IN THE MATTER OF

UNION CARBIDE CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SECS. 3 AND 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2902. Consent Order, Sept. 28, 1977—Modifying Order, March 15, 1991

This order reopens the proceeding and modifies Paragraph I.A of the 1977 consent order [90 FTC 257] by allowing the respondent to enter into multi-year requirements contracts with several new industrial gas distribution companies ("NEWCOs").

ORDER MODIFYING CONSENT ORDER ISSUED SEPTEMBER 28, 1977

On November 2, 1990, Union Carbide Corporation ("Carbide") filed a "Request to Reopen Proceeding and Modify Order" ("request") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) and Section 2.51 of the Federal Trade Commission's Procedures and Rules of Practice, 16 CFR 2.51. The request asks the Commission to reopen and modify the consent order in Docket No. C-2902 ("order"). Carbide seeks to have paragraph I.A. of the order modified to permit Carbide to enter into requirements contracts for terms longer than one year with several gas distribution companies, which are to be formed from packaged gas distribution businesses in which UCIG had, as of November 1, 1990, more than a 50% interest ("NEWCOs") and are to be owned jointly by the Union Carbide Industrial Gas division ("UCIG") and its employees. The employees and management together will own more than 50% interest in each NEWCO. The order presently requires that any requirements contracts with distributors in which Carbide does not own a "majority interest" have initial terms not longer than one year and be terminable annually on not more than 90-days notice.

The Commission has carefully considered Carbide's request and has concluded that the public interest warrants reopening and modifying paragraph I.A to allow Carbide to enter into requirements contracts with the NEWCOs for terms greater than one year. Carbide did not request, and the Commission has not considered, that the order be reopened and modified on the grounds of changed conditions of fact or law. The request was put on the public record and no comments were received.

Standard for Reopening a Final Order of the Commission

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission "shall reopen" an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside in whole or in part."[1] The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make the satisfactory showing of changed conditions to obtain a reopening. *See Gautreaux v. Pierce,* 535 F.Supp. 423, 426 (N.D. Ill. 1982) (requester must show "exceptional circumstances, new, changed or unforeseen at the time the decree was entered"). The legislative history also makes clear that the requester has the burden of showing, by means other than conclusory statements, why an order should be modified.[2] If the Commission determines that the petitioner has made the necessary showing, it must reopen the order to consider whether modification is in fact required and the nature and extent of the modification.[3] The Commission is not required to reopen the order, however, if the requester fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. This burden is not a light one in view of the public interest in repose and finality of the Commission's orders. *See Federated Department Stores, Inc. v. Moitie,* 425 U.S. 394 (1981) (strong public interest

[1] Section 5(b) provides, in part:

> [T]he Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part.

The 1980 amendment to Section 5(b) did not change the standard for order reopening and modification, but "codifie[d] existing Commission procedures by requiring the Commission to reopen an order if the specified showing is made," S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979), and added the requirement that the Commission act on petitions to reopen within 120 days of filing.

[2] The legislative history of amended Section 5(b), S. Rep. No. 96-500, 96th Cong. 2d Sess. 9-10 (1979), states:

> Unmeritorious, time-consuming and dilatory requests are not to be condoned. A mere facial demonstration of changed facts or circumstances is not sufficient . . . . The Commission, to reemphasize, may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order.

[3] The legislative history notes: "The Commission may employ whatever procedures it deems appropriate in aid" of the decision whether to modify an order. S. Rep. No. 96-500, 96th Cong., 2d Sess. 10 (1979).

considerations support repose and finality); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974) ("sound basis for . . .[not reopening] except in the most extraordinary circumstances"); *RSR Corp. v. FTC,* 656 F.2d 718, 721-22 (D.C. Cir. 1981) (applying *Bowman Transportation* standard to FTC order).

The Commission may also modify an order pursuant to Section 5(b) when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. Respondents are invited in requests to reopen to show how the public interest warrants the requested modification. 16 CFR 2.51(b). In the case of a request for modification based on this ground, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. *See Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 24, 1983) (unpublished) ("Damon Letter") at 2. For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, Docket No. 2916, 101 FTC 692 (1983). Once this showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *See* Damon Letter at 2, *see, e.g., Chevron Corp.*, Docket No. C-3147, 105 FTC 228 (1985) (public interest warrants modification where potential harm to respondent's ability to compete outweighs any further need for the order). The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

Requested Modification of Paragraph I.A of the Order

Carbide proposes to spin off a portion of UCIG to form approximately five new companies, the NEWCOs, that will sell packaged industrial gas in cylinders to retail distributors. The NEWCOs will take over UCIG's filling plants, calcium carbide based acetylene production facilities and packaged gas retail outlets. They will also acquire UCIG's cylinder inventory. UCIG will continue to sell industrial gas in bulk form to independent distributors and to the NEWCOs (which will become UCIG's largest bulk gas customers) which will sell packaged gas to independent distributors.

The NEWCOs will be run by current UCIG management. At least 35% of each NEWCO's voting securities will be owned by UCIG, and a majority of each NEWCO's stock will be owned by NEWCO Employee

Stock Ownership Plan ("ESOP"). The small remaining amount of stock of each NEWCO would be sold to the NEWCO management.[4] In addition, UCIG will have a warrant permitting it to purchase enough new issue stock to raise its common stock position in the NEWCO to over 50%. UCIG will not be required to exercise the warrant but may do so at any time with no constraint from the NEWCO. UCIG's stock ownership will assure it of a seat on the NEWCO's boards, and Carbide states that it is contemplated that UCIG will have the right to approve most major decisions by the NEWCOs. Request at 11.

UCIG proposes that it will enter into a multi-year supply contract with each NEWCO for industrial gas with (1) an "evergreen" provision—a provision that renews a contract from term to term in lieu of notice by one of the parties to the contrary; and (2) a right of UCIG to meet any lower price offered by a competitor.

The Order Should be Reopened and Modified

The Commission has determined that paragraph I.A of the order should be reopened and modified as requested by Carbide. Carbide's currently planned restructuring is neither prohibited nor required by anything in the order. As a consequence, the Commission is not called upon to consider whether Carbide's preference for a structure in which Carbide retains less than fifty percent ownership is a reasonable business decision. Carbide has shown, however, that its business judgment will be affected by the application of the order to Carbide's relationships with the NEWCOs. The order may thus cause injury to Carbide, by causing Carbide to choose a less preferred structure for the NEWCOs. Carbide has therefore shown, as a threshold matter, the potential for competitive injury if it is unable to use multi-year requirements contracts with the new companies to be spun off from UCIG. The Commission also has determined that applying the order to Carbide's relationship with the NEWCOs may deter these spin-offs, a result not intended by the order, and thus that the reasons for the modification outweigh any reasons against this modification.

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[4] Only NEWCO employees, UCIG and the ESOP will be permitted to own NEWCO stock. The NEWCOs will also be allowed to use a Linde-derived name (Linde is the trade name for UCIG gas) as a company name, use the Linde logo, enter into a reciprocal free exchange of safety information, an applications technology license and an exchange of cylinder technology. These benefits will be contingent upon the NEWCOs' continued use of UCIG gas, UCIG's continuation of ownership in the NEWCO, and maintenance of safety standards acceptable to UCIG.

1. Carbide has shown a threshold injury

Initially, Carbide asserts that it is experiencing financial difficulties in the packaged gas business and hopes that restructuring with employee-owned businesses will revitalize an otherwise stagnant business sector. The creation of the NEWCOs is not constrained by the order. Carbide also has shown that if multi-year contracts with the NEWCOs are not permitted it may incur costs—by having to choose a less preferred structure for the NEWCOs—as a result of the order in a way not contemplated when the order was entered.

Carbide's decision to create the NEWCOs stems from what it claims is the generally poor performance of its packaged gas business and the hope that a new structure will increase the competitiveness of the business. Carbide attributes this poor performance to a number of factors: the lack of entrepreneurial spirit needed to compete in the retail packaged gas business; outmoded fill plants and acetylene plants; poor productivity; excess labor costs; higher salary and benefit structures than its competitors because UCIG's compensation and benefits are pegged to the chemical industry as opposed to competition in the retail packaged gas business; and high overhead costs attributable to the existing Carbide structure.

The proposed spin-offs will, Carbide hopes, revitalize its packaged industrial gas business. The NEWCOs will have lower salary and benefit schedules and lower overhead costs. According to Carbide, a key component to the creation of the NEWCOs is that an Employee Stock Ownership Plan will own over 50% of each NEWCO. First, Carbide believes that a business that is majority owned by its employees will be a more effective competitor. Request at 16. According to Carbide's ESOP expert, companies in which ESOPs own over 50 percent of the business have higher productivity and perform better than conventional firms in terms of sales growth, operating margin, return on equity, book value per share growth, long term debt as a percentage of capitalization, and return on investment in company stock. *See* Request at Exhibit 4, Affidavit of John S. Hoffmire, III, President of Hoffmire & Associates, Ltd. Second, it is important that lenders to the ESOP for the acquisition of company stock are granted special tax incentives if the ESOP lendee owns 50% or more of the company. This allows the lender frequently to offer the majority-owning ESOP reduced rates at which it may borrow money to invest in the company's stock; if the ESOP buys less than 50 percent of NEWCO, its cost of capital will be higher. Request at 17.

In Carbide's business judgment, it must invigorate its industrial gas business, and Carbide has chosen to spin off part of its business in an effort to gain efficiencies. This spin-off proposal is not prohibited by the order.

Although Carbide has not conditioned the spin-offs on the Commission's approval of the requested modification, it may change the form of the NEWCOs if the modification is not granted. Carbide states that it may increase its stock ownership in the NEWCOs to over 50%, thereby clearly retaining a "majority interest." Request at 17. By doing this, Carbide would be able to maintain long-term supply contracts but, in the process, the NEWCOs with minority ESOP ownership would likely forego some efficiency gains of the NEWCOs with majority ESOP ownership. Request at 17. Carbide has identified the potential efficiency losses from such a decision: the tax advantages Congress afforded to businesses that are more than 50% owned by ESOPs will be lost; the businesses' entrepreneurial incentives will be more limited; and "to the extent the NEWCOs are successful in expanding sales, this in turn would likely permit better loading of UCIG's plants and make UCIG a more effective competitor in gas production. If the ESOP's ability to acquire more than 50% of the NEWCO's stock harms NEWCO's cash flow and cost of capital— thus reducing its ability to compete—this will, in turn, adversely affect UCIG as the NEWCOs' supplier." Request at 17.[5]

The Commission has concluded that Carbide has met its threshold burden of establishing that it is suffering or may suffer some competitive injury as a result of the order and in a way not contemplated when the order was entered. Carbide has satisfactorily demonstrated a need for modification of the order to enable it to use requirements contracts with terms greater than one year with the NEWCOs. Carbide's proposal to spin off the packaged industrial gas business—as opposed to entering contracts or making acquisitions that increase concentration and vertical integration—was not a concern addressed by the complaint when the complaint and order were entered in 1977. The order's prohibition against requirements contracts with terms greater than one year may deter Carbide from making what may be cost-reducing changes in its industrial gas business. Accordingly, the order will likely impede Carbide's ability to compete vigorously and effectively in the industrial gas market.

[5] Carbide's cost savings would not technically be efficiencies, but nonetheless could strengthen Carbide's ability to compete.

2. The Order should be modified

The Commission has determined that Carbide's showing of need for the modification outweighs any reasons not to modify the order. In this particular situation, the use of long-term contracts with the NEWCOs is consistent with the apparent general intent of the order and does not increase the specific problems that paragraph I.A.1 was designed to remedy.

The complaint addressed Carbide's acquisitions and plans to acquire many industrial gas distributors, which would have had the effect of foreclosing Carbide's competitors from a substantial segment of the sale and manufacture of industrial gas, impairing the ability of nonintegrated competitors and distributors to compete in the sale of industrial gases, raising barriers to entry in the sale of industrial gases to distributors, accelerating a trend towards vertical integration of suppliers and distributors of industrial gases, and eliminating Carbide as a potential entrant through internal expansion into the retail sales of industrial gases in areas where it acquired an interest in distributors. Paragraphs III and IV of the order required Carbide to obtain the prior approval of the Commission before making certain acquisitions of downstream distributors. Both paragraphs expired in 1987.

The complaint also alleged that Carbide required independent distributors, pursuant to a contract, agreement or understanding, to purchase from Carbide their total requirements of each industrial gas. Complaint at paragraph 10(a). The effects of such acts were alleged to substantially lessen competition in the sale of industrial gas to independent distributors and consumers, increase entry barriers in the sales of industrial gases to distributors and deprive distributors of the opportunity of competing for sales of industrial gases to certain customers. Complaint at paragraph 11. Paragraphs I and II of the order curtail Carbide's non-acquisition behavior, such as multi-year contracts, that may have an effect similar to vertical acquisitions. These paragraphs are in effect until 1997.

Carbide's decision to change the structure of its industrial gas business—through the creation of the NEWCOs—does not run contrary to the concerns in the complaint. The complaint addressed the harmful effects of Carbide's further integration of the industrial gas business through acquisitions or other contractual activities with independent distributors. Although the NEWCOs will change from formerly 100% Carbide-owned businesses to less than wholly-owned entities, Carbide will retain significant control over them. Using long-term requirements contracts with these entities, therefore, does not appear to vary significantly from Carbide's present relationship with its wholly-owned distributors. Because Carbide will not retain a majority interest in the NEWCOs, however, a modification is required to allow Carbide to pursue this particular restructuring.

Carbide's likely retention of a significant interest and effective control over many of the NEWCOs' operations does not outweigh the arguments favoring the requested order modification. Carbide already has complete control over its wholly-owned distributors, and the proposed spin-offs cannot enhance and may somewhat reduce that control. Although denying the use of multi-year contracts with the NEWCOs might force Carbide to break totally its ties with its formerly wholly-owned distributors, a denial also might stop or impede Carbide's preferred structuring plan for the NEWCOs. The Commission concludes, therefore, that the order's prohibition on long-term contracts should be modified in this instance.

The proposed modification narrowly outlines which entities will be allowed to have multi-year requirements contracts with Carbide. Carbide must own at least 35% of the distributor and have a warrant exercisable at its sole discretion permitting Carbide to cause the distributor to raise Carbide's stock interest to over 50%. In addition, the proposed language limits Carbide from entering into long-term contracts with distributors unless it is with a distributor that Carbide owned outright on November 1, 1990, or a distributor that was formed to conduct a packaged gas distribution business in which Carbide had a majority interest on November 1, 1990, and a majority of the stock is owned by an ESOP. This severely limits the number of entities with which Carbide can enter into long-term contracts; no current independent distributors could be included. The modification, therefore, allows Carbide to accomplish its spin-offs, but does not alter Carbide's obligations to its current independent distributors.

Even though Carbide will be able to enter into multi-year contracts with the NEWCOs, the NEWCOs will not be able to do the same with independent distributors or end users that acquire packaged gas from them, because the NEWCOs will be successors in interest to Carbide's cylinder gas business. Similarly, UCIG's bulk sales to independent distributors will also remain subject to the multi-year contract prohibition in the order. It is not inconsistent to treat the NEWCOs as separate entities, *i.e.*, not majority-owned subsidiaries of Carbide, for purposes of UCIG contracts with the NEWCOs, but require the NEWCOs to adhere to the order in their contracts with independent distributors. Carbide has acknowledged that as a condition to the formation of the NEWCOs, the NEWCOs will agree to be bound by the terms of the order.

Accordingly, *it is ordered,* that this matter be reopened and that paragraph I.A of the Commission's order in Docket No. C-2902, issued on September 28, 1977, be modified, as of the date of service of this order, to add the following language to the end of paragraph I.A:

Provided, however, for the purpose of applying Part I.A.1 of this order, any distributor in which respondent owns not less than 35% of the distributor's common stock and in which respondent has a warrant exercisable at its sole discretion permitting respondent to cause the distributor to issue sufficient new stock to raise respondent's stock interest to more than 50% shall be treated in the same manner as a distributor in which respondent owns a majority interest, provided that (1) respondent owned more than 50% of the outstanding capital stock of such distributor on November 1, 1990, or (2) such distributor was formed to conduct a packaged gas distribution business in which respondent had a majority interest on November 1, 1990, and a majority of the stock of such distributor is owned by an employee stock ownership plan.

Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

A majority of the Commission today grants the petition of Union Carbide Corporation to reopen and modify the order in Docket C-2902, although Union Carbide failed to show public interest considerations that warrant reopening.[1] The decision of the majority is inconsistent with the Commission's standards for reopening a final order, and it is manifestly unfair to the respondents that have been held to those standards. The decision also is inconsistent with the Commission's ruling on a virtually identical petition in this same matter in 1988, and it is inconsistent with a decision in another matter

[1] Union Carbide in its petition to reopen relied solely on public interest considerations and did not allege changed conditions of law or fact. *See* § 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b).

that the Commission is now defending in federal court.[2] The decision is arbitrary and capricious. I dissent.

I.

Paragraph I.A of the order in Docket C-2902 bars Union Carbide from having supply contracts with an initial term of more than one year with industrial gas distributors "in which [Union Carbide] owns less than a majority interest."[3] The order does not restrict supply contracts between Union Carbide and distributors in which it owns a majority interest. These two alternatives would seem sufficient to address the universe of ownership interests that Union Carbide might have in distributors. But the modification granted today at Union Carbide's request creates a third category of distributors— those in which Union Carbide recently has divested its majority interest but with whom, unlike other firms in which Union Carbide also does not own a majority interest, Union Carbide is permitted to have longterm supply contracts. The only justification identified for reopening and so modifying the order is Union Carbide's preference for multi-year contracts with distributors that it formerly owned. Union Carbide's preference not to comply with a constraint to which it agreed is insufficient for reopening a final order of the Commission.

Reopening an order may be warranted in the public interest when the respondent shows as a threshold matter some affirmative need to modify the order, usually a competitive disadvantage resulting from the order that was not contemplated when the order was entered.[4] Union Carbide has not made the requisite threshold showing. Instead, Union Carbide in its request asserts that the order's one-year limit on contracts with distributors in which Union Carbide owns less than a majority interest impedes its ability to achieve efficient distribution. Request To Reopen Proceeding and Modify Order, November 2, 1990 ("request"), at 21. This alleged burden is the same burden Union Carbide agreed to assume in 1977 in settlement of alleged violations of law, and Union Carbide makes no showing that the competitive context of the order now is any different in nature or degree from when it agreed to the terms of the order.

[2] Louisiana-Pacific Corp., Docket C-2956, *appeal filed,* No. 90-35733 (9th Cir. Aug. 16, 1990).

[3] Paragraph I.A will expire in 1997.

