

IN THE MATTER OF

SAINT-GOBAIN/NORTON INDUSTRIAL CERAMICS CORPORATION

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

Docket C-3673. Complaint, June 12, 1996--Decision, June 12, 1996

This consent order requires, among other things, a Massachusetts-based corporation to divest businesses and associated assets in the United States markets for fused cast refractories, hot surface igniters, and silicon carbide refractory bricks. If the divestiture is not completed as required, the Commission may appoint one or more trustees to divest the remaining properties and assets.

Appearances

For the Commission: *Howard Morse, Robert Tovsky and William Baer.*

For the respondent: *Mark Leddy, Cleary, Gottlieb, Steen & Hamilton, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Compagnie de Saint-Gobain, through its wholly-owned subsidiary Societe Europeenne des Produits Refractaires ("SEPR"), has entered into a Stock Purchase Agreement with subsidiaries of the British Petroleum Company p.l.c. ("BP") whereby Compagnie de Saint-Gobain will acquire certain of the subsidiaries of BP that together comprise The Carborundum Company ("Carborundum"), and that as part of this agreement, Saint-Gobain/Norton Industrial Ceramics Corporation ("Saint-Gobain") will acquire the United States assets of Carborundum other than assets relating to ceramic fibers, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, and having reason to believe that Compagnie de Saint-Gobain has entered into

such agreements in restraint of trade in violation of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

I. THE RESPONDENT

1. Respondent Saint-Gobain/Norton Industrial Ceramics Corporation is a corporation organized and existing under the laws of Delaware, with its principal place of business at One New Bond Street, Worcester, Massachusetts. Saint-Gobain is a wholly-owned indirect subsidiary controlled by Compagnie de Saint-Gobain, a French company with its principal place of business located at 18, avenue d'Alsace, 92400 Courbevoie, France.

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

II. THE PROPOSED ACQUISITION

3. On or about May 26, 1995, Compagnie de Saint-Gobain, through SEPR, and BP executed a Stock Purchase Agreement wherein Saint-Gobain agreed to acquire certain assets of Carborundum from BP.

4. Saint-Gobain and Carborundum are substantial direct competitors in several markets, including United States markets for fused cast refractories, hot surface igniters, and silicon carbide refractory bricks.

III. FUSED CAST REFRACTORIES

A. Relevant Line of Commerce

5. One relevant line of commerce within which to analyze the effects of the acquisition is the United States market for fused cast refractories. Fused cast refractories are highly dense brick or block materials typically comprised either of alumina, zirconia and silica

together or alumina alone. Glass manufacturers, including producers of float glass (flat glass for homes, offices and automobiles), container glass (for bottles and jars) and other types of glass products (*e.g.*, for video screens, light bulbs, lenses, and beakers), require fused cast refractories to line the interior of the furnaces in which they melt raw materials -- silica, soda ash, limestone, salt cake and dolomite -- into a homogenous mass of molten glass.

6. Fused cast refractories are used by glass manufacturers for their excellent wear-resistant properties. Glass manufacturers would not substitute to other materials for fused cast refractories even in response to a significant price increase. The use of other materials in the applications where fused cast refractories are currently used would generally lead to an unacceptable deterioration in glass quality, and would dramatically reduce the length of furnace campaigns, requiring more frequent costly and time-consuming furnace repairs.

7. Imports of fused cast refractories into the United States are small, and come primarily from Saint-Gobain. The potential for significant imports is constrained by overseas production costs, shipping and handling costs, and duties. Product availability and product quality issues also limit the competitiveness of most of the fused cast refractories produced overseas. In any event, customers in the United States would require extensive testing over several years before using fused cast refractories produced overseas.

8. Total sales of fused cast refractories in the United States are over \$45 million.

B. Market Concentration

9. Saint-Gobain and Carborundum are the only two producers in the United States of fused cast refractories. Therefore, the United States fused cast refractory market is extremely concentrated as measured by the Herfindahl-Hirschmann Index (HHI), and the acquisition would result in a monopoly. In 1994, Carborundum accounted for the majority of sales of fused cast refractories in the United States, and Saint-Gobain accounted for the remainder. Even on a worldwide basis, Saint-Gobain is by far the largest producer of fused cast refractories, and Carborundum the second-largest, with a combined share of sales of approximately 70%.

