "those caught violating the Act must expect some fencing in." *Id.* at 431.

Op. at 89.

¹ Specifically, TRU again alleges that the Commission's finding of horizontal collusion is inconsistent with the law and with economic theory, Mem. in Supp. of App. for Stay at 16-20, that the Commission's analysis of TRU's market power was erroneous, Mem. in Supp. of App. for Stay at 20-24, and that the Commission should have accepted its free rider defense of its actions, Mem. in Supp. of App. for Stay at 24-26. Each of these arguments was considered and rejected in the Commission's earlier opinion in this matter.

The communications and purchasing policies prohibited by paragraphs II.C and II.E are the means used by TRU to implement and police the illegal restraints of trade. These paragraphs are accordingly necessary to correct the effects and prevent the recurrence of the illegal conduct.

The principal opinion squarely acknowledges (*see* Op. at 1 (citing *United States v. Colgate & Co.*, 250 U.S. 300 (1919))) that legal liability under Section 1 of the Sherman Act does not attach to any truly *unilateral* business decision. Likewise, the vast majority of communications between a manufacturer and its distributors enhance the marketing of products and therefore enhance competition. *See Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. at 764 & n.8. In this case, however, TRU went far beyond the legal and procompetitive use of these business practices. Although the contested provisions of the Commission's Order redress the abuses of these ordinarily acceptable business practices that were identified in the principal opinion, we believe that for the relatively brief period of a stay pending appeal, TRU's asserted difficulties in distinguishing between lawful and unlawful conduct support granting a stay as to these provisions.

II. IRREPARABLE INJURY

TRU bears the burden of demonstrating that denial of a stay would cause irreparable harm. Bald assertions of harm or conclusory statements based on unsupported assumptions will not suffice. Rather, TRU must show that the alleged irreparable injury is substantial and likely to occur absent a stay. *See Michigan Coalition of Radioactive Material Users v. Griepentrog, Inc.*, 945 F.2d 150, 154 (6th Cir. 1991).

TRU's most serious allegation of irreparable injury involves the application of the provisions of paragraphs II.C and II.E. Complaint counsel argues that these provisions are "reasonably related" to TRU's unlawful conduct and therefore must remain in force during the pendency of an appeal. *See FTC v. National Lead Co.*, 352 U.S. 419 (1957). While the Commission undoubtedly has the authority to impose this relief (*Federal Trade Comm'n v. Ruberoid Co.*, 343 U.S. at 473), these provisions potentially affect to a substantial degree TRU's purchasing behavior during the next one or two buying seasons. Moreover, the communications with suppliers proscribed by

paragraphs II.C and II.E would, *if considered alone and undertaken unilaterally*, fall under the umbrella of *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. at 762, *United States v. Colgate & Co.*, 250 U.S. at 307, and their progeny.² Despite the fact that it might not be feasible to quantify their potential harm, the Commission recognizes that paragraphs II.C and II.E may unnecessarily impose "irretrievable costs," in terms of changes in purchasing behavior that TRU might not otherwise have made or transaction costs that TRU might not otherwise have incurred, were the Commission's decision to be overturned on appeal.

TRU's remaining allegations of irreparable injury are premised principally upon speculative concerns and misconceptions about the requirements of the Commission's order. Mem. in Supp. of App. for Stay at 12-13. TRU argues primarily that the facilitating conduct prohibited by paragraph II.D of the Commission's Order is useful and necessary; however, the Commission has already rejected these contentions in its ruling on the merits.

TRU's objections to the breadth of the definitional provisions of the order (*see* Mem. in Supp. of Supp. of App. for Stay at 13-14) are likewise without merit. TRU's inability to extend the same anticompetitive conduct to products and entities beyond the scope of the administrative complaint is not legally cognizable irreparable injury. *Cf. FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967) (even "substantial financial injury" is not cognizable where the injury is caused by prohibitions on unlawful activity).