[4] Once such a showing is made, the Commission will consider the reasons for and against modification and whether the particular modification requested is appropriate to remedy the identified harm. *See, e.q.,* Damon Corp., Docket C-2916, 101 FTC 689, 692 (1983).

Union Carbide's argument for multi-year supply contracts also is the identical argument that it made in its 1988 petition to reopen the order and that the Commission considered and rejected in 1988. Letter to Glen S. Howard, Esq., November 10, 1988. The majority does not even acknowledge the 1988 decision, much less explain why it should be overruled. This reveals a troubling inattention to the principles of law that should underlie our decisions. Like its twin in 1988, the request should be denied.

II.

Union Carbide proposes to create several new companies ("NEW-COs") by divesting its majority interest in several gas distribution companies that are wholly owned by Union Carbide Industrial Gases, Inc. ("UCIG"), a wholly-owned subsidiary of Union Carbide, to employee stock ownership plans ("ESOP"). UCIG will retain a substantial interest in each NEWCO and the right to buy enough NEWCO shares to reacquire a majority interest.[5] The NEWCOs will acquire UCIG's cylinder gas business, and UCIG anticipates that the NEWCOs will be UCIG's largest bulk gas customers. Request at 9-12. Union Carbide hopes to achieve a number of benefits from the ESOP-owned NEWCOs, including improved entrepreneurial spirit and the ability to cut costs. Request at 8-9 & 16-17.

Union Carbide insists that multi-year supply contracts with the NEWCOs are essential because the order's one-year limit on contracts with distributors in which Union Carbide owns less than a majority interest "impedes UCIG's ability to achieve efficient distribution." Request at 21. This is the argument that the Commission rejected in 1988. Union Carbide also warns that if the requested modification is not granted, UCIG may choose to keep its majority interest in the NEWCOs. Request at 16-17.[6] Why this should be objectionable to the Commission is unexplained.

[5] The majority by its silence implicitly rejects Union Carbide's suggestion that its "*de facto* control" of the NEWCOs might be deemed a "majority interest" for purposes of paragraph I.A of the order. Request at 3 n.4. This seems correct according to the terms of the order.

[6] In a variation of this argument, Union Carbide asserts that it should "not be compelled" by its proposed divestiture "to forfeit its multi-year relationships" with its current subsidiaries. Request at 3. Although this argument has a certain facile appeal, it does not withstand examination. First, it is Union Carbide's 1988 argument in new clothes and, like the earlier petition, incorrectly assumes that the order's limit on contracts impedes Union Carbide's ability to compete in some way that was not contemplated when the order was entered. Second, the argument ignores the simple fact that the restriction to which Union Carbide objects does not and would not apply to its current subsidiaries but rather to newly organized non-subsidiaries. Third, and conversely, Union Carbide is not compelled under any scenario from forfeiting multi-year relationships with its actual subsidiaries. Finally, the word "forfeit" implies some new right to multi-year contracts with distributors in which Union Carbide owns less than a majority interest, but any such "right" was resolved by the order to which Union Carbide consented.

III.

I agree with the majority of the Commission that nothing in the order prohibits or requires Union Carbide's proposed divestiture to the NEWCOs. The order does not contemplate any particular structure for Union Carbide.[7] Paragraph I.A of the order accords different treatment to distributors that are majority-owned by Union Carbide and those that are not, but it is indifferent to the identity of owners other than Union Carbide. I also agree with the majority that the Commission need not decide "whether Carbide's preference" to divest its majority interest in its wholly-owned distributors "is a reasonable business decision." Order Modifying Consent Order at 5. The proposed divestitures clearly are matters with which the order is not concerned.[8]

I disagree with the conclusion of the majority that Union Carbide has made a threshold showing of competitive injury resulting from the order. The majority infers injury from Union Carbide's claim that "its business judgment will be affected by the application of the order to Carbide's relationships with the NEWCOs," *i.e.,* that the order may "caus[e] Carbide to choose a less preferred structure for the NEWCOs."[9] Order Modifying Consent Order at 5. In other words, the majority finds that the order creates an impediment to competition if the order affects Union Carbide's preference or "business judgment." This extraordinary conclusion relegates the decision whether to reopen final orders of the Commission to the business preferences of the respondent. If this is the standard, can there be a point to writing orders in the first place?

A final order of the Commission necessarily affects the business judgment of a respondent. The order is part of the legal landscape in which the respondent does business. For example, an order requiring divestiture surely affects the business judgment of a respondent. The

[7] Paragraphs III and IV of the order required Union Carbide for ten years to obtain the prior approval of the Commission before making certain acquisitions. They expired in 1987.

[8] Despite its disclaimer, the majority appears to attribute some efficiencies (or cost savings) to Union Carbide's restructuring plan. *See* Order Modifying Order at 6-7 & n.5. It is worth noting that it is a departure from the Commission's usual practice to accept assertions of efficiencies at face value. Further, it is not the Commission's primary concern to maximize the profitability of individual companies. If that were the case, the Commission would stand aside and allow anticompetitive mergers and, indeed, blatant price fixing to proceed unchallenged. The mode of thinking that underlies competition policy and the antitrust laws is that companies like Union Carbide generally can be expected to take care of their own interests, which leaves the Commission free to constrain any abuse of their methods and to maintain a level playing field among competitors.

[9] The majority presumably means a structure that is "less preferred" by Union Carbide, consistent with its statement that the Commission need not consider whether the proposed divestiture to the NEWCOs "is a reasonable business decision." The Commission is ill-equipped to assess the reasonableness of ESOP ownership versus other possible ownership structures.

respondent made a business judgment to acquire the assets required by the order to be divested and surely would prefer, in its business judgment, to keep them. But this is not a recognized or acceptable public interest reason for reopening and modifying the order. *See Louisiana-Pacific Corp.,* Docket C-2956, slip op. at 26 (November 15, 1989), *appeal filed,* No. 90-35733 (9th Cir. Aug. 16, 1990). Respondents subject to prior approval provisions no doubt would prefer to make acquisitions without first obtaining the Commission's approval, but we have consistently declined to substitute their business judgment for our independent review under the order. Carried to its logical extreme, the "business judgment" rule would obviate the need for orders in the first place: a respondent's business decisions to make certain acquisitions or to disseminate its preferred advertising or, indeed, to ignore the technical requirements of the Truth in Lending Act all would carry the day over the Commission's independent review under the law.

Union Carbide's arguments for reopening the order all are restatements of the argument, previously rejected by the Commission, that the one-year limit on supply contracts impedes its ability to compete. The argument has no greater credibility in the 1990 request in application to distributors previously owned by Union Carbide than it had in 1988 to distributors that were not previously owned by Union Carbide. In this request, as in the 1988 petition, Union Carbide fails to show, indeed, even to assert, that the limit on supply contracts impedes its ability to compete in any way that was not foreseeable when the order was entered.

The majority implicitly concludes that longterm contracts between Union Carbide and the NEWCOs will not be anticompetitive. This conclusion, of course, revisits the premises of the order and, correspondingly, revises the remedy according to our latter day perceptions of what is appropriate. This is precisely the avenue that is unavailable to us unless the standard for reopening is met. "Because a final order is presumptively valid, the continued need for the remedy imposed by the order is relevant if a need for modifying the order is demonstrated in the first instance, but the burden is on the petitioner to 'show that the . . . restraint [under the order] can no longer be justified, and that they are suffering injury, without countervailing advantage to the public interest.'" *Louisiana-Pacific Corp.,* Docket C-2956 (Nov. 15, 1989), slip op. at 9, *quoting United States v. Swift & Co.,* 189 F. Supp. 885, 906 (N.D. Ill. 1960), *aff'd per curiam,* 367 U.S. 909 (1961).

The gravamen of the argument in Union Carbide's request is that the order impedes its ability to have multi-year contracts with independent distributors, *i.e.*, that the order does what it does, and Union Carbide would like to deal with some new independent distributors without that constraint. This is a classic attempt to have the cake and eat it too. It is not an argument for reopening but râther a complaint that Union Carbide does not like paragraph I.A. of the order. Regret over having consented to an order provision is not, nor should it be, a sufficient reason for the Commission to reopen a proceeding to consider modifying that provision.

IV.

The standards under Section 5(b) of the Federal Trade Commission Act for reopening an order are stringent, and the petitioner carries a heavy burden of proof in light of the public interest in repose and the finality of orders. *See United States v. Swift & Co.*, 286 U.S. 106 (1932); *United States v. Swift & Co.*, 276 U.S. 311 (1928); *United States v. Swift & Co.*, 189 F. Supp. 885 (N.D. Ill. 1960), *aff'd per curiam*, 367 U.S. 909 (1961); *Louisiana-Pacific Corp.*, Docket C-2956 (Nov. 15, 1989), *appeal filed*, No. 90-35733 (Aug. 16, 1990). These interests are threatened when the Commission reopens and modifies orders absent a satisfactory showing of changed conditions or public interest considerations that eliminate the need for the order or make continued application of the order inequitable or harmful to competition. Insubstantial or frivolous petitions may be encouraged, wasting our resources. Decisions based on inadequate showings may tend to be arbitrary, resulting in inequitable treatment and lessening respect for the Commission's enforcement program. We can avoid these dangers by adhering to the standards for reopening set forth in Section 5(b) of the Federal Trade Commission Act.

Although I believe that this decision is arbitrary and capricious and would be so viewed by any court, because Union Carbide has achieved what it sought, the decision will never be tested. In that respect, this is an easy throwaway. The implications of the decision, however, betray the seriousness with which the Commission undertakes to issue orders in the first place. Both this institution and the public interest deserve better. I dissent.

IN THE MATTER OF

ASICS TIGER CORPORATION

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

Docket C-3328. Complaint, Apr. 17, 1991—Decision, Apr. 17, 1991

This consent order prohibits, among other things, a California manufacturer of athletic shoes from making performance and injury-reduction claims about its athletic shoes unless it possesses competent and reliable evidence to substantiate those claims.

Appearances

For the Commission: *Janet M. Evans* and *Joel Winston.*

For the respondent: *George Miron, Wyman, Bautzer, Kuchel & Silbert,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Asics Tiger Corporation, a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent Asics Tiger Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California. Respondent's office and principal place of business is located at 10540 Talbert Avenue, Fountain Valley, California.

PAR. 2. Respondent, at all times mentioned herein, has maintained a substantial course of business, including the acts and practices hereinafter set forth, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. Respondent advertises, offers for sale, sells and distributes athletic shoes, including Asics Gel shoes.

PAR. 4. In the course and conduct of its business, in order to induce the sale of Asics Gel athletic shoes, respondent has disseminated or caused the dissemination of advertisements and promotional materials. Typical of respondent's advertisements and promotional materials for its Asics Gel athletic shoes, but not necessarily all-inclusive thereof, are the advertisements attached hereto as Exhibits A-E. The aforesaid advertisements and promotional materials contain the following statements and depictions:

1. A newly-developed silicone gel is being used to enhance shock absorption in athletic shoes ... The gel, called Asics' Gel, was engineered to dispel 28% more impact than shoes that use air as a shock absorber. That means runners can reduce strike force on the foot by 1.2 million pounds during the course of one 10K run. (Complaint Exhibit A).

2. Welcome to an amazing advancement in high-tech shock absorption for sport shoes .... Welcome to ASICS' GEL .... Greater shock absorption protects you from painful shinsplints, stress fractures, knee and hip aches and bone bruises. Studies using our GT II running shoe prove ASICS' GEL dispels 28% more injury-causing impact than the leading "air" shoes .... ASICS' GEL significantly reduces painful injuries caused by inadequate shock absorption. (Complaint Exhibit B).

3. Introducing ASICS' GEL. The best shock absorption ever put in a sport shoe .... ASICS' GEL gives you greater shock absorption and stability than other protective systems, including conventional foams or air cushioning. Studies using our GT II running shoes indicate ASICS' GEL dispels up to 28% more injury-reducing impact than the leading "air" shoes. (Complaint Exhibit C).

4. ASICS' GEL SYSTEM RANKS #1 IN BIOMECHANICAL TESTS. In recent tests for stability and shock absorption performed by Dr. Barry Bates of the University of Oregon's Biomechanics Sports Medicine Laboratory, ASICS' GEL cushioning system combined with today's more conventional materials proved to be the most stable and best shock absorbing system used in <u>this</u> comparison of athletic shoes. [Followed by chart comparing ASICS GT II, ASICS Gel-Lyte, New Balance 995, Brooks Nexus, and Nike Air Max.] (Complaint Exhibit D) (Emphasis added).

5. Shinsplints. Stress fractures. Bone bruises. Knee and hip aches. They're the price too many women are paying for wearing aerobic shoes that don't absorb all the shock they should....Asics Tiger now protects you with ASICS' GEL—a shock absorption breakthrough that's more effective than the air or foam cushioning you're wearing now .... Biochemical tests indicate our Ensemble aerobics shoe with ASICS' GEL absorbs more forefoot impact than shoes many are calling "state of the art"— 15% more than Reebok Instructor, 17% more than Avia 440, and 23% more than Nike Air Conditioner. (Complaint Exhibit E).

PAR. 5. Through the statements referred to in paragraph four, and others not specifically set forth herein, respondent has represented, directly or by implication, that:

1. Asics' GT II running shoes absorb 28% more shock than athletic shoes relying on air as a shock absorber, including the leading "air" shoe.

2. Asics' GT II and Gel-Lyte shoes absorb more shock than New Balance 995, Brooks Nexus, and Nike Air Max.

3. Asics' Ensemble aerobic shoes absorb 15% more shock than Reebok Instructor, 17% more shock than Avia 440, and 23% more shock than Nike Air Conditioner.

4. Persons using Asics' athletic shoes will suffer fewer impact-related injuries than persons using other athletic shoes, including "air" shoes.

PAR. 6. Through the use of the statements and representations referred to in paragraphs four and five, and others not specifically set forth herein, respondent has represented, directly or by implication, that at the time it made said representations, respondent possessed and relied upon a reasonable basis, consisting of competent and reliable evidence, for such representations.

PAR. 7. In truth and in fact, at the time respondent made said representations, respondent did not possess and rely upon a reasonable basis, consisting of competent and reliable evidence, for such representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. Through the use of the statements referred to in paragraph four, and others not specifically set forth herein, respondent has represented directly or by implication, that scientific tests prove the accuracy of the claims set forth in paragraph five.

PAR. 9. In truth and in fact, scientific tests do not prove the accuracy of the claims set forth in paragraph five. Therefore, the representation set forth in paragraph eight, was, and is, false and misleading.

PAR. 10. The dissemination by respondent of the aforesaid false and misleading representations, as herein alleged, constituted, and now constitutes, unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Commissioner Starek not participating.

EXHIBIT A

COMPLAINT EXHIBIT A

SMITH & MYERS
ADVERTISING, INC.

#9

000016

NEWS FOR IMMEDIATE RELEASE

CONTACT:

Melissa Field
Public Relations
(714) 547-7600

NEWLY-DEVELOPED SILICONE GEL DESIGNED TO ENHANCE SHOCK ABSORPTION IN ATHLETIC SHOES

(SANTA ANA, CA) April 24, 1986 -- A newly-developed silicone gel is being used to enhance shock absorption in athletic shoes. The gel* is marketed in America exclusively by Asics Tiger Corporation in the new GT-II running shoe, and is scheduled to appear in new models of Tiger fitness, basketball, tennis and track shoes by late 1986.

For the runner, Tiger's biomechanical tests show that 25% of injuries stem from insufficient shock absorption. The gel, called Asics' Gel, was engineered to dispel 28% more impact than shoes that use air as a shock absorber. That means runners can reduce strike force on the foot by 1.2 million pounds during the course of one 10K run.

Asics' Gel disperses shock from a vertical to a horizontal angle. In the new GT-II, Tiger utilizes 3mm of gel in a pad located at the forefoot reflex point and 5mm of gel in a pad positioned at the rearfoot reflex point. Midsole deterioration is delayed because the gel pads rest above the compression-molded EVA midsole.

-more-

TIGER - NEWLY-DEVELOPED SILICONE GEL DESIGNED 000017

ADD ONE

The damages of overpronation also are reduced because the GT-II features a 10mm heel pillar, sculpted orthotic insole, vertical midsole extension collar and stabilizing upper straps. Designed for high performance mileage runners, the shoe incorporates escaine reinforcements which gives the upper a longer life, and a tri-density outsole with black carbon gum rubber to extend overall wear. A breathable nylon mesh forefoot with nylon mesh vamp provides stability and comfort while a nylon mesh saddle delivers arch support.

The new Tiger GT-II Asics' Gel running shoe is available in white and royal colors, in men's sizes 4-13. Suggested retail price is $85.95.

Contact: Pete Cappelli, National Promotions And Advertising Manager, Asics Tiger Corporation, 3030 South Susan Street, Santa Ana, California 92704, (714) 754-0451.

-30-

* The gel was developed by Geltec Co. Ltd. of Japan.