10. Saint-Gobain has a dangerous probability of obtaining unilateral market power in the United States market for fused cast refractories.

C. Conditions of Entry

11. Entry into the fused cast refractories market would not be timely, likely or sufficient to deter or offset reductions in competition resulting from the acquisition.

12. Product development and plant construction alone would take several years. Obtaining product qualification at glass producers, who require extensive life cycle testing before they will use fused cast refractories in their plants because these products are so critical to the manufacturing process, would require many more years. The total time from initial entry to significant market impact likely would be many years.

13. Entry would also be extremely unlikely as it would require a large sunk capital investment. Efficient production would require entry at a scale that would be relatively large compared to the total sales available in the fused cast refractories market, making entry more risky and unlikely.

D. Effects of the Acquisition

14. The acquisition of Carborundum by Saint-Gobain may substantially lessen competition and tend to create a monopoly in the United States market for fused cast refractories because, among other things:

- a. It will increase concentration substantially in a highly concentrated market;
- b. It will eliminate substantial head-to-head competition between Saint-Gobain and Carborundum;
- c. It will leave Saint-Gobain as the sole producer of fused cast refractories in the United States, allowing Saint-Gobain unilaterally to exercise market power;
- d. It will likely result in increased prices for fused cast refractories; and
- e. It will likely result in diminished product innovation in fused cast refractories.

IV. HOT SURFACE IGNITERS

A. Relevant Line of Commerce

15. A second line of commerce within which to analyze the effects of the acquisition is the United States market for hot surface igniters ("HSIs"). HSIs are ceramic devices which are used as the ignition source in the ignition control system of gas appliances such as range ovens, dryers and furnaces. Depending on the application, HSIs differ in design and price, and are not interchangeable among applications. HSIs are an extremely reliable and cost-effective ignition source for gas appliances.

16. For most of the applications in which HSIs are used, appliance manufacturers would not substitute for HSIs in response to even a significant price increase. Other products, including pilot ignition and spark ignition, are less efficient, less reliable and less cost-effective than HSIs for nearly all gas appliance applications. In addition, appliance manufacturers would need to do extensive product re-design and product testing before substituting another type of ignition source for HSIs.

17. Imports of HSIs into the United States are negligible. Because of differences in line voltages, appliance design and energy efficiency regulations, there is little demand for HSIs overseas, and little production. The only producer of HSIs outside the United States is a Japanese company, Kyocera, which has been trying for several years to develop a commercially viable HSI, and has obtained only minimal sales in the United States. The Kyocera HSI requires a more expensive ignition system.

18. Total sales of HSIs in the United States are over \$45 million.

B. Market Concentration

19. Saint-Gobain and Carborundum together account for nearly all HSI sales in the United States. The only other producer of HSIs in the United States is Igniter Systems, Inc. Igniter Systems' product quality and consistency are questioned by customers, and its sales are limited to a small volume of aftermarket sales.

20. The United States HSI market is extremely concentrated as measured by the Herfindahl-Hirschmann Index ("HHI"), and the acquisition would result in a near-monopoly. In 1994, Saint-Gobain

accounted for the large majority of sales of HSIs and Carborundum accounted for virtually all the remainder. Saint-Gobain's acquisition of Carborundum would increase the HHI to over 9800.

21. Even if one defined a market comprised of all ignition sources for the gas appliances in which HSIs are predominantly used, and included HSIs, pilot ignition and spark ignition, the combined share of Saint-Gobain and Carborundum would be close to 80% of total sales.