Finally, as noted above, TRU has not even attempted to explain why compliance with paragraphs II.A and II.B would cause it irreparable harm. Indeed, as noted by complaint counsel, these provisions merely prohibit conduct that TRU continues to deny ever occurred. TRU cannot logically argue that it did not enter a vertical agreement, or orchestrate a horizontal agreement, yet also assert that it would be irreparably harmed if not allowed to continue these conspiracies during the pendency of an appeal.

III. HARM TO OTHERS AND THE PUBLIC INTEREST

Because complaint counsel represents the public interest in effective law enforcement, we consider the third and fourth prongs

² We emphasize here, however, as we did in the opinion, that TRU's conduct as demonstrated in the record falls far outside of the protections of *Colgate*.

together. See *In re California Dental Ass'n*, 1996 FTC LEXIS 277, at *7-8.

TRU contends that the issuance of a stay would be in the public interest because implementation of the order, and particularly of paragraphs II.C, II.D, and II.E(1), would likely lead to reduced toy output and promotional activity and restrict consumer choice. Mem. in Supp. of App. for Stay at 26-29. The requirements of paragraph II.D go to the core of TRU's ability to implement and supervise the unlawful vertical and horizontal agreements. The Commission already has held that absent these agreements, "competition would have driven TRU to lower its prices." Op. at 41. Because a stay of the provisions of paragraph II.D would enable TRU to maintain and supervise the vertical and horizontal agreements for another one or two buying seasons, a stay of these provisions would cause substantial harm to consumers and far outweigh any conceivable harm to TRU.

These concerns are reduced somewhat with respect to the requirements of paragraphs II.C and II.E(1). While these provisions are necessary under the facts of this case to "close all roads to the prohibited goal" (Op. at 88 (quoting *FTC v. Ruberoid Co.*, 343 U.S. at 473)), the conduct at issue was largely a means to a prohibited end and less of an immediate restraint. Accordingly, a stay of these provisions is less likely to cause immediate harm to the public. The unstayed provisions of our Order prohibit TRU from engaging in the core conspiratorial activities during the pendency of appellate review.

CONCLUSION

Although the decision is a close one, the Commission stays the order with respect to paragraphs II.C and II.E, effective upon the filing of a timely petition for review of the Commission's order in an appropriate court of appeals. Cf. *California Dental Ass'n*, 1996 FTC LEXIS 277, at *11 ("Respondent has not sought to stay those provisions of the order that prohibit continuation of the restraints found to be unlawful. Respondent has thus attempted to minimize the harm to the public interest while focusing on the provisions that create the greatest harm to itself."). The stay will last until the court of appeals issues a ruling disposing of the petition for review. TRU's application is hereby denied in all other respects.

STATEMENT OF COMMISSIONER ORSON SWINDLE ON RESPONDENT'S
APPLICATION FOR STAY OF THE COMMISSION'S FINAL ORDER

I join the decision of the Commission to stay the enforcement of paragraphs II.C and II.E of the order in this case pending a court of appeals' disposition of any petition for review filed by Toys "R" Us ("TRU"). In the opinion that it issues today, the Commission accurately identifies those two paragraphs as the provisions for which a stay is appropriate under the criteria set forth in Commission Rule 3.56(c).

One might ask why I do not also advocate a stay of order paragraph II.D, given my previous conclusion that the evidence adduced by complaint counsel did not prove TRU's orchestration of a horizontal boycott among toy manufacturers. The answer is simple. Although I am doubtless more confident than my colleagues about TRU's chances of persuading an appellate court to reverse the Commission's horizontal boycott findings, I also view as negligible the harm that TRU – which stoutly denies that it ever organized or enforced such a boycott – will incur if paragraph II.D is not stayed. Moreover, in the event a court of appeals sustains the Commission on the horizontal issue, the issuance of a stay at this juncture will have caused considerable harm to the public interest. Thus, under the standards of Rule 3.56(c), a stay of paragraph II.D is unwarranted.