EXHIBIT B

COMPLAINT EXHIBIT B

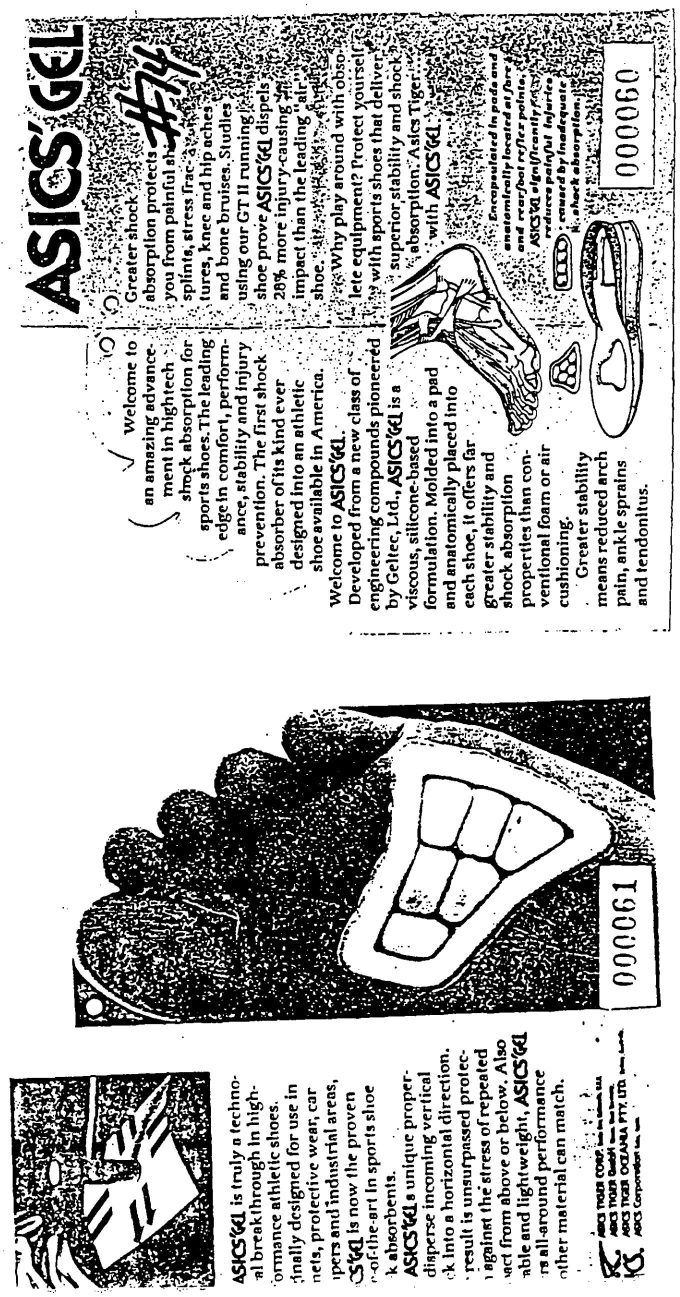


EXHIBIT C

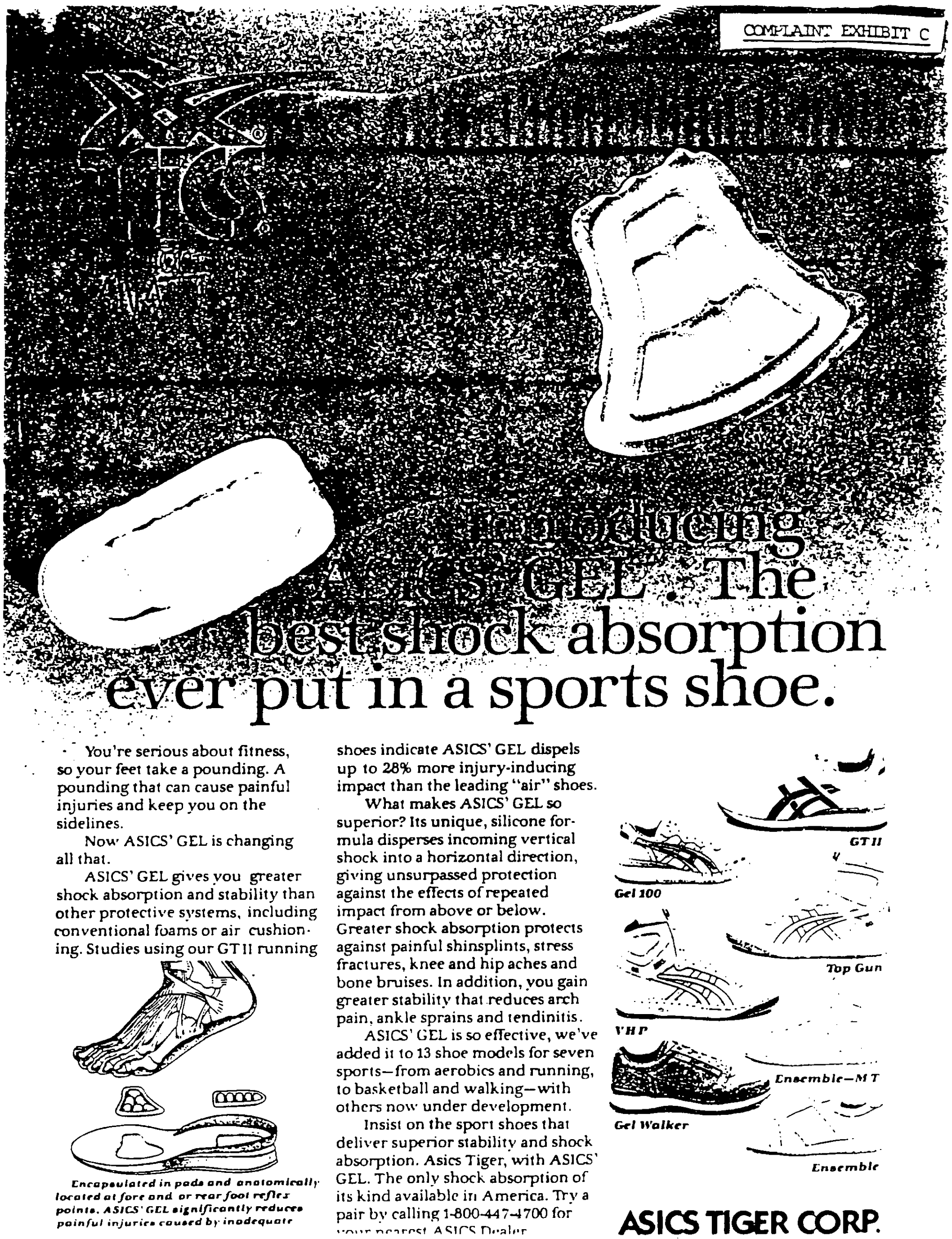

COMPLAINT EXHIBIT C
Introducing ASICS' GEL. The best shock absorption ever put in a sports shoe.
You're serious about fitness, so your feet take a pounding. A pounding that can cause painful injuries and keep you on the sidelines.
Now ASICS' GEL is changing all that.
ASICS' GEL gives you greater shock absorption and stability than other protective systems, including conventional foams or air cushioning. Studies using our GT II running shoes indicate ASICS' GEL dispels up to 28% more injury-inducing impact than the leading "air" shoes.
What makes ASICS' GEL so superior? Its unique, silicone formula disperses incoming vertical shock into a horizontal direction, giving unsurpassed protection against the effects of repeated impact from above or below. Greater shock absorption protects against painful shinsplints, stress fractures, knee and hip aches and bone bruises. In addition, you gain greater stability that reduces arch pain, ankle sprains and tendinitis.
ASICS' GEL is so effective, we've added it to 13 shoe models for seven sports—from aerobics and running, to basketball and walking—with others now under development.
Insist on the sport shoes that deliver superior stability and shock absorption. Asics Tiger, with ASICS' GEL. The only shock absorption of its kind available in America. Try a pair by calling 1-800-447-4700 for your nearest ASICS Dealer.
Encapsulated in pads and anatomically located at fore and or rear foot reflex points. ASICS' GEL significantly reduces painful injuries caused by inadequate
GT II
Gel 100
Top Gun
VHP
Ensemble—MT
Gel Walker
Ensemble
ASICS TIGER CORP.

EXHIBIT D

COMPLAINT EXHIBIT D

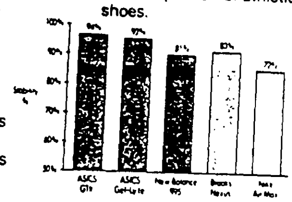
Don't Be Shocked By Your Athletic Shoe's Performance.

Shock attenuation results in less damaging force transmission to the body

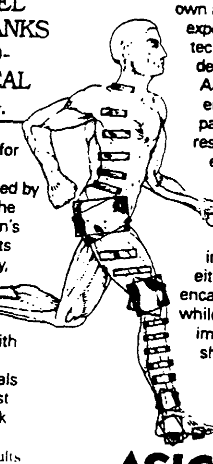
When athletes jump, they land with a force that can equal up to ten times their body weight. For a 160-pound basketball player making a rebound, that means more than *three quarters of a ton* of force sending shock waves back through the bones, muscles, cartilage, tendons and ligaments. And every participant in a 10K run must endure about 2.4 *million* pounds of punishment. Each year, there are thousands of sports injuries stemming directly from inferior athletic shoe design. From shoes that fail to provide adequate shock absorption or proper stability.

"ASICS' GEL SYSTEM" RANKS #1 IN BIO-MECHANICAL TESTING.

In recent tests for stability and shock absorption performed by Dr. Barry Bates of the University of Oregon's Biomechanics Sports Medicine Laboratory, ASICS' GEL cushioning system combined with today's more conventional materials proved to be the most stable and best shock absorbing system used in this comparison of athletic shoes.



"ASICS' GEL SYSTEM" IS A TRUE ORIGINAL.



Combining the shock absorption breakthroughs of the most advanced gel technology with our own athletic shoe expertise, ASICS' technologists developed the ASICS' GEL encapsulated pads. As a result, these pads, each designed for a specific purpose and location, absorb more impact than either foam or encapsulated air while greatly improving the shoe's stability.

ASICS' GEL

ASICS THE CHOICE OF FANATICS

ASICS TIGER CORP.
3030 South Susan • Santa Ana, CA 92704

EXHIBIT E


COMPLAINT EXHIBIT E
#3
asics
THE CHOICE OF FANATICS
Introducing ASICS' GEL™.
The best shock absorption ever put in a women's fitness shoe.
Shinsplints. Stress fractures. Bone bruises. Knee and hip aches. They're the price too many women are paying for wearing aerobics shoes that don't absorb all the shock they should.
The truth can be painful, but it doesn't have to be. Because Asics Tiger now protects you with ASICS' GEL—a shock absorption break-through that's more effective than the air or foam cushioning in the shoes you're wearing now.
ASICS' GEL pads significantly reduce injury-related impact.
Already proven effective in our running shoes, ASICS' GEL is a semi-fluid silicone substance with amazing shock absorption qualities. It works by dispersing incoming vertical force into a horizontal direction, giving you greater stability and unbeatable protection against the dangerous effects of repeated impact from above or below.
Biomechanical tests indicate our Ensemble aerobics shoe with ASICS' GEL absorbs more forefoot impact than shoes many are calling "state-of-the-art"—15% more than Reebok Instructor,® 17% more than Avia 440® and 23% more than Nike Air Conditioner.®
Think about the hundreds of steps you take in just one aerobics class. Then try the shoe that takes steps to put something better between you and impact-related injuries. Ensemble with ASICS' GEL. Call 1-800-447-4700 for the Asics Tiger Dealer near you.
ASICS TIGER CORP.

Decision and Order

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of 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 Asics Tiger Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 10540 Talbert Avenue, Fountain Valley, California.

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

Part I

It is ordered, That respondent Asics Tiger Corporation, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labelling, packaging, offering for sale, sale or distribution of any athletic shoes in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, if contrary to fact, that tests prove:

A. That Asics' GT II running shoes absorb 28% more impact than athletic shoes relying on air as a shock absorber, including the leading "air" shoe.

B. That Asics' GT II and Gel-Lyte shoes absorb more shock than New Balance 995, Brooks Nexus, and Nike Air Max.

C. That Asics' Ensemble aerobic shoes absorb 15% more shock than Reebok Instructor, 17% more shock than Avia 440, and 23% more shock than Nike Air Conditioner including "air" shoes.

D. That persons using Asics' athletic shoes will suffer fewer impact-related injuries than persons using other athletic shoes including "air" shoes.

PART II

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary or division or other device, in connection with the advertising, offering for sale, sale or distribution of any athletic shoes, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the contents, validity, results, conclusions, or interpretations of any test or study.

PART III

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any athletic shoes in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, any performance characteristic(s) of any such product unless at the time of making such representation respondent possesses and relies upon a reasonable basis consisting of competent and reliable evidence which substantiates the representation. To the extent such evidence consists of tests, experiments, analysis, research, studies or other evidence based on the expertise of professionals in the relevant area, such evidence shall be "competent and reliable" only if those tests, experiments, analyses, research, studies or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

PART IV

It is further ordered, That for three (3) years after the date of the last dissemination of the representation to which they pertain, respondent shall maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

A. All materials relied upon to substantiate any claim or representation covered by this order; and

B. All test reports, studies, surveys, demonstrations or other materials in its possession or control that contradict, qualify, or call into question the representation or the basis upon which respondent relied for such representation, including complaints from consumers.

PART V

It is further ordered, That respondent shall forthwith distribute a copy of this order to all operating divisions, subsidiaries, franchisees, officers, managerial employees, and all of its employees or agents engaged in the preparation and placement of advertisements or promotional materials covered by this order and shall obtain from each such employee a signed statement acknowledging receipt of the order.

PART VI

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

PART VII

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order and at such other times as the

Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Starek not participating.

IN THE MATTER OF

R.R. DONNELLEY & SONS CO., ET AL.

Docket 9243. Interlocutory Order, April 19, 1991

ORDER

Based upon the Motion to Dismiss Meredith Corporation as a Respondent and Stipulation of All Parties With Respect Thereto ("Stipulation"), filed by counsel on April 19, 1991,

It is ordered, That Meredith Corporation be, and it hereby is, dismissed as a respondent in this proceeding.

It is further ordered, That the Stipulation is accepted, and it shall be binding upon the parties thereto.

IN THE MATTER OF

NOBODY BEATS THE WIZ, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE MAGNUSON-MOSS WARRANTY ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket C-3329. Complaint, May 7, 1991—Decision, May 7, 1991

This consent order prohibits, among other things, a New Jersey retailer of consumer electronic goods from violating the Pre-Sale Availability Rule, promulgated under the Magnuson-Moss Warranty Act, requiring warranty disclosures. Respondent also is required to instruct all current and future Wiz retail-store managers engaged in the sale of consumer products as to their obligations and duties under the Act.

Appearances

For the Commission: *Alice Au* and *Michael J. Bloom.*

For the respondent: *Robin J. Cass, Schekter, Rishty & Goldstein,* New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Magnuson-Moss Warranty Act and Rule 702, 16 CFR 702, promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Nobody Beats the Wiz, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and Rule 702 promulgated under the Magnuson-Moss Warranty Act, 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 charge in that respect as follows:

PARAGRAPH 1. The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act Pub. Law No. 93-637, 15 U.S.C. 2301 (Supp. 1975) and in Rule 702, 16 CFR 702.1 promulgated thereunder, shall apply to the terms used in this complaint.

PAR. 2. Respondent Nobody Beats the Wiz, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1300 Federal Boulevard, Carteret, New Jersey.

PAR. 3. Respondent is now and has been engaged in the operation of a chain of consumer electronic retail stores in the metropolitan New York City area, including the five boroughs of New York City, Long Island, Westchester County and New Jersey. In the operation of its retail stores, respondent is now and has been distributing, advertising, offering for sale and selling, among other items, electronic appliances, including but not limited to televisions, video cassette recorders, stereo equipment, video cameras and microwave ovens which are consumer products. Therefore, respondent is both a supplier and seller of consumer products.

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

PAR. 5. In the ordinary course and conduct of its aforesaid business, respondent regularly sells or offers for sale consumer products for purposes other than resale or use in the ordinary course of the buyer's business. Therefore, respondent is a seller of consumer products.

PAR. 6. On or after March 12, 1987, respondent, in the ordinary course of its aforesaid business as a seller of consumer products actually costing more than $15.00 and manufactured on or after January 1, 1977, has failed to make the texts of written warranties readily available for examination by prospective buyers prior to sale through utilization of one or both of the following methods required by 16 CFR 702.3(a), as amended:

1. Displaying the text of the warranty in close proximity to the warranted product;

2. Furnishing the text of the warranty upon request prior to sale and placing signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of warranties upon request.

PAR. 7. Respondent's failure to comply with the provisions of 16 CFR 702, as amended, constituted and now constitutes a violation of the Magnuson-Moss Warranty Act and, pursuant to a Section 110(b) thereof, an unfair or deceptive practice under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office 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, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

(1) Respondent Nobody Beats the Wiz, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at 1300 Federal Boulevard, Carteret, New Jersey.

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

Order

The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, Pub. Law 93-637, 15 U.S.C. 2301, and in Rule 702, 16 CFR 702.1, promulgated thereunder, shall apply to the terms of this order.

I.

It is ordered, That respondent Nobody Beats the Wiz, Inc., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device in connection with the sale or offering for sale of any consumer product in or affecting commerce, do forthwith cease and desist from failing to make a text of any written warranty on a consumer product actually costing more than $15.00 readily available for examination by prospective buyers prior to sale through utilization of one or more means specified in 16 CFR 702.3(a), as amended.

II.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, deliver to each current retail store manager and assistant manager engaged in the sale of consumer products on behalf of respondent, a copy of this order to cease and desist.

III.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, instruct all current retail store managers and assistant managers engaged in the sale of consumer products on behalf of respondent as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

IV.

It is further ordered, That respondent shall instruct all future retail store managers and assistant managers who will be engaged in the sale of consumer products on behalf of respondent, before they assume said responsibilities for respondent, as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

V.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, develop and implement a program to instruct its sales personnel about the availability and location of warranty information.

VI.

It is further ordered, That respondent shall, for a period of not less than two (2) years from the date of service of the order, maintain and upon request make available to the Federal Trade Commission for inspection and copying (i) copies of all written instructions provided by respondent to its retail store managers and assistant managers and sales personnel regarding their obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order; (ii) copies of signs posted by respondent in its retail store outlets designed to elicit prospective buyers' attention to the availability of the text of written warranties for review upon request; and (iii) copies of the text of written warranties made readily available by respondent's retail store outlets for examination by prospective buyers on request.

VII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any dissolution, assignment, or sale resulting in the emergence of a successor corporation, 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 respondent shall, within sixty (60) days after service of this order on it, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

THE TORRINGTON COMPANY, ET AL.

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

Docket C-3330. Complaint, May 10, 1991—Decision, May 10, 1991

This consent order prohibits, among other things, two producers of needle rollers, The Torrington Company, of Connecticut, and Universal Bearings, Inc., of Indiana, from implementing or otherwise providing for any consolidation of the business or assets of the entity to be acquired and the acquiring entity prior to the consummation of any proposed acquisition.

Appearances

For the Commission: *Casey R. Triggs* and *Steven A. Newborn.*

For the respondents: *Joseph F. Tringali, Simpson, Thatcher & Bartlett*, New York, N.Y. *James H. Neu, Kizer & Neu*, Plymouth, IN.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, (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 The Torrington Company ("Torrington"), a corporation, and Universal Bearings, Inc. ("Universal"), a corporation, hereinafter sometimes referred to as respondents, have 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 its complaint stating its charges in that respect as follows:

RESPONDENTS

PARAGRAPH 1. Respondent Torrington is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 59 Field Street, Torrington, Connecticut.

PAR. 2. Respondent Universal is a corporation organized, existing and doing business under and by virtue of the laws of the State of

Indiana, with its office and principal place of business located at 431 N. Birkey Drive, Bremen, Indiana.

PAR. 3. Respondents each manufacture and sell cylindrically shaped component parts of anti-friction devices, including rollers, pins, and axle shafts, throughout the United States.