22. Saint-Gobain has a dangerous probability of obtaining unilateral market power in the United States market for HSIs.

C. Conditions of Entry

23. There is a history of failed entry into the HSI market, and new entry would not be timely, likely or sufficient to deter or offset reductions in competition resulting from the acquisition. Designing and manufacturing HSIs would require several years for process development, plant construction, and product testing. Entry would require significant sunk investment with uncertain ultimate success. Efficient production would require entry at a scale that would be relatively large compared to the total sales available in the HSI market, making entry more risky and unlikely.

D. Effects of the Acquisition

24. The acquisition of Carborundum by Saint-Gobain may substantially lessen competition and tend to create a monopoly in the HSI market in the United States because, among other things:

- a. It will increase concentration substantially in a highly concentrated market;
- b. It will eliminate substantial head-to-head competition between Saint-Gobain and Carborundum, who are each other's closest competitors in the research and development, manufacture, and sale of HSIs;
- c. It will allow Saint-Gobain unilaterally to exercise market power;
- d. It will likely result in increased prices for HSIs; and
- e. It will likely result in diminished product innovation in HSIs.

V. SILICON CARBIDE REFRACTORY BRICKS

A. Relevant Line of Commerce

25. A third line of commerce within which to analyze the effects of the acquisition is the United States market for silicon carbide refractory bricks. Silicon carbide refractory bricks are fired ceramic bricks made from silicon carbide grain. These products are used to line the interior sidewalls of aluminum reduction cells, steel blast furnaces, and copper shaft furnaces.

26. Aluminum, steel and copper manufacturers would not substitute for silicon carbide bricks in response to even a significant price increase. The choice of a refractory material is sensitive primarily to the performance requirements as established by the design of the manufacturing facility in which the material will be used. Silicon carbide's excellent heat and oxidation resistance makes it a superior product for certain types of aluminum reduction cells, steel blast furnaces and copper shaft furnaces.

27. Imports of silicon carbide refractory bricks are minimal. Overseas production costs are generally higher than production costs in the United States, and imports would be constrained by added shipping and handling costs, and by duties, and would not constrain increased prices in the United States.

28. Total sales of silicon carbide refractory bricks in the United States are approximately \$15 million.

B. Market Concentration

29. The United States silicon carbide refractory brick market is extremely concentrated as measured by the Herfindahl-Hirschmann Index (HHI), and the acquisition would result in a near-monopoly. In 1994, Carborundum accounted for the majority of sales of silicon carbide refractory bricks in the United States, and Saint-Gobain virtually all of the rest. Saint-Gobain's acquisition of Carborundum would increase the HHI to over 9000.

30. Saint-Gobain has a dangerous probability of obtaining unilateral market power in the United States market for silicon carbide refractory bricks.

C. Conditions of Entry

31. Entry into the silicon carbide refractory brick market would not be timely, likely or sufficient to deter or offset reductions in competition resulting from the proposed acquisition. Designing and manufacturing silicon carbide refractory bricks would require product and process development, plant construction, and product testing, all of which could require several years of effort. In addition, entry would require significant sunk investment with uncertain ultimate success.

D. Effects of the Acquisition

32. The acquisition of Carborundum by Saint-Gobain may substantially lessen competition and tend to create a monopoly in the silicon carbide refractory bricks in the United States because, among other things:

- a. It will increase concentration substantially in a highly concentrated market;
- b. It will eliminate substantial head-to-head competition between Saint-Gobain and Carborundum, who are each other's closest competitors in the research and development, manufacture, and sale of silicon carbide refractory bricks;
- c. It will allow Saint-Gobain unilaterally to exercise market power; and
- d. It will likely result in increased prices for silicon carbide refractory bricks.