JURISDICTION

PAR. 4. Respondents each maintain, and have maintained a substantial course of business and engage in acts or practices, including the acts or practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

ANTICOMPETITIVE ACTS OR PRACTICES

PAR. 5. On April 11, 1990, Torrington's parent and Universal filed premerger notification with the Federal Trade Commission pursuant to the Hart-Scott-Rodino Antitrust Improvements Act ("H-S-R"), 18 U.S.C. 18(a), in connection with the proposed acquisition of Universal by Torrington's parent. On May 11, 1990, the Commission issued Requests for Additional Information and Documentary Materials to each filing party.

PAR. 6. During May, 1990, (during the H-S-R waiting period for the proposed acquisition of Universal), officials from Universal and Torrington discussed a particular customer's business and whether Torrington could supply axle shafts to that customer to meet the customer's immediate production schedules.

PAR. 7. Universal decided in May, 1990 that it would exit the manufacture of axle shafts as soon as possible and so advised its customer. Universal advised Torrington of its plans and suggested to the customer that it purchase the product from Torrington. Universal's president knew from information acquired from Torrington's officials that Torrington planned to consolidate Universal's production of the axle shafts in a Torrington plant after the consummation of the merger, and he believed that if this axle shaft customer acquired axle shafts from Torrington, it would "speed up" the consolidation of the two companies' axle shaft business and "keep the business in the family." The customer, however, requested that Universal continue to supply it with this particular axle shaft, and Universal agreed to do so.

PAR. 8. On or before May 11, 1990, the customer asked Universal for a quotation for the sale of different axle shafts. On May 11, 1990, Universal returned the customer's request with a "No Quote" pursuant to its May, 1990 plan "to get out of the axle business as soon as it is possible."

ANTICOMPETITIVE EFFECTS

PAR. 9. By engaging in the acts or practices described above, respondents may have unreasonably restrained competition among suppliers of rollers, pins, and axle shafts and may have injured consumers in the following ways, among others:

(a) The prices of rollers, pins, and axle shafts may have been stabilized, fixed, or otherwise interfered with; and

(b) Competition between Torrington and Universal may have been hindered, restrained, foreclosed and frustrated.

PAR. 10. The acts or practices of the respondents described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. These acts or practices are continuing and will continue or recur in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of The Torrington Company ("Torrington"), a corporation, and Universal Bearings, Inc. ("Universal"), a corporation, hereinafter collectively referred to as "respondents", and the respondents 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 the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all 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 act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of 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 Torrington is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 59 Field Street, Torrington, Connecticut.

2. Respondent Universal is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 431 N. Birkey Drive, Bremen, Indiana.

3. 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

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

A. "*Torrington*" means The Torrington Company and its successors and assigns, as well as its officers, employees, agents, divisions, subsidiaries, including their successors and assigns.

B. "*Universal*" means Universal Bearings, Inc. and its successors and assigns, as well as its officers, employees, agents, divisions, subsidiaries, and their successors and assigns.

C. "*The relevant product*" means rollers, pins, and axle shafts, each an assembly or component part of an assembly used to reduce the resistance to relative motion between two objects in contact.

I.

It is ordered, That respondents Torrington and Universal, in connection with any proposed acquisition of stock, share of capital, or production assets of any person manufacturing or selling the relevant product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall each cease and desist from directing, implementing or otherwise providing for any consolidation of the business or assets of the person to be acquired and the acquiring person prior to the consummation of the proposed acquisition.

II.

It is further ordered, That respondents Torrington and Universal shall each:

A. Within thirty (30) days following the date this order becomes final, provide a copy of this order to each officer of the respondent, each director of the respondent, and each relevant product salesman of the respondent;

B. File a verified written report with the Federal Trade Commission within sixty (60) days following the date this order becomes final and at such other times as the Federal Trade Commission or its staff may, by written notice to the respondent, require, setting forth in detail the manner and form in which it has complied and is complying with this order; and

C. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor, the creation or dissolution of subsidiaries, or any other change in the respondent which may affect compliance obligations arising out of this order.

III.

It is further ordered, That for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request by the Commission or its staff and on reasonable notice to any respondent made to its principal office, such respondent shall permit duly authorized representatives of the Commission:

A. Reasonable access during respondent's office hours, in the presence of counsel, to 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, for inspection and copying; and

B. An opportunity, subject to respondent's reasonable convenience, to interview, in the presence of counsel, officers or employees of respondent regarding such matters.

IN THE MATTER OF

AMERICAN STAIR-GLIDE 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-3331. Complaint, May 17, 1991—Decision, May 17, 1991

This consent order requires, among other things, American Stair-Glide to grant a non-exclusive perpetual license to Cheney's technology involved in the production of curved stairway lifts, straight stairway lifts, and vertical wheelchair lifts, and a perpetual exclusive license to sell such products under the Cheney name and certain trade names, to a Commission-approved licensee, pursuant to a Commission-approved licensing agreement.

Appearances

For the Commission: *M. Howard Morse* and *Steven A. Newborn.*

For the respondents: *Michael Cooper, Bryan, Cave, McPheeters & McRoberts,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents American Stair-Glide Corporation and Access Industries, Inc., both subject to the jurisdiction of the Federal Trade Commission, have acquired respondent The Cheney Company, Inc., also subject to the jurisdiction of the Federal Trade Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45; and it appearing that a proceeding in respect thereof would be in the public interest, the Commission 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. RESPONDENTS

1. Respondent American Stair-Glide Corporation is a corporation organized, existing and doing business under and by virtue of the laws

of the State of Missouri with its principal executive offices located at 4001 East 138th Street, Grandview, Missouri.

2. Respondent Access Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri with its principal executive offices located at 4650 College Boulevard, Suite 300, P.O. Box 7933, Overland Park, Kansas.

3. Respondent The Cheney Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin with its principal executive offices located at 2445 S. Calhoun Road, New Berlin, Wisconsin.

II. JURISDICTION

5. Respondents at all times herein have been and now are engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose business or practices are in or affecting commerce as "commerce" is defined in section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

6. On or about November 21, 1990, American Stair-Glide, acting through Access Industries, acquired all of Cheney's outstanding stock.

IV. THE RELEVANT MARKETS

7. The relevant product markets in which to analyze the acquisition of Cheney are the manufacture and sale of: (1) curved stairway lifts, (2) straight stairway lifts, and (3) vertical wheelchair lifts.

8. The relevant geographic market is the United States for all products.

V. THE MARKET STRUCTURE

9. The United States market for curved stairway lifts is marked by extremely high concentration as measured by the Herfindahl-Hirschmann Index ("HHI") or by the four-firm and eight-firm concentration ratios. American Stair-Glide and Cheney are the only competitors in this market.

10. The United States markets for straight stairway lifts and vertical wheelchair lifts are highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI") or by the four-firm and eight-firm concentration ratios. American Stair-Glide and Cheney are the market leaders with dominant shares of these markets.

11. In all three relevant markets, American Stair-Glide and Cheney are the two largest competitors and compete substantially and directly on price, service and product innovation.

VI. BARRIERS TO ENTRY

12. Entry into each of the relevant markets is difficult and time consuming because of the need to design and develop products, develop distribution, and build a reputation.

VII. EFFECTS

13. The effect of the acquisition may be to substantially lessen competition in the relevant markets described above in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45, by, among other things:

a. Eliminating actual competition in the relevant markets;
b. Establishing a dominant firm in the relevant markets;
c. Diminishing future product innovation;
d. Increasing barriers to new entry; and
e. Enhancing the likelihood of collusion or interdependent coordination between or among the firms in the relevant markets.

VIII. VIOLATIONS CHARGED

14. The acquisition as set forth in paragraph 6 herein violates 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.

Commissioner Azcuenaga dissenting.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents 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 violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act; 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 a 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 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, 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 American Stair-Glide Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the state of Missouri, with its principal executive offices located at 4001 East 138th Street, Grandview, Missouri.

2. Respondent Access Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the state of Missouri with its principal executive offices located at 4650 College Boulevard, Suite 300, P.O. Box 7933, Overland Park, Kansas.

3. Respondent The Cheney Company, Inc., is a corporation organized, existing and doing business under and by virtue of the law of the state of Wisconsin with its principal executive offices located at 2445 S. Calhoun Road, New Berlin, Wisconsin.

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.

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

A. "*Stair-Glide*" means American Stair-Glide Corporation, a Missouri corporation, and its directors, officers, employees, agents and representatives, its predecessors, successors, subsidiaries, divisions, groups, and any other corporations, partnerships, joint ventures, companies and affiliates that Stair-Glide controls, directly or indirectly, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. "*Access*" means Access Industries, Inc., a Missouri corporation, and its directors, officers, employees, agents and representatives, its predecessors, successors, subsidiaries, divisions, groups, and any other corporations, partnerships, joint ventures, companies and affiliates that Access controls, directly or indirectly, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. "*Cheney*" means the Cheney Company, Inc., a Wisconsin corporation, and its directors, officers, employees, agents and representatives, its predecessors, successors, subsidiaries, divisions, groups, and any other corporations, partnerships, joint ventures, companies and affiliates that Cheney controls, directly or indirectly, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

D. "*Respondents*" means Stair-Glide, Access, and Cheney.

E. "*Cheney Name*" shall mean the use of the name "Cheney" in conjunction with the Trade Names, as defined herein, and does not include use of the corporate name.

F. "*Commission*" means the Federal Trade Commission;

G. "*Stairway lift*" means any device that carries a person seated on a chair from one level to another on an incline up or down a stairway, and includes devices meeting Section 2002 of the ASME/ANSI (American Society of Mechanical Engineers/American National Standards Institute) A17.1 Code.

H. "*Straight stairway lift*" means any stairway lift designed for straight stairways.

I. "*Curved stairway lift*" means any stairway lift designed for stairways with landings, bends, or curves, and spiral stairways.

J. "*Vertical wheelchair lift*" means any device that carries a person in a wheelchair or standing, on a platform, vertically from one level to another, and includes devices meeting Section 2000 of the ASME/ANSI (American Society of Mechanical Engineers/American National Standards Institute) A17.1 Code.

K. "*Stairway Lift Technology and Know-how*" means all of Cheney's drawings, blueprints, patents, specifications, tests and other documentation, and all information contained therein or available to Cheney personnel relating to the design, and the production methods, processes and systems used by Cheney in the production, of curved stairway lifts and straight stairway lifts.

L. "*Stairway Lift Trade Names*" means all trademarks, registered names and trade names used by Cheney in the sale of curved stairway lifts and straight stairway lifts, including Liberty LX, Liberty LT, Liberty II, Liberty I, and Liberty Special.

M. "*Vertical Wheelchair Lift Technology and Know-how*" means all of Cheney's drawings, blueprints, patents, specifications, tests and other documentation, and all information contained therein or available to Cheney personnel relating to the design, and the production methods, processes and systems used by Cheney in the production, of vertical wheelchair lifts.

N. "*Vertical Wheelchair Lift Trade Names*" means all trademarks, registered names and trade names used by Cheney in the sale of vertical wheelchair lifts, including Handi-Lift, Handi Home Lift and Handi-enclosure.

O. "*Technology and Know-how*" means Stairway Lift Technology and Know-how and Vertical Wheelchair Lift Technology and Know-how.

P. "*Trade Names*" means Stairway Lift Trade Names and Vertical Wheelchair Lift Trade Names.

II.

It is ordered:

A. Within twelve (12) months after the date this order becomes final, respondents shall grant to a licensee a perpetual non-exclusive license of the Technology and Know-how, and a perpetual exclusive license to sell curved stairway lifts, straight stairway lifts, and vertical wheelchair lifts in the United States under the Trade Names and under the Cheney Name, for a fixed sum without a royalty based on future sales. Respondents shall grant the license only to a licensee that receives the prior approval of the Commission and only pursuant to a licensing agreement that receives the prior approval of the Commission. The purpose of the licensing shall be to remedy the lessening of competition alleged in the Commission's complaint.

B. Respondents shall make available to the licensee such Cheney personnel, assistance and training at its facility in New Berlin, Wisconsin as the licensee might reasonably need to transfer the Technology and Know-how and shall continue providing such personnel, assistance and training at no additional cost for a period of time sufficient to satisfy the licensee's management that its personnel are appropriately trained in the Technology and Know-how. However, Cheney shall not be required to continue providing such personnel, assistance and training for more than six (6) months after the execution of the license agreement.

C. Respondents shall provide the licensee with lists of Cheney's suppliers of components and of its distributors of curved stairway lifts, straight stairway lifts, and vertical wheelchair lifts.

D. For a period of five (5) years, respondents shall not enter into any sales or distribution agreement with any distributor exceeding one (1) year in duration for the sale of curved stairway lifts, straight stairway lifts, or vertical wheelchair lifts; shall not enter any exclusive agreement with any distributor limiting directly or indirectly the distributor's ability to sell curved stairway lifts, straight stairway lifts, or vertical wheelchair lifts of any other manufacturer; and shall not seek to prevent any distributor from selling curved stairway lifts, straight stairway lifts, or vertical wheelchair lifts of any other manufacturer by conditioning the sale of respondents' products or the provision of any services on any distributor not selling curved stairway lifts, straight stairway lifts, or vertical wheelchair lifts of any other manufacturer.

E. Notwithstanding the foregoing, respondents may submit for approval, and the Commission may in its sole discretion approve, separate licensees and licensing agreements (1) for the Stairway Lift Technology and Know-how and the Stairway Lift Trade Names, and (2) for the Vertical Wheelchair Lift Technology and Know-how and Vertical Wheelchair Lift trade names. In the event the respondents submit for approval separate licensees and licensing agreements, the Commission may in its sole discretion approve one licensing agreement which does not include the right to sell under the Cheney Name.

F. Except as provided in paragraph IV., and except during any transition period under a license agreement approved by the Commission, respondents shall not use the Cheney Name in connection with any product sold in the United States. *Provided however*, that respondents shall not be required to change the corporate name of Cheney or to authorize the use of the Cheney Name for any purpose other than in connection with the sale of curved stairway lifts, straight stairway lifts, and vertical wheelchair lifts in the United States.

III.

It is further ordered, That:

A. If respondents have not licensed the Technology and Know-how, the Trade Names, and the Cheney Name, absolutely and in good-faith and with the Commission's approval, as provided in paragraph II, within twelve (12) months of the date this order becomes final, respondents shall consent to the appointment by the Commission of a trustee to license the Technology and Know-how, the Trade Names, and the Cheney Name, and to provide to the licensee lists of Cheney's suppliers of components and of Cheney's distributors of curved stairway lifts, straight stairway lifts and vertical wheelchair lifts. *Provided, however,* if the Commission has not approved or disapproved a proposed license agreement within 120 days of the date the application for approval of such license agreement has been put on the public record, the running of the twelve (12) month period shall be tolled until the Commission approves or disapproves the license agreement. In the event the Commission or the Attorney General brings an action pursuant to Section 5(*1*) of the Federal Trade Commission Act, 15 U.S.C. 45(*1*), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(*1*), of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by 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, respondents shall consent to the following terms and conditions regarding the trustee's powers, authorities, duties and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld.

2. The trustee shall, subject to the prior approval of the Commission, have the exclusive power and authority to license the Technology and Know-how, the Trade Names, and the Cheney Name, and to provide to such licensee lists of Cheney's suppliers of components and of Cheney's distributors of curved stairway lifts, straight stairway lifts and vertical wheelchair lifts, as provided in paragraph II.

3. The trustee shall have eighteen (18) months from the date of appointment to license the Technology and Know-how, the Trade Names, and the Cheney Name. If, however, at the end of the eighteen-month period the trustee has submitted a plan of licensing or believes that licensing can be accomplished within a reasonable time, the period within which the trustee may license the Technology and Know-how, the Trade Names, and the Cheney Name may be extended by the Commission. *Provided, however*, the Commission may only extend this period two (2) times.

4. The trustee shall have full and complete access to the personnel, books, records and facilities of Cheney related to the Technology and Know-how, the Trade Names, and the Cheney Name, as the trustee may reasonably request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. Respondents shall take no action to interfere with or impede the trustee's efforts to license. Any delays in licensing caused by respondents shall extend the time for executing a license agreement under this paragraph in an amount equal to the delay, as determined by the Commission or the court for a court-appointed trustee.

5. Subject to the respondents' absolute and unconditional obligation to license at no minimum price and the purpose of licensing as stated in paragraph II.A. of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available for the Technology and Know-how, the Trade Names, and the Cheney Name. The license shall be made in the manner set out in paragraph II, *provided, however*, if the trustee receives bona fide offers from more than one prospective licensee, and if the Commission determines to approve more than one such licensee, the trustee shall grant a license to the licensee or licensees selected by respondents from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the license and all expenses incurred. After approval by the Commis-

sion 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 respondents and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's licensing the Technology and Know-how, the Trade Names, and the Cheney Name.

7. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order.

8. Within sixty (60) days after appointment of the trustee, and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, respondents shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the license required by this order.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A of this order.

10. The Commission and, 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 license required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Technology and Know-how, the Trade Names, and the Cheney Name.

12. The trustee shall report in writing to respondents and to the Commission every sixty (60) days concerning the trustee's efforts to license.

IV.

It is further ordered, That pending the license agreement for the Technology and Know-how, Trade Names, and the Cheney Name:

A. Respondents shall maintain, preserve and promote all of the Technology and Know-how, Trade Names, and the Cheney Name so that such Technology and Know-how, Trade Names, and the Cheney Name can be licensed effectively and viably in accordance with the requirements of this order. Respondents shall take such action as is necessary to maintain the viability, competitiveness, and marketability of the Technology and Know-how, Trade Names and the Cheney Name.

B. Respondents shall refrain from taking any actions that may cause any material adverse change in the Technology and Know-how, Trade Names, and the Cheney Name.

V.

It is further ordered, That respondents shall remain in compliance with the license agreement entered pursuant to paragraph II of this order until the date at which all of the obligations under the license cease, and shall not, without the prior approval of the Commission, make or agree to any modifications, directly or indirectly, of any of the terms of such license agreement approved by the Commission, or make or agree to any other agreements with the licensee relating to curved stairway lifts, straight stairway lifts or vertical wheelchair lifts.

VI.

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for ten (10) years, respondents shall cease and desist from acquiring, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise any assets, any interest in, or the stock or share capital of any entity that owns or operates assets, engaged in the production, distribution or sale in or to the United States of any curved stairway lift, straight stairway lift, or vertical wheelchair lift.

VII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until the respondents have fully complied with the provisions of paragraph II and III of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which respondents intend to comply, are complying, or have complied with those provisions. Respondents shall include in their compliance reports, among other things reasonably required from time to time, a full description of substantive contacts or negotiations for the license specified in paragraph II of this order, including the identity of all parties contacted. Respondents also shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and reports and recommendations concerning the licensing.

B. One year from the date this order becomes final and annually for nine years thereafter, respondents shall file with the Commission a verified written report of their compliance with this order.

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondents made to Stair-Glide's principal office, respondents shall permit duly authorized representatives of the Commission:

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

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

IX.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall notify the Commission at least thirty (30) days prior to any proposed change in any respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation, dissolution or sale of subsidiaries or any other change that may affect compliance obligations arising out of the order.

Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I disagree with the majority of the Commission that a remedy is warranted in this case. I see no basis for finding reason to believe that the acquisition is unlawful, unless we rely solely on market share and concentration data in the alleged product markets. The likelihood of anticompetitive effect is doubtful because of the absence of any barriers or impediments to entry. Even assuming the likelihood of anticompetitive effect, the licensing required by the order provides an inadequate remedy.

The products can be designed and assembled well within the two-year benchmark against which we usually assess entry conditions. The additional alleged impediments to entry, the need to develop distribution and build a reputation, are nothing more than inertia. Consumers—here, the distributors that resell and install the products—will continue to deal with a supplier that has an established record for quality and service, unless someone offers them a better deal. Nothing prevents an aspirant from offering a quality product at a competitive price, either through existing distributors or through, for example, durable medical equipment dealers.

Even if we assumed that the need to build a reputation for quality and service is sufficient to delay entry for more than two years, the consent order offers little prospect for relief. The industry members that commented on the proposed order agree that the required licensing is not adequate to remedy the alleged harm, because a firm without such a reputation cannot acquire it simply by using the name "Cheney." Instead, any licensee under the consent order will have to develop its own reputation for quality and reliability.

The order is unlikely to provide relief from any potential anticompetitive effects stemming from the impediments to entry alleged in the complaint. At the same time, the order imposes substantial compliance costs on the respondents, the Commission and, ultimately, the public. I dissent.

IN THE MATTER OF

TK-7 CORPORATION, ET AL.

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

Docket 9224. Complaint, Feb. 7, 1989—Decision, May 17, 1991

This consent order prohibits, among other things, a corporation, that manufactures and distributes fuel additive products, and its officer, Moshe Tal, from making any representations concerning the efficacy of any fuel or engine additives, unless they possess competent and reliable scientific evidence that substantiates the representation.

Appearances

For the Commission: *William L. Haynes* and *Lydia B. Parnes.*

For the respondents: *Moshe Tal, President*, Oklahoma City, OK. *John A. Claro, Claro & Johnston*, Oklahoma City, OK.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 45 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondents TK-7 Corporation (TK-7) and Moshe Tal, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, 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:

PARAGRAPH 1. Respondent TK-7 Corporation is a Nevada corporation with its office and principal place of business located at 1300 N.E. 4th ST., Oklahoma City, OK.

PAR. 2. Respondent Moshe Tal is the President of TK-7. His business address is the same as that of the corporate respondent. At all times relevant to this complaint, he has formulated, directed and controlled the business acts and practices of respondent TK-7.

PAR. 3. Respondents are now and for some time in the past have been engaged in the promotion, manufacture, distribution, marketing, advertising and sale of various fuel additives known by the product name TK-7 (hereinafter "products"). These products are additives purported to improve engine performance.

PAR. 4. In the course and conduct of their business, respondents cause, and in the past have caused, said products to be transported from their place of business for sale to purchasers located in various states and territories of the United States and the District of Columbia. Respondents maintain, and at all times relevant mentioned herein, have maintained a substantial course of trade in said products in or affecting commerce, as "commerce" is defined by the Federal Trade Commission Act as amended.

PAR. 5. In the course and conduct of their business, respondents have disseminated and caused the dissemination of advertisements and promotional material for their products by various means in or affecting commerce, including magazines distributed by the mail and across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products.

PAR. 6. In the course of their aforesaid business, respondents have made numerous representations in their advertising, promotional literature, and labels prepared and/or disseminated by respondents for use in selling respondents' products. Illustrative and typical but not inclusive of the representations concerning aforesaid products are the advertisements attached as Exhibits A, B, C, and D.

PAR. 7. Through those advertisements and others, respondents have made the following representations:

1. TK-7 provides top cylinder lubrication, reduces engine friction, and extends engine life;
2. TK-7 lowers engine operating temperatures;
3. TK-7 protects spark plugs from fouling and prevents carbon build-up;
4. TK-7 increases engine power;
5. TK-7 boosts fuel octane levels;
6. TK-7 increases gasoline mileage.

PAR. 8. In truth and in fact, the representations set forth in paragraph seven are false, misleading and deceptive.

PAR. 9. In making the representations set forth in paragraph seven respondents have represented, directly or by implication, that at the times of making the representations set forth in paragraph seven respondents possessed and relied upon a reasonable basis for making those representations.

PAR. 10. In truth and in fact, at the time of making the representations set forth in paragraph seven respondents did not possess and rely upon a reasonable basis for making those representations. Therefore, the representation set forth in paragraph nine was, and is, false.

PAR. 11. The acts and practices of respondents alleged in this complaint, have constituted and now constitute unfair and deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions might be inadequate to fully protect the public, the Commission may order such other relief as it finds necessary or appropriate.

ORDER

I.

It is ordered, That respondent TK-7 Corporation, a corporation; its successors and assigns, and its officers, and Moshe Tal, individually and as an officer of the corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the production, labeling, advertising, offering for sale, sale or distribution of the gasoline fuel additive currently marketed under the name "TK-7" in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication.

A. That the additive provides top cylinder lubrication, reduces engine friction, and extends engine life;

B. That the additive lowers engine operating temperatures;

C. That the additive protects spark plugs from fouling and prevents carbon build-up;

D. That the additive increases engine power;

E. That the additive boosts fuel octane levels;

F. That the additive increases gasoline mileage.

II.

It is further ordered, That respondent TK-7 Corporation, a corporation; its successors and assigns, and its officers, and Moshe Tal, individually and as an officer of the corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division of other device, in connection with the production, labeling, advertising, offering for sale, sale or distribution of any fuel additive or engine additive ("additive") in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, concerning the performance or efficacy of the product unless and only to the extent that, at the time of making such representation, respondents possess and rely upon a reasonable basis consisting of competent and reliable evidence which substantiates the representation.

For purposes of this provision, to the extent evidence consists of scientific or professional tests, analyses, research, studies or any other evidence based on expertise of professionals in the relevant area, such evidence shall be "competent and reliable" only if those tests, analyses, research, studies, or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

III.

It is further ordered, That for three (3) years from the date that the representations to which they pertain are last disseminated, respondents shall maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

A. All materials relied upon to substantiate any claim or representation covered by this order; and

B. All test reports, studies, surveys or other materials in their possession or control that contradict, qualify or call into question such representation or the basis upon which respondents relied for such representation, including complaints from consumers.

IV.

It is further ordered, That respondent TK-7 Corporation and its successors and assigns shall forthwith distribute a copy of this order to each of its subsidiaries and divisions and to all present and future agents, representatives and employees having responsibility for advertising, production, packaging, quality control or corporate policy with respect to the subject matter of this order, shall secure from each such person a signed and dated statement acknowledging receipt of the order and shall maintain such statement for three (3) years after the end of such person's employment by respondents.

V.

It is further ordered, That respondent Moshe Tal promptly notify the Commission of the discontinuance of his present business or employment. In addition, for a period of ten (10) years from the date of service of this order, respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include respondent's new business address and a statement of the nature of the business or employment in which respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

VI.

It is further ordered, That respondent TK-7 Corporation and its successors and assigns notify the Commission at least thirty (30) days prior to any proposed change to itself, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change which may affect compliance obligations arising out of this order.

VII.

It is further ordered, That respondents and their successors and assigns shall, within sixty (60) days after service of this order upon it, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

EXHIBIT A


EXHIBIT A
SPACE AGE PERFORMANCE
DIESEL FUEL SAVER
TK7
SUPER OCTANE BOOSTER
TK7
TWO STROKE SUPER BOOSTER
TK7
GAS SAVER & CONDITIONER
TK7
SUPER BOOSTER
TK7
TK7
00075


THE TK-7 SECRET
K-7 Corporation has developed a remarkable formula of organic compounds which release additional oxygen at engine temperatures to increase power and improve engine performance while decreasing fuel consumption. The residue from burning TK-7 products form a type of synthetic lubricant providing cylinder lubrication for your engine which results in reduced friction, protects spark plugs from fouling and prevents carbon build-up on valves and valve seats. TK-7's superior formula protects the system from corrosion and acts as an anti-gel.
TK-7 Products contain no lead.
TK-7
Super Octane
Booster
Power Formula — Anti-knock and cylinder lubrication for high compression engines, super charged and gasoline engines with detonation problems or "low power" engines. engine head temperatures.
oz. bottle treats 20-30 gallons of Leaded or unleaded. Contains no lead. Will not harm catalytic converter.
Order No. 3835-21
TK-7
Gas Saver &
Conditioner
Increase M.P.G. — Top cylinder lubricant recommended for average gasoline engines (4,6,8 cylinder) Improves performance, easier staring, faster acceleration response. Reduces engine "Dieseling".
oz. container treats 20 gallons of gasoline. Leaded or unleaded. Contains no lead. Will not harm catalytic converter.
Order No. 3835-22
TK-7
Diesel Fuel
Saver
Increase M.P.G., cetane booster. Special formula designed for diesel engines. cylinder lubrication, protects fuel injection systems and fuel pump from corrosion. Eliminates "fungus" in the fuel and protects the fuel from gelling. Recommended for diesel automobiles, trucks, agricultural equipment and commercial vehicles.
0 oz. container treats 20-40 gallons.
Order No. 3835-23


TK-7 The only fuel additive for your engine!
The only fuel additive to give your engine and fuel system a combination of 7 ways of assistance to improve performance.
1. Octane Booster — Anti-knock
2. Increases Power
3. Friction Reducer — Top cylinder lubrication
4. Increases M.P.G.
5. Anti-gel/dry gas
6. Fuel system cleaner
7. Corrosion reducer
Long neck container for easy use, no funnel neccessary.
TK-7 Two-Stroke Super Booster
Special formula increases power. Catalyst to improve blending gasoline with synthetic lubricant. Increases power. Easy starting. Smoother engine operation at higher R.P.M. Provides additional lubrication. Reduces head temperatures. Protects against spark plug fouling. Contains no lead.
Designed for all 2-stroke engines.
oz. container treats 5-20 gallons.
TWO STROKE SUPER BOOSTER
TK-7
Order No. 8835-24
TK-7 Motorcycle Super Booster
More horsepower — lower head temperature. Specially designed for four-stroke motorcycle engines for top cylinder lubrication, smoother idle, faster acceleration response, increased octance, reduces spark plug fouling, increases M.P.G.
oz. bottle treats 5-20 gallons. Contains no lead.
MOTORCYCLE (4 CYCLE) SUPER BOOSTER
TK-7
Order No. 3835-25
TK-7 Turbo Charger Octane Booster
Top cylinder lubrication. Increases power. Designed for turbo charged, high compression engines to improve engine performance while protecting cylinder components from friction and wear. Protects fuel generation system from corrosion build-up and reduces detonation. Keeps plugs and valve seats cleaner. Contains no lead.
oz. container treats 20-30 gallons.
NEW! AVAILABLE SUMMER '85
TURBO CHARGER OCTANE BOOSTER
TK-7
Order No. 8835-26

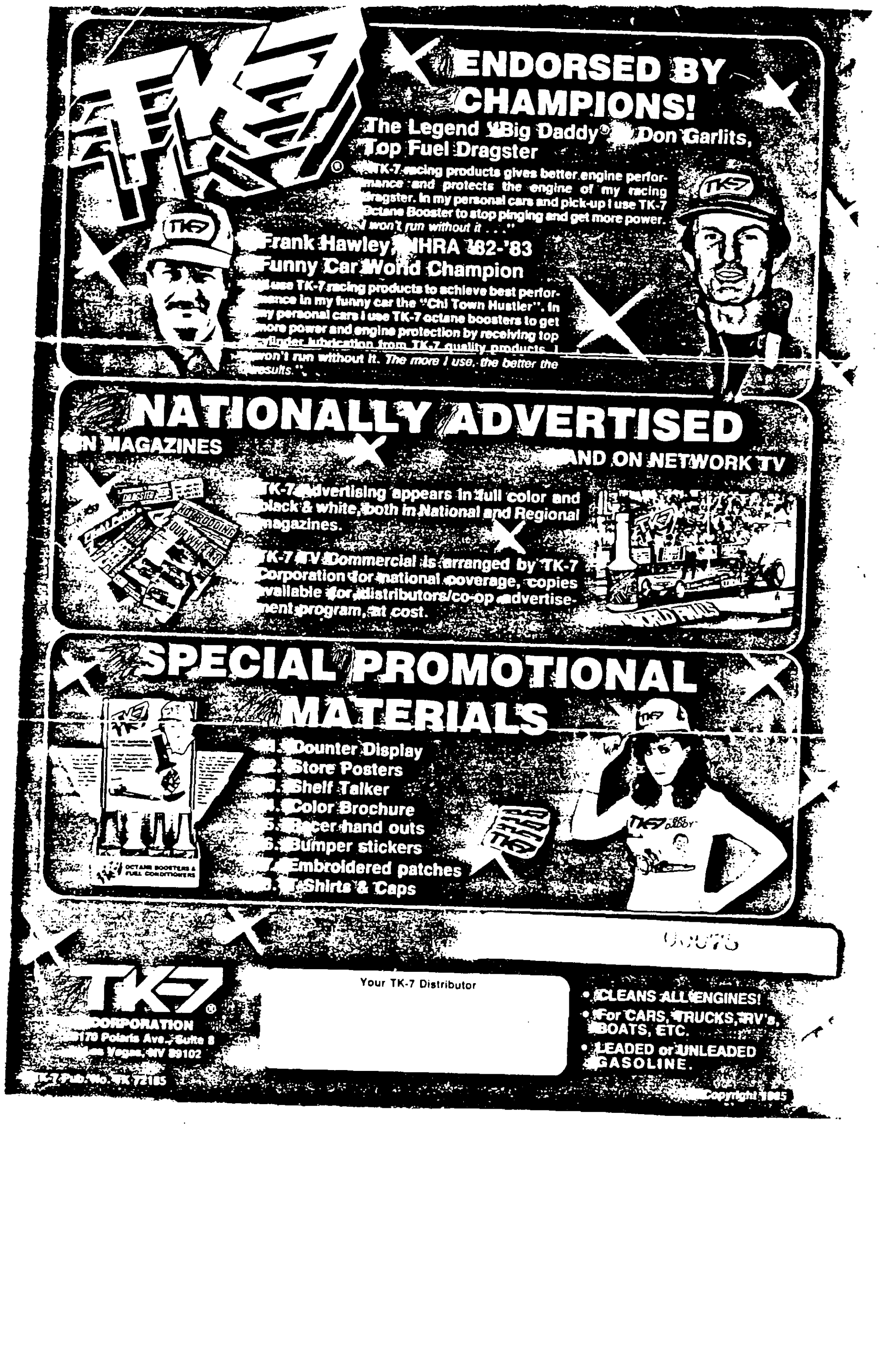
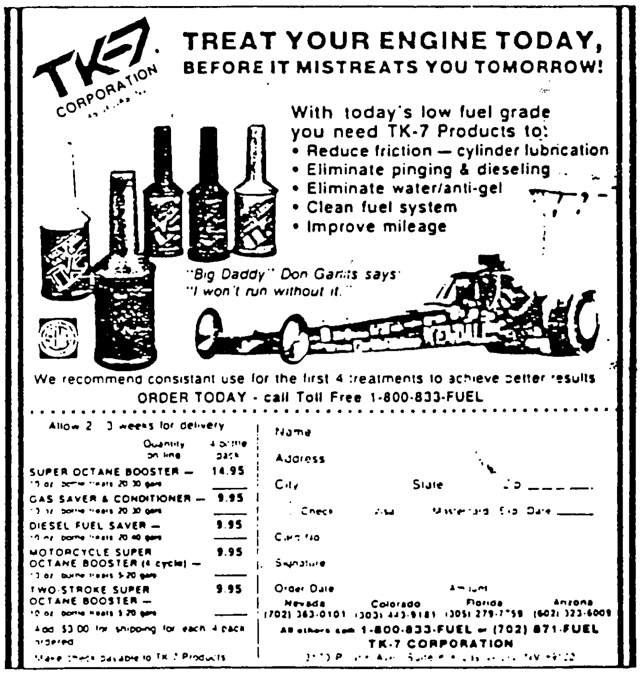

ENDORSED BY CHAMPIONS!
The Legend "Big Daddy" Don Garlits, Top Fuel Dragster
TK-7 racing products gives better engine performance and protects the engine of my racing dragster. In my personal cars and pick-up I use TK-7 Octane Booster to stop pinging and get more power. I won't run without it . . ."
Frank Hawley, NHRA '82-'83 Funny Car World Champion
use TK-7 racing products to achieve best performance in my funny car the "Chi Town Hustler". In my personal cars I use TK-7 octane boosters to get more power and engine protection by receiving top cylinder lubrication from TK-7 quality products. I won't run without it. The more I use, the better the results."
NATIONALLY ADVERTISED
IN MAGAZINES
AND ON NETWORK TV
TK-7 Advertising appears in full color and black & white, both in National and Regional magazines.
TK-7 TV Commercial is arranged by TK-7 Corporation for national coverage, copies available for distributors/co-op advertisement program, at cost.
SPECIAL PROMOTIONAL MATERIALS
1. Counter Display
2. Store Posters
3. Shelf Talker
4. Color Brochure
5. Racer hand outs
6. Bumper stickers
7. Embroidered patches
8. T-Shirts & Caps
TK-7 CORPORATION
Your TK-7 Distributor
CLEANS ALL ENGINES!
For CARS, TRUCKS, RV's, BOATS, ETC.
LEADED or UNLEADED GASOLINE.
Copyright 1985

EXHIBIT B

IN REFERANCE TO 4A & 6A

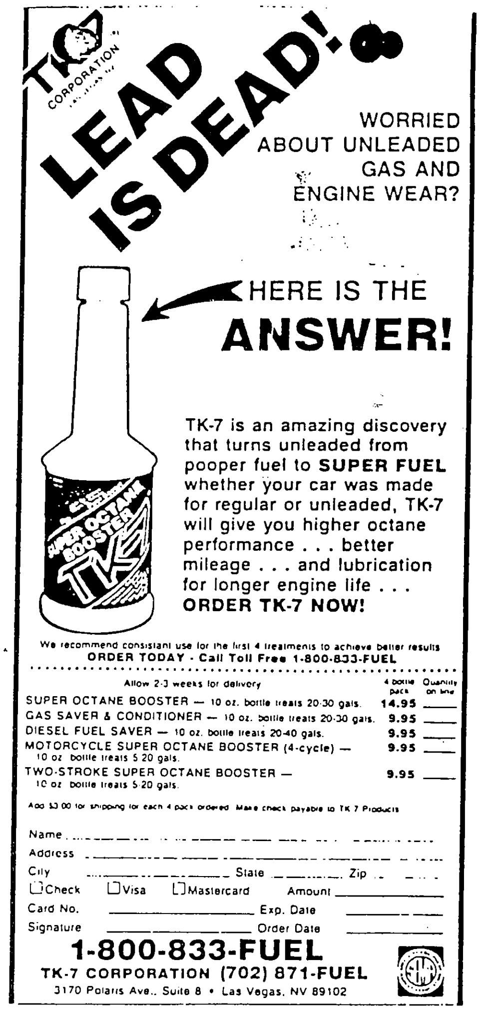
CAR CRAFT - MAY 1985 ISSUE



11

00008

EXHIBIT C



"NATIONAL DRAGSTER" - MARCH, APRIL, AND MAY ISSUES

EXHIBIT C

12

00009

EXHIBIT D

EXHIBIT D

February 1985 "FLIGHT PATHS"

00010 13

Decision and Order

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents 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 complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter 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 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent TK-7 Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada with its office and principal place of business located at 200 Third Street, S.E., in the City of Oklahoma City, State of Oklahoma.