VI. VIOLATIONS CHARGED

33. The acquisition agreement between Saint-Gobain and BP described in paragraph three violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

34. The proposed acquisition of Carborundum by Saint-Gobain would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

35. The proposed acquisition of Carborundum by Saint-Gobain, if consummated, would allow Saint-Gobain to monopolize the United

States markets for fused cast refractories, HSIs and silicon carbide refractory bricks, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the proposed acquisition by Compagnie de Saint-Gobain of certain of the subsidiaries of British Petroleum which together comprise The Carborundum Company ("Carborundum"), in which Saint-Gobain/Norton Industrial Ceramics Corporation ("Saint-Gobain") will acquire substantially all of the Carborundum assets in the United States, which acquisition is more fully described at paragraph I. (F) below, and Saint-Gobain having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration and which, if issued by the Commission, would charge Saint-Gobain with violations of the Clayton Act and Federal Trade Commission Act; and

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

The Commission, having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of 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, makes the following jurisdictional findings and enters the following order:

1. Respondent Saint-Gobain/Norton Industrial Ceramics is a corporation organized, existing and doing business under and by

virtue of the laws of the State of Delaware, with its principal office and place of business located at One New Bond Street, Worcester, Massachusetts.

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

ORDER

I.

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

A. "*Respondent*" or "*Saint-Gobain*" means Saint-Gobain/Norton Industrial Ceramics Corporation, its directors, officers, employees, agents and representatives, its predecessors, successors, and assigns; subsidiaries, divisions, and groups and affiliates controlled by Saint-Gobain, and the respective directors, officers, employees, agents, representatives, successors and assigns of each; its domestic and foreign parents, including Compagnie de Saint-Gobain, and the subsidiaries, divisions, and groups and affiliates controlled by Compagnie de Saint-Gobain or any other domestic or foreign parent, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. "*Carborundum*" means the companies and assets comprising The Carborundum Company that Saint Gobain proposes to acquire from BP pursuant to the Acquisition.

C. "*BP*" means The British Petroleum Company p.l.c.

D. "*Toshiba Monofrax*" means the joint venture between Carborundum and Toshiba Ceramics Company, Limited, pursuant to the Joint Venture Agreement dated December 20, 1965.

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

F. "*Acquisition*" means the acquisition described in the Stock Purchase Agreement entered into on May 26, 1995 by which Saint-Gobain has agreed to acquire and BP has agreed to convey certain rights and interests in, and title to, Carborundum.

G. "*Fused cast refractories*" means all grades or types of refractory products which are produced using a fused cast process, *i.e.*, melting components in electric furnaces and casting the molten

product into shaped products, including, but not limited to, fused cast AZS (alumina-zirconia-silica) and fused cast alumina.

H. "*Hot surface igniters*" means all silicon carbide hot surface igniters used in the ignition system of gas appliances.

I. "*Silicon carbide performance refractories*" means all refractory products composed of bonded silicon carbide grains.

J. "*Silicon carbide refractory bricks*" means all refractory products composed of bonded silicon carbide grains which are formed by hydraulic, mechanical or vibratory pressing, and are marketed for use in the manufacture of primary metals, including aluminum reduction cells, steel blast furnaces, and copper shaft furnaces.

K. "*Carborundum silicon carbide refractory brick technology*" means all patents, trade secrets, technology and know-how of Carborundum for producing any silicon carbide refractory brick product sold by Carborundum on or before the date of the Acquisition, all such information being sufficiently detailed for the commercial production and sale of such products, including, but not limited to, all technical information, data, specifications, drawings, design and equipment specifications, manuals, engineering reports, manufacturing designs and reports, operating manuals, and formulations, laboratory research, and quality control data.

L. "*Assets and Businesses*" means assets, properties, businesses, and goodwill, tangible and intangible, including, without limitation, the following:

1. All plant facilities, machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property;

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, dedicated management information systems, information contained in management information systems, rights to software, trademarks, patents and patent rights, inventions, trade secrets, technology, know-how, ongoing research and development, specifications, designs, drawings, processes and quality control data;

3. Raw material and finished product inventories and goods in process;

4. All right, title and interest in and to real property, together with appurtenances, licenses, and permits;

5. All right, title, and interest in and to the contracts entered into in the ordinary course of business with customers (together with associated bids), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

6. All rights under warranties and guarantees, express or implied;

7. All separately maintained, as well as relevant portions of not separately maintained books, records and files; and

8. All items of prepaid expense.

M. "*Carborundum fused cast refractories properties to be divested*" means the Carborundum Monofrax Group, Carborundum's manufacturing facility in Falconer, New York, and any other Carborundum Assets and Businesses utilized in connection with the research, development, manufacture, distribution or sale of fused cast refractories (including any assets located at or research or development work ongoing or completed at the Carborundum Technology Center); provided, however, that the "*Carborundum fused cast refractories properties to be divested*" does not include the name "Carborundum" nor any interest of Carborundum in, or contractual relationship with, Toshiba Monofrax.