Respondent Moshe Tal is the President of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

2. 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 respondent TK-7 Corporation, a corporation; its successors and assigns, and its officers, and Moshe Tal, individually and as an officer of the corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the production, labeling, advertising, offering for sale, sale or distribution of any fuel additive or engine additive ("additive") in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, concerning the performance or efficacy of the additive, including, but not limited to, representations

A. That the additive provides top cylinder lubrication, reduces engine friction, and extends engine life;

B. That the additive lowers engine operating temperatures;

C. That the additive protects spark plugs from fouling and prevents carbon build-up;

D. That the additive increases engine power;

E. That the additive boosts fuel octane levels; and

F. That the additive increases gasoline mileage

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; provided, however, that for purposes of this provision, to the extent such evidence consists of any test, analysis, research, study, or other evidence based on the expertise of professionals in the relevant area, such evidence shall be "competent and reliable" only if the test, analysis, research, study, or other evidence was conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

II.

It is further ordered, That for three (3) years from the date that the representation to which they pertain is last disseminated, respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials relied upon to substantiate any representation covered by this order; and

B. All test reports, studies, surveys or other materials in their possession or control that contradict, qualify or call into question such representation or the basis upon which respondents relied for such representation, including complaints from consumers.

III.

It is further ordered, That respondent TK-7 Corporation shall distribute a copy of this order to each of its subsidiaries and divisions and to all present and future agents, representatives and employees having responsibility for advertising, production, packaging, quality control or corporate policy with respect to the subject matter of this order; shall secure from each such person a signed and dated statement acknowledging receipt of the order; and, shall maintain such statement for three (3) years after the end of such person's employment by respondents.

IV.

It is further ordered, That respondent Moshe Tal shall promptly notify the Commission of the discontinuance of his present business or employment and for a period of ten (10) years from the date of service of this order, respondent shall promptly notify the Commission of each affiliation with a new business or employment, each such notice to include respondent's new business address and a statement of the nature of the business or employment in which respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment.

V.

It is further ordered, That respondent TK-7 Corporation and its successors and assigns shall notify the Commission at least thirty (30) days prior to any proposed change to itself, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change which may affect compliance obligations arising out of this order.

VI.

It is further ordered, That respondents and their successors and assigns shall, within sixty (60) days after service of this order upon them, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

STRAWBRIDGE & CLOTHIER, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3332. Complaint, June 13, 1991—Decision, June 13, 1991

This consent order requires, among other things, a Pennsylvania company to provide appropriate origin and textile fiber product disclosures, under the Textile Fiber Products Identification Act, in textile mail order promotional materials and catalogs.

Appearances

For the Commission: *Robert E. Easton.*

For the respondent: *Stephen Paul Mahinka, Morgan, Lewis & Bockius,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Strawbridge & Clothier, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of the Federal Trade Commission Act and of the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby alleges:

PARAGRAPH 1. Respondent Strawbridge & Clothier, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania with its office and principal place of business located at 801 Market Street, Philadelphia, Pennsylvania.

PAR. 2. Respondent is now, and for some time past has been, engaged, by means of mail order catalogs, in the advertising, offering for sale, sale and distribution of a variety of products in or affecting commerce, including textile wearing apparel and other textile fiber products.

PAR. 3. In September 1984 Congress amended the Textile Fiber Products Identification Act (15 U.S.C. 70) (hereafter referred to as the Textile Act) to require that catalogs and other mail order promotional material disclose whether textile fiber products offered for sale are imported or domestically produced or both. The amendment states:

Misbranding and False Advertising of Textile Fiber Products

(i) For the purposes of this Act, a textile fiber product shall be considered to be falsely or deceptively advertised in any mail order catalog or mail order promotional material which is used in the direct sale or direct offering for sale of such textile fiber product, unless such textile fiber product description states in a clear and conspicuous manner that such textile fiber product is processed or manufactured in the United States of America, or imported, or both. (15 U.S.C. 70b(i))

PAR. 4. The Commission, pursuant to authority under the Textile Act to make such rules and regulations as may be necessary and proper for the enforcement of the Textile Act (15 U.S.C. 70e), promulgated a rule effective April 17, 1985, relating to country of origin in mail order advertising. Rule 34 states:

When a textile fiber product is advertised in any mail order catalog or mail order promotional material, the description of such product shall contain a clear and conspicuous statement that the product was either made in U.S.A., imported, or both. Other words or phrases with the same meaning may be used. The statement of origin required by this section shall not be inconsistent with the origin labeling of the product being advertised. (16 CFR 303.34, as amended)

PAR. 5. Section 4(b) of the Textile Act requires that a label attached to an imported or domestic textile product contains disclosure of the constituent fibers by their generic names. Section 4(c) of the Textile Act states that if fiber content is mentioned or implied in a written advertisement, then the proper generic names as required under Section 4(b) of the Textile Act must be disclosed. Section 4(b) of the Textile Act reads, in part, as follows:

. . .a textile fiber product shall be misbranded if a stamp, tag, label, or other means of identification, or substitute therefore authorized by Section 5, is not on or affixed to the product showing in words and figures plainly legible, the following:

(1) The constituent fiber or combination of fibers in the textile fiber product, designating with equal prominence each natural or manufactured fiber in the textile fiber product by its generic names . . .

Section 4(c) of the Textile Act reads:

(c) For the purpose of this Act, a textile fiber product shall be considered to be falsely or deceptively advertised if any disclosure or implication of fiber content is made in any written advertisement which is used to aid, promote, or assist directly or indirectly in the sale or offering for sale of such textile fiber product, unless the same information as that required to be shown on the stamp, tag, label, or other identification under Section 4(b) (1) and (2) is contained in the heading, body, or other part of such written advertisement, except that the percentages of the fiber present in the textile fiber product need not be stated. (15 U.S.C. 70b(c)).

PAR. 6. The Commission, pursuant to authority under the Textile Act to make such rules and regulations as may be necessary and proper for the enforcement of the Textile Act (15 U.S.C. 70e), promulgated Rules 41 and 42 relating to fiber content disclosures in advertising. Rules 41 and 42 read:

Rule 41—Use of Fiber Trademarks and Generic Names in Advertising.

(a) In advertising textile fiber products, the use of a fiber trademark shall require a full disclosure of the fiber content information required by the Act and Regulations in at least one instance in the advertisement.

(b) Where a fiber trademark is used in advertising textile fiber products containing more than one fiber, other than permissible ornamentation, such fiber trademark and the generic name of the fiber must appear in the required fiber content information in immediate proximity and conjunction with each other in plainly legible type or lettering of equal size and conspicuousness.

(c) Where a fiber trademark is used in advertising textile fiber products containing only one fiber, other than permissive ornamentation, such fiber trademark and the generic name of the fiber must appear in immediate proximity and conjunction with each other in plainly legible and conspicuous type or letter at least once in the advertisement.

Rule 42 - Arrangement of Information in Advertising Textile Fiber Products.

(a) Where a textile fiber product is advertised in such manner as to require disclosure of the information required by the Act and Regulations, all parts of the required information shall be stated in immediate conjunction with each other in legible and conspicuous type or lettering of equal size and prominence. In making the required disclosure of the fiber content of the product, the generic names of fibers present in an amount five percentum or more of the total fiber weight of the product together with any fibers disclosed in accordance with Rule 3(b) shall appear in order of predominance by weight, to be followed by the designation other fiber or other fibers if a fiber or fibers required to be so designated be present. [16 CFR 303.42, as amended, effective December 13, 1965.]

PAR. 7. Pursuant to Section 3(f) of the Textile Act, 15 U.S.C. 70(a), violation of that Act and the Federal Trade Commission rules issued thereunder is an unfair method of competition and an unfair and deceptive act or practice under the Federal Trade Commission Act.

PAR. 8. Respondent's aforesaid textile fiber products have been advertised or offered for sale in mail order catalogs or mail order promotional material without a clear and conspicuous statement that the products are processed or manufactured in the United States of America, or imported, or both.

PAR. 9. Respondent's aforesaid textile fiber products have been advertised or offered for sale in mail order catalogs or mail order promotional materials in which fiber content is mentioned or implied in a written advertisements, but the proper generic names were not disclosed.

PAR. 10. Respondent's sale, offering for sale and advertising of textile fiber products in or affecting commerce were, and are, in violation of the Textile Act and the Federal Trade Commission rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint 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 Textile Fiber Products Identification Act; and

The respondent, its 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 respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, 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 Strawbridge & Clothier, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania with its office and principal place of business presently located at 801 Market Street, Philadelphia, Pennsylvania.

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

It is ordered, That respondent Strawbridge & Clothier, Inc., a corporation, its successors and assigns, trading under its own name or as Strawbridge & Clothier or under any other name or names, and its officers, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale or sale by mail order catalog or mail order promotional material of any textile fiber product as that term is defined in the Textile Fiber Products Identification Act (15 U.S.C. 70) do forthwith cease and desist from:

1. Offering for sale, selling or advertising any such textile fiber product in any mail order catalog or mail order promotional material which is used in the direct sale or direct offering for sale of any such textile fiber product, without stating in the description of such textile fiber product in a clear and conspicuous manner that such textile fiber product is processed or manufactured in the United States of America, or imported, or both; and

2. Offering for sale, selling or advertising any such textile fiber product in any mail order catalog or mail order promotional material which is used in the direct sale or direct offering for sale of any such textile fiber product, and which contains any written advertisement that mentions or implies fiber content but fails to use the proper generic fiber names in a manner consistent with the Textile Act and the rules and regulations thereunder.

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

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

BOISE CASCADE CORPORATION

MODIFIED FINAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 2 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9133. Final Order, Feb. 11, 1986—Modified Final Order, June 20, 1991*

This modified final order prohibits the Idaho-based distributor of office products from knowingly inducing, receiving, or accepting wholesale discounts on such products that Boise resells to end-users in the future. The Commission's original order prohibited the respondent from knowingly receiving prices discriminatorily lower than those available to its competitors in the sale of office products to end-users.

Appearances

For the Commission: *Chris M. Couillou.*

For the respondent: *Victor E. Grimm, Bell, Boyd & Lloyd,* Chicago, IL.

MODIFIED FINAL ORDER

Boise Cascade Corporation having filed in the United States Court of Appeals for the District of Columbia Circuit a petition for review of the order to cease and desist issued herein on February 11, 1986, 107 FTC 76, 224, and reissued on November 1, 1990, and the Commission having before it a proposal of Boise Cascade to terminate the proceeding for judicial review upon the Commission's entry of the following modified order, and the Commission having determined to accept the proposal, and having the authority to modify its order by virtue of the fact that the record in the proceeding has not been filed with the Court of Appeals (*see* 15 U.S.C. 21(b) and Commission Rule 3.72(a)); accordingly,

It is ordered, That the cease and desist order entered in this matter be modified to read as follows:

I.

The following definitions shall apply in this order:

*Complaint, Final Order, etc. previously published at 107 FTC 76 (1986).

A. "*Boise Cascade*" shall mean Boise Cascade Corporation, its divisions and subsidiaries, its officers, directors, agents and employees, and its successors and assigns.

B. "*Office Products*" shall mean furniture and supplies commonly used in offices such as those which are sold or distributed by Boise Cascade Corporation's Office Products Division.

C. "*Wholesaler*" is a firm that regularly purchases Office Products for resale to another firm that sells such products to end-users.

D. "*Wholesale Discount*" is any discount, rebate, allowance or deduction or term or condition of sale (however characterized) provided by sellers of Office Products to wholesalers by reason of their status as wholesalers.

II.

It is further ordered, That Boise Cascade shall, in connection with the offering to purchase or purchasing in commerce, as "commerce" is defined in the Clayton Act, of Office Products for resale, cease and desist from knowingly inducing, receiving or accepting, directly or indirectly, from any seller a wholesale discount if the product on which such discount is received is resold by Boise Cascade to an end-user.

III.

It is further ordered, That Boise Cascade shall, within sixty (60) days of the effective date of this order, distribute a copy of this order to each of its suppliers of Office Products.

IV.

It is further ordered, That Boise Cascade shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate structure of Boise Cascade, such as the creation or dissolution of subsidiaries or divisions, or any other change in the corporation, which may affect compliance obligations arising out of the order.

V.

It is further ordered, That Boise Cascade shall, within ninety (90) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner in which it has complied with this order and shall file such other reports as the Commission may from time to time require to assure compliance with the terms and conditions of this order.

Commissioner Azcuenaga dissenting and Commissioner Owen not participating.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission today decides to accept an order proposed by Boise Cascade Corporation in settlement of this matter. The order proposed by Boise is at once more narrow and more broad than the order entered by the Commission following adjudication on the merits.[1] Neither change is in the public interest.

The compromise order is considerably more narrow than the adjudicated order, because it prohibits Boise only from accepting wholesale prices, not discriminatory prices, on goods resold to end users. Boise will remain free to use its buying power to negotiate any discriminatorily lower price that does not fit the definition of wholesale contained in the order. In view of the Commission's unanimous finding of liability for "endemic" practices and the theory of injury in the case (Boise's receipt of discriminatory prices, of which wholesale discounts were an example, *see* Complaint ¶ 4, 107 FTC at 77), I see no compelling reason to concede that the adjudicated order is overbroad. I see even less reason to abandon the gravamen of the relief that was anticipated at the outset of the case and that was imposed after a full adjudication and full consideration by the Commission of the terms of the order. 107 FTC at 223.[2]

The compromise order also is more broad than the adjudicated order and, indeed, the Robinson-Patman Act, because it omits any reference to two elements essential to a violation: a discriminatory price and competition with disfavored purchasers. As I understand it, Boise's receipt of a wholesale price on goods resold to end users would violate the compromise order even if Boise's only competitors are others of the "Big 5" wholesalers that paid the same price. This is a perverse result.

[1] The adjudicated order of the Commission prohibits Boise from receiving a net price lower than that paid by distributors with which Boise competes for sales to end users. The order proposed by Boise ("compromise order") prohibits the receipt of wholesale discounts on products that Boise resells to end users.

[2] The Commission, describing the order as "unremarkable," nevertheless modified the order to "eliminate the suggestion of overbreadth" by making explicit that it applied only to office products resold by Boise to end users.

Accepting the compromise order at this stage of the proceeding, when Boise's appeal from the Commission's adjudicated order and opinion on remand in pending, also fails to serve the public interest by leaving the applicable legal standards in a state of confusion and disarray. This might be acceptable, if the compromise order were consistent with the public interest. Unfortunately, the only interest served here is expediency. I dissent.

IN THE MATTER OF

CHAIN PHARMACY ASSOCIATION OF NEW YORK STATE, INC.

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

Docket 9227. Complaint, April 19, 1989—Decision, June 20, 1991

This consent order prohibits, among other things, the pharmaceutical association from organizing or entering into any agreement among pharmacy firms to withdraw from or refuse to enter into a third-party payer prescription drug plan; for ten years, from continuing any meeting of representatives of pharmacy firms at which any person makes any statement concerning whether any firm will enter into or refuse to enter into any third-party payer prescription drug plan; and for eight years, from providing comments or advice to any pharmacist or pharmacy firm on the desirability or appropriateness of entering into or refusing to enter into any third-party payer prescription drug plan.

Appearances

For the Commission: *Karen G. Bokat* and *Michael D. McNeely.*

For the respondent: *Michael E. Rosen,* Valatie, N.Y. and *Willard K. Tom, Sutherland, Asbill & Brennan,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Chain Pharmacy Association of New York State, Inc.; Melville Corporation; Fay's Drug Company, Inc.; Kinney Drugs, Inc.; Peterson Drug Company of North Chili, New York, Inc.; Rite Aid Corporation; and James E. Krahulec have violated the provisions of said Act, 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:

PARAGRAPH 1. Respondent Chain Pharmacy Association of New York State, Inc. ("Chain Association") is a corporation organized, existing and doing business under and by virtue of the laws of the

State of New York, with its principal office located at 17 Elk Street, Albany, New York.

PAR. 2. Respondent Chain Association is an association composed of the following individual member firms: Brooks Drug, Inc., 75 Sabin St., Pawtucket, RI; Carl's Drug Co., Success Drive, Box 203, Rome, NY; CVS, One CVS Drive, Woonsocket, RI; Duane Reade, 4929 Thirtieth Place, Long Island City, NY; Fay's Drug Co., 7245 Henry Clay Blvd., Liverpool, NY; Genovese Drug Stores, 80 Marcus Dr., Melville, NY; Kinney Drugs, Inc., 29 Main St., Gouverneur, NY; The Kroger Co., 1014 Vine St., Cincinnati, OH; Peterson Drug Co., 68 Main St., P.O. Box 166, Oakfield, NY; Revco D.S., Inc., 1925 Enterprise Parkway, Twinsburg, OH; Rite Aid Corp., P.O. Box 3165, Harrisburg, PA; Supermarkets General Corp., 301 Blair Rd., Woodbridge, NJ; Super X Drugs Corp., 1933 Victory Blvd., Staten Island, NY; Walgreen Co., 200 Wilmont Rd., Deerfield, IL. Chain Association's members are engaged in the business of the retail sale of prescription drugs.

PAR. 3. Respondent Fay's Drug Company, Inc. ("Fay's") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal offices located at 7245 Henry Clay Boulevard, Liverpool, New York. In 1986, the retail sale of prescription drugs accounted for a significant portion of the sales of the 110 to 120 pharmacies that respondent Fay's operated in New York State.

PAR. 4. Respondent Kinney Drugs, Inc. ("Kinney") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal offices located at 29 Main Street, Gouverneur, New York. The retail sale of prescription drugs accounts for a significant portion of the sales of the approximately 23 pharmacies that respondent Kinney operates in New York State.

PAR. 5. Respondent Melville Corporation ("Melville") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal offices located at 3000 Westchester Ave., Harrison, New York. CVS (a/k/a CVS Pharmacies or Consumer Value Stores), with principal offices located at One CVS Drive, Woonsocket, Rhode Island, is a division of Melville. In 1986, the retail sale of prescription drugs accounted for a significant portion of sales of the approximately 115 pharmacies that respondent Melville operated under the CVS name in New York State.

PAR. 6. Respondent Peterson Drug Company of North Chili, New

York, Inc. ("Peterson") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal offices located at 68 North Main Street, Oakfield, New York. The retail sale of prescription drugs accounts for a significant portion of the sales of the approximately 18 pharmacies that respondent Peterson operates in New York State.

PAR. 7. Respondent Rite Aid Corporation ("Rite Aid") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal offices located at Railroad Ave. and Trindle Road, Shiremanstown, Pennsylvania. In 1986, the retail sale of prescription drugs accounted for a significant portion of the sales of the approximately 260 pharmacies that respondent Rite Aid operated in New York State.

PAR. 8. Respondent James E. Krahulec is an individual and was employed by respondent Rite Aid as Vice-President, Government and Trade Relations in 1986 in respondent Rite Aid's principal offices at Railroad Ave. and Trindle Road, Shiremanstown, Pennsylvania.

PAR. 9. Except to the extent that competition has been restrained as alleged herein, members of respondent Chain Association have been and now are in competition among themselves and with other pharmacy firms and other health care providers in the state of New York.

PAR. 10. Respondents' general businesses or activities, and the acts and practices described below, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, 15 U.S.C. 45.

PAR. 11. Respondent Chain Association is, and has been at all times relevant to this complaint, 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. 12. Customers often receive prescriptions through health benefit programs under which a third-party payer compensates the pharmacy for the prescription according to a predetermined formula. The New York State Employees Prescription Program is a prescription drug benefit plan made available by the State of New York to its employees, its retirees, certain other persons, and their dependents. There were approximately 500,000 beneficiaries covered by the Employees Prescription Program in 1986. Since July 1, 1986, the Equitable Life Assurance Society of the United States has insured the Employees Prescription Program, and PAID Prescriptions, Inc., a wholly-owned subsidiary of Medco Containment Services, Inc., has administered it.

PAR. 13. Pharmacies are solicited to participate in the Employees Prescription Program. Pharmacies that participate in the Employees Prescription Program accept as payment in full a reimbursement of the ingredient cost of the drug and a professional fee for dispensing the drug. The Employees Prescription Program provides a formula for determining the reimbursement of the ingredient cost of drugs dispensed.

PAR. 14. Absent collusion between or among pharmacy firms, each pharmacy firm would decide independently whether to participate in the Employees Prescription Program, and the State of New York would enjoy the benefits of competition among pharmacy firms.

PAR. 15. In May 1986, PAID Prescriptions, Inc. formally solicited pharmacy participation in the Employees Prescription Program under terms to become effective on July 1, 1986. Among the proposed terms were changes in the reimbursement level for ingredient costs, an increase in the professional fee, and the offer of additional reimbursement for the use of generic drugs. The proposed terms were intended to reduce the price the State paid for the Employees Prescription Program, and thus minimize costs, and yet to offer reimbursement high enough to attract a sufficient number of participating pharmacies to ensure that Employees Prescription Program beneficiaries would have adequate access to medication.

PAR. 16. In 1986, respondents Melville, Fay's, Kinney, Peterson, and Rite Aid ("respondent pharmacy firms") participated in many prescription drug benefit plans offered by third-party payers, including the Employees Prescription Program as it existed prior to July 1. Each respondent pharmacy firm purchased prescription drugs at a cost which on average was below the Employees Prescription Program's proposed level of reimbursement for ingredient costs. Each respondent pharmacy firm would have suffered a significant loss of customers had its competitors participated in the Employees Prescription Program at a time when it was not participating.

PAR. 17. Even before PAID formally solicited pharmacy participation in the Employees Prescription Program, New York State began to inform pharmacists' associations of the proposed terms. In or before March 1986, respondent Chain Association became aware of the proposed terms of the Employees Prescription Program, and, in response, communicated to members that the extent to which pharmacies participated in the Employees Prescription Program could affect state officials' consideration of the reimbursement level. Respondent Chain Association held meetings at which some respondent pharmacy firms informed other pharmacy firms that they would not participate in the proposed Employees Prescription Program. Respondent pharmacy firms communicated information regarding their own intentions concerning participation in the Employees Prescription Program to other pharmacy firms. Respondent Chain Association and respondent Krahulec communicated, to Chain Association members and other pharmacy firms, information regarding the intentions of Chain Association members and other pharmacy firms concerning participation in the Employees Prescription Program. Through these exchanges of information and other acts, and through the activities of respondent Chain Association and respondent Krahulec, respondent pharmacy firms and other pharmacy firms agreed to refuse to participate in the Employees Prescription Program at the proposed reimbursement level, for the purpose of increasing the level of reimbursement offered by the State of New York under the Employees Prescription Program.

PAR. 18. Respondents have restrained competition among pharmacy firms by conspiring among themselves and others, or by acting as a combination, to increase the price paid to participating pharmacies under the Employees Prescription Program and to deny to the State the benefits of competition.

PAR. 19. The combination or conspiracy and the acts and practices described above have unreasonably restrained and continue unreasonably to restrain competition among pharmacists and pharmacies in New York, and have injured consumers in the following ways, among others:

A. Price competition among pharmacy firms with respect to third-party prescription benefit plans has been and continues to be reduced;

B. The State of New York was coerced into raising the prices paid to pharmacies under the Employees Prescription Program; and,

C. The State of New York has been and continues to be forced to pay substantial additional sums for prescription drugs provided to Employees Prescription Program beneficiaries, including approximately seven million dollars for the eighteen-month period beginning on July 1, 1986.

PAR. 20. The combination or conspiracy and the acts described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The combination or conspiracy, or the effects thereof, are continuing, will continue, or will recur in the absence of the relief herein requested.

Commissioners Azcuenaga and Machol voted in the negative.

STATEMENT OF COMMISSIONER MARGOT E. MACHOL

The case as presented to the Commission was a very complex one, both factually and legally. It alleged a conspiracy among the Chain Pharmacy Association, a number of drugstore chains operating in New York State, and an executive of one of the chains, to coerce the State into raising proposed prescription drug payments to pharmacies under its employee benefit program by threats of refusal to participate in that program.

Each of the pharmacies and pharmacy chains eligible to participate in the program, of course, was free to make its own decision on whether to agree to do so or to threaten to withhold participation. Liability, under the law we administer, would attach only to conspiracy or collusion in reaching such decisions.

Further, the *Noerr/Pennington* line of cases in the Supreme Court teaches us that even commercial enterprises may not be held accountable under the antitrust laws for conspiring or colluding to exercise their right to petition governments, a right protected under the First Amendment. Though this area of the law is itself complex, it is clear that many of the activities in which the parties engaged in this case were thus protected.

As to the activities alleged in this case which would not be protected by *Noerr,* the information we received clearly contained no "smoking gun" evidence of conspiracy. We could find the necessary "reason to believe" that a violation had occurred only on the basis of circumstantial evidence. But, in the *Matsushita/Monsanto* line of Supreme Court cases, we are taught that an inference of conspiracy must be supported by at least some significant evidence of activity which was logically consistent <u>only</u> with conspiracy. That is, if the activity of each member of an alleged conspiracy was wholly consistent with its pursuit of its unilateral self-interest, that inference must fail.

In my view, the inference in this case—on the information available to support issuance of a complaint—fails for that reason. I believe—again on this information—that it was in the independent interest of each chain pharmacy to threaten to refuse to participate in the program unless prices were raised, because, if the threat had failed to achieve a price increase, the pharmacy could then have reversed itself and participated. The costs of such a strategy were very limited; the potential gains were very large.

It seems clear that the parties to the alleged conspiracy exchanged a good deal of information. It seems very doubtful that it can be established that they conspired with respect to their decisions to threaten non-participation, however, because they did not need to. Their conversations appear to me to have taken place in the context of protected lobbying activity; their actions seem to have been entirely consistent with their individual economic self-interest; and there simply was not sufficient evidence from which I could find reason to believe in the existence of an unlawful conspiracy.[1]

Decision and Order

The Commission having heretofore issued its complaint charging the respondent Chain Pharmacy Association of New York State, Inc. with a violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of the contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

[1] Should I have occasion to review this matter following a proceeding before an administrative law judge, I will of course reconsider the factual issues presented solely on the basis of the adjudicative record.

1. Respondent Chain Pharmacy Association of New York State, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 28 Fairway Lane, in the City of Schenectady, State of New York.

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.

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

A. "*Chain Association*" means the Chain Pharmacy Association of New York, Inc., and its directors, committees, officers, representatives, agents, employees, successors and assigns;

B. "*Third-party payer*" means any person or entity that provides a program or plan pursuant to which such a person or entity agrees to pay for prescriptions dispensed by pharmacies to individuals described in such plan or program as eligible for such coverage ("Covered Persons"), and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Cross and Blue Shield plans; health maintenance organizations; preferred provider organizations; prescription service administrative organizations; and any of the above which contract with the State of New York or other governmental units to provide health benefits programs for government employees, retirees and dependents;

C. "*Participation agreement*" means any existing or proposed agreement, oral or written, in which a third-party payer agrees to reimburse a pharmacy for the dispensing of prescription drugs to Covered Persons, and the pharmacy agrees to accept such payment from the third-party payer for such prescriptions dispensed during the term of the agreement;

D. "*Pharmacy firm*" means any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, that owns, controls or operates one or more pharmacies, including the directors, officers, employees, and agents, of such partnership, sole proprietorship or corporation as well as the directors, officers, employees, and agents of such partnership's, sole proprietorship's or corporation's subsidiaries, affiliates, divisions and joint ventures. The words "subsidiary", "affiliate", and "joint venture" refer to any firm in which there is partial (10% or more) or total ownership or control between corporations.

II.

It is ordered, That Chain Association, directly, indirectly, or through any corporate or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Entering into, threatening or attempting to enter into, organizing, encouraging, continuing, cooperating in, or carrying out any agreement between or among pharmacy firms, either express or implied, to withdraw from, threaten to withdraw from, refuse to enter into, or threaten to refuse to enter into, any participation agreement;

B. For a period of ten (10) years after the date this order becomes final, continuing a meeting of representatives of pharmacy firms at which any person makes any statement concerning one or more firms' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement;

C. For a period of ten (10) years after the date this order becomes final, communicating to any pharmacist or pharmacy firm any information concerning any other pharmacy firm's intention or decision with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement;

D. For a period of eight (8) years after the date this order becomes final, providing comments or advice to any pharmacist or pharmacy firm on the desirability or appropriateness of participating in any existing or proposed participation agreement. However, nothing in this paragraph shall prohibit Chain Association from communicating purely factual information describing the terms and conditions of any participation agreement or operations of any third-party payers; and

Provided that nothing in this order shall be construed to prevent

Chain Association from exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body, concerning legislation, rules, programs or procedures, or to participate in any federal or state administrative or judicial proceeding.

III.

It is further ordered, That Chain Association:

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

B. Publish this order and the accompanying complaint in an issue of the Chain Association newsletter or in any successor publication published no later than sixty (60) days after the date this order becomes final, in the same type size normally used for articles that are published in the Chain Association Newsletter or successor publication;

C. For a period of five (5) years after the date this order becomes final, provide each new Chain Association member with a copy of this order at the time the member is accepted into membership;

D. File a verified, written report with the Commission within ninety (90) days after the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may, by written notice to Chain Association, require, setting forth in detail the manner and form in which it has complied and is complying with the order;

E. For a period of five (5) years after the date this order becomes final, maintain and make available to Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Parts II and III of this order, including, but not limited to, all documents generated by Chain Association or that come into Chain Association's possession, custody, or control regardless of source, that embody, discuss or refer to the terms or conditions of any participation agreement; and

F. Notify the Commission at least thirty (30) days prior to any proposed change in Chain Association such as, assignment or sale resulting in the emergence of a successor corporation or association, change of name, change of address, dissolution, or any other change that may affect compliance with this order.

Commissioner Azcuenaga dissenting.

IN THE MATTER OF

RICHARD B. PALLACK, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE WOOL PRODUCTS LABELING ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket C-3333. Complaint, June 24, 1991—Decision, June 24, 1991

This consent order prohibits, among other things, a California retailer of men's clothing and accessories, and an officer of the corporation, from importing, transporting, distributing, delivering, or selling wool products that are misbranded; from removing or mutilating any stamp, tag, label or other identification required by the Wool Products Labeling Act, prior to the time the wool product is sold/delivered; and from misrepresenting the country of origin of such products. In addition, the respondents are required to distribute a copy of the order to all present and future personnel.

Appearances

For the Commission: *Paul R. Roark.*

For the respondents: *Ralph F. Hirschmann, Hennigan and Mercer,* Los Angeles, CA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and the Wool Products Labeling Act of 1939, 15 U.S.C. 68 *et seq.*, (hereinafter "Wool Act") and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Richard B. Pallack, Inc., a corporation, and Richard B. Pallack, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, 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 in that respect as follows:

PARAGRAPH 1. Respondent Richard B. Pallack, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 4554 Sherman Oaks Avenue, Sherman Oaks, CA.

Respondent Richard B. Pallack is sole shareholder, President, Vice President, and Secretary of the corporate respondent named herein. He formulates, directs and controls the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. His office and principal place of business are the same as that of respondent Richard B. Pallack, Inc.

PAR. 2. Respondents are engaged in, among other things, the retail sale of wool products including, but not limited to, men's suits, sport coats, and other clothing and accessories that were imported into the United States.

PAR. 3. Respondents, now and for some time last past, have imported into commerce, introduced into commerce, transported, distributed, delivered for shipment, shipped, offered for sale, or sold in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 4. Certain of said wool products were misbranded in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Sections 4(a)(2)(D) and 4(f) of the Wool Act and the rules and regulations promulgated under said Act. Respondents have, therefore, violated Section 3 of the Wool Act.

Among such misbranded wool products, but not limited thereto, were men's suits, sport coats, and other clothing which, when offered for sale and sold by respondents, did not have on or affixed thereto, on the inside center of the neck or elsewhere, a stamp, tag, label, or other means of identification showing the name of the country where processed or manufactured.

PAR. 5. Respondents have also caused or participated in the removal or mutilation of stamps, tags, labels or other means of identifying the countries where wool products were processed or manufactured, with intent to violate the provisions of the Wool Act. Pursuant to Section 5(b) of the Wool Act, such removals and mutilations are unfair methods of competition, and unfair and deceptive acts or practices, in commerce within the meaning of the Federal Trade Commission Act.

PAR. 6. The acts and practices of respondents as set forth in paragraphs 4 and 5 were, and are, in violation of the Wool Act and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition, and unfair and deceptive acts or practices, in or affecting commerce, within the meaning of the Federal Trade Commission Act, as amended.

PAR. 7. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as merchandise sold by respondents.

PAR. 8. The acts and practices of respondents, as herein alleged, were and are to the prejudice and injury of the public and respondents' competitors. The acts and practices of respondents, as herein alleged, may recur in the absence of the relief herein requested.

DECISION AND ORDER

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

The respondents, their attorney, 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 Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, 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 Richard B. Pallack, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the

State of California, with its office and principal place of business located at 4554 Sherman Oaks Avenue, Sherman Oaks, CA.

Respondent Richard B. Pallack is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

2. 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 respondents Richard B. Pallack, Inc., a corporation, its successors and assigns, and its officers, and Richard B. Pallack, individually and an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or any other device, in connection with wool products, as "wool products" are defined in the Wool Products Labeling Act of 1939, as amended, (hereinafter "Wool Act") do forthwith cease and desist from importing or introducing into commerce, transporting, distributing, delivering for shipment, shipping, offering for sale, or selling in commerce, as "commerce" is defined in the Wool Act, wool products that are misbranded in that they:

A. Are falsely or deceptively stamped, tagged, labeled or otherwise identified;

B. Do not have securely affixed to, or placed on, each such product in the location, manner, and form required by the Wool Act, a stamp, tag, label or other means of identification correctly showing, in a clear and conspicuous manner, each element of information required to be disclosed by Section 4(a)(2) of the Wool Act.

II.

It is further ordered, That respondents Richard B. Pallack, Inc., a corporation, its successors and assigns, and its officers, and Richard B. Pallack, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or any other device, in connection with wool products, as "wool products" are defined in the Wool Act, do forthwith cease and desist from removing or mutilating, or causing or participating in the removal or mutilation of, any stamp, tag, label or other identification required by the Wool Act to be affixed to wool products, prior to the time any such wool product is sold and delivered to the ultimate consumer, without substituting therefor labels conforming to Section 4(a)(2) of the Wool Act.

III.

It is further ordered, That respondents Richard B. Pallack, Inc., a corporation, its successors and assigns, and its officers, and Richard B. Pallack, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the purchasing, advertising, offering for sale, sale and distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from misrepresenting in any manner, the country of origin of any such product.

IV.

It is further ordered, That respondents distribute a copy of this order to all present or future personnel, agents or representatives having sales, advertising, or policy responsibilities with respect to the subject matter of this order and that respondents secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That, whenever a stamp, tag, label or other form of identification which shows information required by the Wool Act is substituted or otherwise removed, respondents shall keep records for a period of three years sufficient to show the information set forth on the removed stamp, tag, label, or other form of identification, as well as the name or names of the person or persons from whom such product was received.

VI.

It is further ordered, That respondents shall, for a period of five (5) years after this order becomes final, maintain and, upon reasonable notice, make available to the Federal Trade Commission for inspection and copying all documents that relate to the manner and form in which respondents have complied with this order.

VII.

It is further ordered, That respondents shall, for a period of ten (10) years from the date of this order, notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in Richard B. Pallack, Inc., such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this order. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

VIII.

It is further ordered, That the individual respondent named herein shall, for a period of ten (10) years from the date of this order, promptly notify the Commission of the discontinuance of his present business or employment and of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

IX.