N. "*Carborundum igniters properties to be divested*" means Carborundum's hot surface igniter manufacturing facility in Mayaguez, Puerto Rico, and any other Carborundum Assets and Businesses utilized in connection with the research, development, manufacture, distribution or sale of hot surface igniters (including any assets located or research and development work done at the Carborundum Technology Center, and any rights of Carborundum in which any person has agreed not to compete with Carborundum in the manufacture or marketing of hot surface igniters); provided, however, that "*Carborundum igniters properties to be divested*" does not include the name "Carborundum."

O. "*Carborundum silicon carbide properties to be divested*" means Carborundum's Keasbey, New Jersey silicon carbide performance refractories manufacturing facility, and any other Carborundum Assets and Businesses utilized in connection with the research, development, manufacture, distribution or sale of all products, including silicon carbide refractory bricks and products, other than silicon carbide refractory bricks, manufactured at that plant (including such assets located, or research and development work

done, at the Carborundum Technology Center); provided, however, that "silicon carbide properties to be divested" does not include the name "Carborundum" or any Carborundum silicon carbide refractory manufacturing facilities other than the Keasbey, New Jersey plant, or any trade names used by Carborundum.

P. "*Carborundum properties to be divested*" means the Carborundum fused cast refractories properties to be divested, the Carborundum igniters properties to be divested, and the Carborundum silicon carbide properties to be divested.

Q. "*Carborundum Technology Center*" means Carborundum's research and development facility located in Niagara Falls, New York.

R. "*Saint-Gobain fused cast refractories properties to be divested*" means (i) Saint-Gobain's manufacturing facility in Louisville, Kentucky, and any other Saint-Gobain Assets and Businesses located in North America that are utilized in the research, development, manufacture, sale or distribution of fused cast refractories and (ii) any product or processing technology utilized in connection with the research, development, manufacture, distribution or sale of fused cast refractories (including any ongoing or completed research or development work within Saint-Gobain that is related to fused cast AZS refractories, fused cast alumina refractories, or to any other fused cast products produced or sold by Saint-Gobain in North America; provided, however, that such research shall not include research or development work that relates solely to process technology used by Societe Europeenne des Produits Refractaires in Europe).

S. "*Licensee*" means the person to whom the Carborundum silicon carbide refractory brick technology is licensed pursuant to paragraph II of this order.

T. "*License date*" means the date on which the Carborundum silicon carbide refractory brick technology is licensed following Commission approval pursuant to paragraph II of this order.

U. "*Remaining properties to be divested*" means the following:

1. The Carborundum fused cast refractories properties to be divested if the Carborundum fused cast refractories properties to be divested have not been divested, or divestiture of the Saint-Gobain fused cast refractories properties to be divested has not been

approved by the Commission and divested, by the time that a trustee is appointed in accordance with paragraph III of this order, and

2. The Carborundum igniters properties to be divested if the Carborundum igniter properties to be divested have not been divested by the time that a trustee is appointed in accordance with paragraph III of this order, and

3. The Carborundum silicon carbide properties to be divested if the Carborundum silicon carbide properties to be divested have not been divested, or a license to the Carborundum silicon carbide refractory brick technology has not been approved by the Commission and granted, by the time that a trustee is appointed in accordance with paragraph III of this order.

V. "*Viability and competitiveness*" of the properties to be divested means that such respective properties are capable of functioning independently and competitively in the fused cast refractories, hot surface igniters, and silicon carbide performance refractories businesses.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, at no minimum price, by the earlier of February 28, 1997, or one year from the date the Acquisition is consummated, the Carborundum fused cast refractories properties to be divested as an ongoing business, and shall also divest such additional ancillary Carborundum Assets and Businesses and effect such arrangements as are necessary to assure the viability and competitiveness of the Carborundum fused cast refractories properties to be divested.