It is further ordered, That respondents shall, within sixty (60) days after the date of service of this order, submit a report, in writing, to the Federal Trade Commission setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

FAY'S INCORPORATED

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

Docket 9227. Complaint, April 19, 1989—Decision, June 25, 1991*

This consent order prohibits, among other things, a pharmaceutical firm from organizing or entering into any agreement among pharmacy firms to withdraw from or refuse to enter into a third-party payer prescription drug plan; for ten years, from stating or communicating to any pharmacy firm the intent to enter into or refuse to enter into any third-party payer prescription drug plan; and for eight years, from providing comments or advice to any pharmacist or pharmacy firm on the desirability or appropriateness of entering into or refusing to enter into any third-party payer prescription drug plan.

Appearances

For the Commission: *Karen G. Bokat* and *Michael D. McNeeley.*

For the respondent: *Paul J. Curtin, Jr., Law Offices of C. Daniel Shulman,* Syracuse, N.Y.

DECISION AND ORDER

The commission having heretofore issued its complaint charging the respondent Fay's Drug Company, Inc. with a violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of the contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the 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 Secretary of the Commission having thereafter withdrawn this

*Order amending complaint to reflect changed name of respondent issued August 17, 1990 (113 FTC 762). Complaint previously published at 114 FTC 327.

matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Fay's Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 7245 Henry Clay Boulevard, Liverpool, New York.

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.

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

A. "*Fay's*" means Fay's Incorporated, its directors, officers, agents, employees, divisions, subsidiaries, successors and assigns;

B. "*Third-party payer*" means any person or entity that provides a program or plan pursuant to which such a person or entity agrees to pay for prescriptions dispensed by pharmacies to individuals described in such plan or program as eligible for such coverage ("Covered Persons"), and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Cross and Blue Shield plans; health maintenance organizations; preferred provider organizations; prescription service administrative organizations; and health benefit programs for government employees, retirees or dependents;

C. "*Participation agreement*" means any existing or proposed agreement, oral or written, in which a third-party payer agrees to reimburse a pharmacy for the dispensing of prescription drugs to Covered Persons, and the pharmacy agrees to accept such payment from the third-party payer for such prescriptions dispensed during the term of the agreement;

D. "*Pharmacy firm*" means any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, that owns, controls or operates one or more pharmacies, including the directors, officers, employees, and agents of such partnership, sole proprietorship or corporation as well as the directors, officers, employees, and agents of such partnership's, sole proprietorship's or corporation's subsidiaries, affiliates, divisions and joint ventures, but excludes any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, which own, are owned by, control or are under common control with Fay's. The words "subsidiary", "affiliate", and "joint venture" refer to any firm in which there is partial (10% or more) or total ownership or control between corporations.

II.

It is ordered, That Fay's, directly, indirectly, or through any corporate or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Agreeing or combining, attempting to agree or combine, or taking any action in furtherance of any agreement or combination, advocating an agreement, or organizing or cooperating with any pharmacy firm(s) to (1) boycott, refuse to enter into, withdraw from, or not participate in, any participation agreement or (2) threaten to boycott, threaten to refuse to enter into, threaten to withdraw from, or threaten not to participate in, any participation agreement;

B. For a period of ten (10) years after the date this order becomes final, stating or communicating in any way to any pharmacy firm the intention or decision of Fay's with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement into which Fay's and the other pharmacy firm have entered, could enter or are considering entering;

C. For a period of eight (8) years after the date this order becomes final, advising any pharmacy firm with respect to entering into, refusing to enter into, participating in, or withdrawing from any existing or proposed participation agreement into which Fay's and the other pharmacy firm have entered, could enter or are considering entering.

Provided that, nothing in this order shall prevent Fay's from:

(1) Exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body concerning legislation, rules or procedures, or to participate in any federal or state administrative or judicial proceeding;

(2) Subcontracting, preparing joint bids, or otherwise jointly undertaking with pharmacy firms to provide prescription drug services under a participation agreement if requested to do so in writing by the third-party payer; or

(3) Communicating to the public truthful, nondeceptive statements concerning any existing or proposed participation agreement.

III.

It is further ordered, That Fay's:

A. Provide a copy of this order within thirty (30) days after the date this order becomes final to each officer, director, employee pharmacist who is employed in New York state, and each employee whose responsibilities include recommending or deciding whether to enter into any participation agreement, and each employee who regularly attends meetings on Fay's' behalf that include representatives of other pharmacies; and

B. For a period of five (5) years after the date this order becomes final, provide each new director and each employee who enters a position described in paragraph A a copy of the order within ten (10) days of the date the employee or director assumes the new position.

IV.

It is further ordered, That Fay's:

A. File a verified, written report with the Commission within ninety (90) days after the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may, by written notice to Fay's, require, setting forth in detail the manner and form in which it has complied and is complying with this order;

B. For a period of five (5) years after the date this order becomes final, maintain and make available to Commission staff for inspection and copying upon reasonable notice all documents generated by Fay's or that come into Fay's possession, custody, or control regardless of source, that embody, discuss or refer to the decision or upon which Fay's relies in deciding whether to enter into any participation agreement in which Fay's participates, has participated, or has considered participating; and

C. Notify the Commission at least thirty (30) days prior to any proposed change in Fay's such as assignment or sale resulting in the emergence of a successor corporation or association, change of name, change of address, dissolution, the creation, sale or dissolution of a subsidiary, or any other change that may affect compliance with this order.

Commissioner Azcuenaga dissenting.

IN THE MATTER OF

CANANDAIGUA WINE COMPANY

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

Docket C-3334. Complaint, June 26, 1991—Decision, June 26, 1991

This consent order prohibits, among other things, the maker of Cisco, a flavored wine product, from representing that Cisco is a low-alcohol product, from implying that a bottle of Cisco constitutes a single serving, and from displaying Cisco next to low-alcohol products like wine coolers. In addition, the consent order requires new packaging for the product.

Appearances

For the Commission: *Judith D. Wilkenfeld.*

For the respondent: *Ronald A. Block, McDermott, Will & Emery,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Canandaigua Wine Company ("respondent"), has violated Sections 5 and 12 of the Federal Trade Commission Act (15 U.S.C. 45 and 52), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Canandaigua Wine Company is a Delaware corporation with its office and principal place of business located at 116 Buffalo Street, Canandaigua, New York.

PAR. 2. Respondent has advertised, offered for sale, sold, and distributed fruit-flavored wine products with an alcohol content of 20% by volume to the public under the registered trademark Cisco. Cisco is a "food" as that term is defined in Section 12 of the Federal Trade Commission Act.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce.

PAR. 4. Respondent has distributed or caused to be distributed Cisco in packaging resembling that of a wine cooler or other low-alcohol, single-serving beverage. The Cisco bottles, depicted on attached

Exhibits 1-5, have shapes similar to the bottles of many wine coolers or other low-alcohol, single-serving beverages. The Cisco bottle glass is clear, as is the glass of many wine coolers. The beverage displayed in the Cisco bottles is colored similarly to the beverages displayed in many wine cooler bottles. And, the Cisco flavor names are similar to the flavor names of many wine coolers.

PAR. 5. Respondent has disseminated or has caused to be disseminated promotional materials for Cisco that describe its packaging as cooler-style and suggest that Cisco should be sold alongside similar bottles. This promotional material includes, but is not limited to, material containing the following statements:

> **The key to selling Cisco is proper cold box placement.** Keep it cold so Cisco buyers can experience "the thrill of the chill".
>
> Cisco is available in 5 refreshing flavors: Berry, Red, Gold, Peach and Orange. And it comes packaged in distinctive cooler-style bottles, in both 375 ml and 750 ml sizes.

PAR. 6. Respondent has disseminated or has caused to be disseminated point-of-sale advertisements for Cisco that suggest that it can be consumed in the same manner and quantities as wine coolers or other low-alcohol, single-serving beverages. These advertisements have included, but not been limited to, two point-of-sale posters, each of which depicts a model holding and about to consume the contents of an opened, full, 375 ml (12.7 ounce) bottle of Cisco; and, another point-of-sale poster which depicts a model holding and about to consume the contents of a large wine glass, full of Cisco.

PAR. 7. Through the packaging, marketing, and advertising referred to in paragraphs four, five, and six, respondent represented, expressly or by implication, that Cisco wine products are wine coolers or other low-alcohol, single-serving beverages.

PAR. 8. In truth and in fact, Cisco wine products are not wine coolers or other low-alcohol, single-serving beverages. Cisco is 20% alcohol by volume (40 proof) and is three to five times as potent as a wine cooler or other low-alcohol, single-serving beverage. A single 375ml bottle of Cisco has the same quantity of alcohol as five one ounce servings of 80 proof vodka. Therefore, the representations set forth in paragraph seven are false and misleading.

PAR. 9. Through the packaging, marketing, and advertising referred to in paragraphs four, five, and six, respondent represented, expressly or by implication, that consumers may drink Cisco in quantities similar to wine coolers or other low alcohol, single-serving beverages with no increased risk of injury.

PAR. 10. In truth and fact, many consumers may not consume Cisco in quantities similar to wine coolers or other low-alcohol, single-serving beverages with no increased risk of injury. Consumption of Cisco as if it were a wine cooler or other low-alcohol beverage has caused a significant number of persons consuming Cisco, who believed it to be a wine cooler, to suffer alcohol poisoning, resulting in unconsciousness and hospital emergency room care. Therefore, the representation set forth in paragraph nine is false and misleading.

PAR. 11. The acts and practices of respondent as alleged in this complaint constitute deceptive acts or practices in or affecting commerce and false advertisements in violation of Sections 5 and 12 of the Federal Trade Commission Act.

EXHIBIT 1

EXHIBIT 1

CANANDAIGUA WINE COMPANY

Complaint

EXHIBIT 2

EXHIBIT 2

EXHIBIT 3

EXHIBIT 3

EXHIBIT 4

EXHIBIT 5

EXHIBIT 5

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint 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, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provision 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 have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, 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 Canandaigua Wine Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 116 Buffalo Street, in the City of Canandaigua, State of New York.

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

PART I.

(A) *It is ordered,* That respondent, Canandaigua Wine Company, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, but not including any wholesaler or retailer, in connection with the advertising, offering for sale, sale, or distribution in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, of Cisco brand wine or any other flavored wine product containing more than 14% but not more than 24% alcohol by volume, do forthwith cease and desist from:

1) Representing, directly or by implication, that any such product is a low-alcohol product that contains less than 7% alcohol by volume;

2) Representing, directly or by implication, that any package of any such product contains only a single serving unless the contents of said container are 100 milliliters or less; and,

3) Requesting or otherwise encouraging any distributor or retailer to display any such product with or next to any alcoholic beverage that contains less than 7% alcohol by volume.

(B) *Provided,* That:

1) The packaging for the respective products depicted in Exhibit A attached hereto, in any size or flavor, or packaging that does not differ therefrom in any material respect, shall not constitute a violation of subparagraphs (A)(1) or (A)(2);

2) The shipment prior to July 1, 1991, to any wholesaler of Cisco in the packaging depicted in Exhibit B in any size or flavor, or packaging that does not differ therefrom in any material respect, shall not constitute a violation of subparagraphs (A)(1) or (A)(2). Shipment to any wholesaler of any such product in the packaging depicted in Exhibit B, or in a substantially similar bottle with the same or a substantially similar label configuration, after July 1, 1991, shall constitute a violation of either of those subparagraphs except to the extent that, and only so long as, shipping Cisco repackaged as depicted in Exhibit A1 to any wholesaler from the Cisco bottling facility normally supplying it with Cisco is prevented solely by an act or acts outside respondent's control, such as, but not limited to, failure of the glass manufacturer(s) to deliver the bottles, failure of the bottler to bottle the product, failure to receive changeover parts from

bottling equipment producers, or failure of the label provider to provide the labels; and, only if and so long as respondent has acted in good faith and has used all reasonable efforts to effectuate shipping to wholesalers from said bottling plants, the product repackaged as depicted in Exhibit A1 at the earliest possible date after July 1, 1991. *Provided,* that in no event shall the shipping of Cisco to any wholesaler in the packaging depicted in Exhibit B or in a substantially similar bottle with the same or substantially similar label configuration continue for more than 90 days after July 1, 1991; and,

3) Advertising for the products depicted in Exhibit A, other than Cisco, created and first disseminated before the date of signing of this agreement, shall not constitute a violation of subparagraphs (A)(1) or (A)(2).

(C) *Provided further,* That no representation prohibited by subparagraphs (A)(1) or (2) shall arise in whole or part from any label, bottle or other container to the extent such label, bottle or other container has been formally approved prior to its use under Section 105(e) of the Federal Alcohol Administration Act, 27 U.S.C. 205(e) and the regulations thereunder.

PART II.

It is further ordered, That respondent, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any unflavored wine product containing more than 14% but not more than 24% alcohol by volume, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist from distributing any product in the bottle with the label configuration depicted on Exhibit B hereto, or in any substantially similar bottle with that or a substantially similar label configuration.

PART III.

It is further ordered, That respondent shall, at any time prior to twenty (20) days following the date this order becomes final, send by first class mail to all Cisco distributors and to all retailers of Cisco whose names and addresses shall have been requested from and to the extent they have been furnished by such distributors, a letter:

A) Requesting the removal from retail display and disposal or return to CWC of all existing Cisco point-of-sale advertising and promotional materials depicting any human form; and

B) Requesting that Cisco not be displayed for sale with or next to any alcoholic beverage containing less than 7% alcohol by volume, on the shelf, in the cooler or coldbox, or otherwise; and, that Cisco instead be displayed with other fortified wines, if these are sold.

The distributor letter shall be sent to all active Cisco wholesalers as of the date of mailing. The retailer letter shall be sent within 30 days of receipt of retailers' names and addresses from their wholesalers.

PART IV.

It is further ordered, That respondent shall distribute a copy of this order to each of its operating divisions and to each of its officers, directors, agents, or employees, but not including wholesalers or retailers, having sales, advertising, or policy responsibilities with respect to the subject matter of this order, and secure from each such person a signed statement acknowledging receipt of the order.

PART V.

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

PART VI.

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

EXHIBIT A

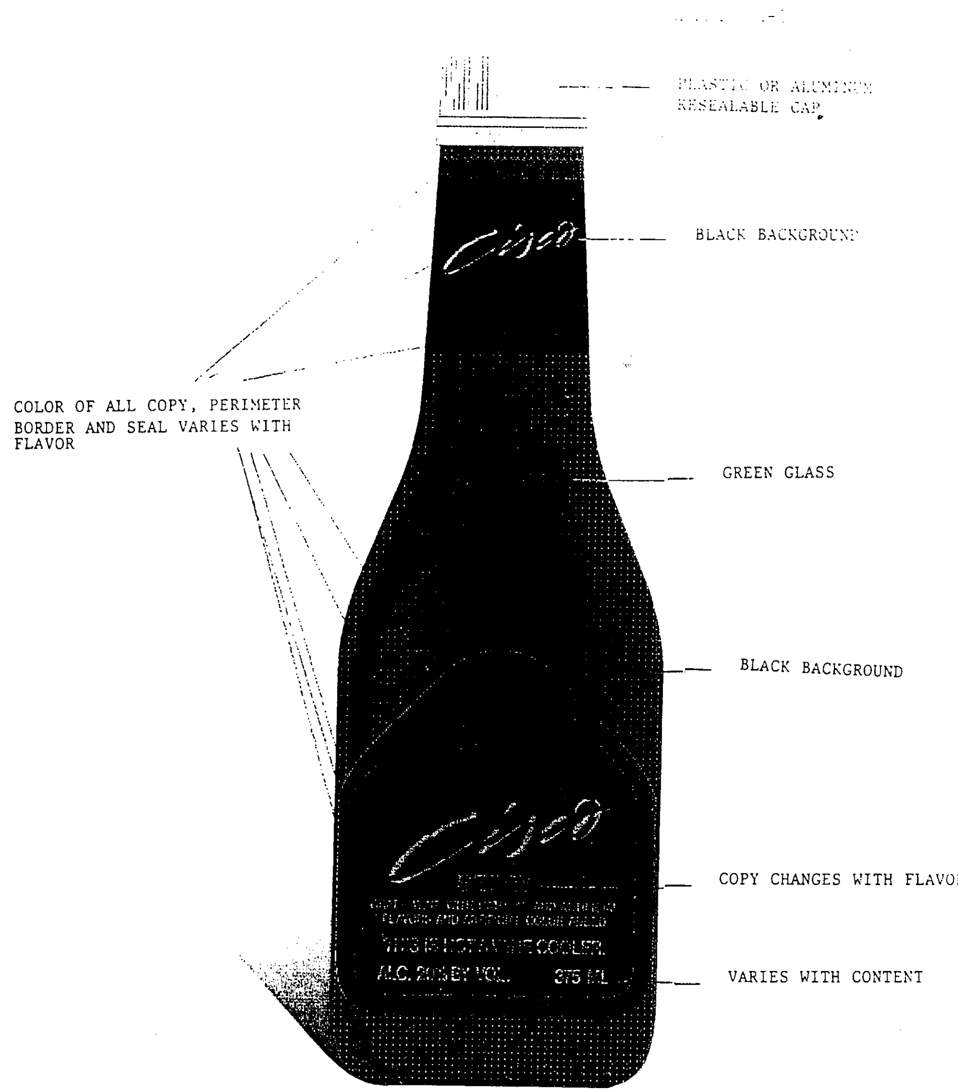

PLASTIC OR ALUMINUM RESEALABLE CAP
BLACK BACKGROUND
COLOR OF ALL COPY, PERIMETER BORDER AND SEAL VARIES WITH FLAVOR
GREEN GLASS
BLACK BACKGROUND
COPY CHANGES WITH FLAVOR
VARIES WITH CONTENT

EXHIBIT A-2

EXHIBIT A-3


SCORPIO
GRAPE WINE WITH NATURAL AND ARTIFICIAL FLAVORS ADDED
CONTAINS SULFITES 375 ml ALCOHOL 18% BY VOLUME
MADE AND BOTTLED BY RICHARDS WINE CO. • CANANDAIGUA, NY
GOVERNMENT WARNING:
375 ml U2257IH 18%

EXHIBIT A-3


SCORPIO
GRAPE WINE WITH NATURAL AND ARTIFICIAL FLAVORS ADDED
CONTAINS SULFITES 375 ml ALCOHOL 18% BY VOLUME
MADE AND BOTTLED BY RICHARDS WINE CO. • CANANDAIGUA, NY
GOVERNMENT WARNING:
375 ml U22571H 18%

EXHIBIT A-5

Decision and Order

EXHIBIT B