B. Respondent may propose, and the Commission may in its sole discretion accept, in lieu of divestiture of the Carborundum fused cast refractories properties to be divested, divestiture of the Saint-Gobain fused cast refractories properties to be divested, to a person that receives the prior approval of the Commission, and in a manner that receives the prior approval of the Commission. Divestiture of the Saint-Gobain fused cast refractories properties to be divested shall, in order to obtain Commission approval, satisfy the purposes of this order and remedy the lessening of competition resulting from the

Acquisition as alleged in the Commission's complaint. Respondent's request that the Commission approve a divestiture of the Saint-Gobain fused cast refractories properties to be divested shall not toll the time in which it is required to divest the Carborundum fused cast refractories properties to be divested, except that if the Commission has not approved or disapproved such request within ninety (90) days of the date on which it was submitted, then, in the event of Commission disapproval of the request, the period shall be extended by the length of time in excess of ninety days before Commission disapproval. Respondent's request that the Commission approve divestiture of the Saint-Gobain fused cast refractories properties to be divested shall not eliminate the requirement that it divest the Carborundum fused cast refractories properties to be divested, unless such substitute divestiture is approved by the Commission and consummated in a timely fashion consistent with the requirements of this order.

C. Respondent shall divest, absolutely and in good faith, at no minimum price, by the earlier of February 28, 1997, or one year from the date the Acquisition is consummated, the Carborundum igniters properties to be divested as an ongoing business, and shall also divest such additional ancillary Carborundum Assets and Businesses and effect such arrangements as are necessary to assure the viability and competitiveness of the Carborundum igniters properties to be divested.

D. Respondent shall divest, absolutely and in good faith, at no minimum price, by the earlier of February 28, 1997, or one year from the date the Acquisition is consummated, the Carborundum silicon carbide properties to be divested, and shall also divest such additional ancillary Carborundum Assets and Businesses and effect such arrangements as are necessary to assure the viability and competitiveness of the Carborundum silicon carbide properties to be divested.

E. Respondent may propose, prior to the earlier of August 30, 1996, or six months from the date the Acquisition is consummated, and the Commission may in its sole discretion accept, in lieu of divestiture of the Carborundum silicon carbide properties to be divested, to grant, with no continuing royalties, a perpetual license to the Carborundum silicon carbide refractory brick technology to a person that obtains the prior approval of the Commission, in a manner that receives the prior approval of the Commission.

Licensing of the Carborundum silicon carbide refractory brick technology shall, in order to obtain Commission approval, satisfy the purposes of this order and remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint. In no event shall any licensing agreement pursuant to this paragraph contain any limitation on the products the licensee is permitted to produce, or the geographic area in which the licensee may produce such products. Respondent's request that the Commission approve a licensee shall not toll the time in which it is required to divest the Carborundum silicon carbide properties to be divested, except that if the Commission has not approved or disapproved such request within ninety (90) days of the date on which it was submitted, then, in the event of Commission disapproval of the request, the period shall be extended by the length of time in excess of ninety days before Commission disapproval. Respondent's request that the Commission approve a licensee shall not eliminate the requirement that it divest the Carborundum silicon carbide properties to be divested, unless such licensing is approved by the Commission and consummated in a timely fashion consistent with the requirements of this order.

F. If respondent licenses the Carborundum silicon carbide refractory brick technology pursuant to paragraph II.E. of this order, then for a period of six (6) months after the license date, upon reasonable notice and request from the licensee, respondent shall provide to the licensee information, technical assistance, and advice sufficient to effect the transfer to the licensee of the silicon carbide refractory brick technology and to enable the licensee to manufacture silicon carbide refractory bricks. Upon reasonable notice and request from the licensee, respondent shall also provide to the licensee consultation and training with knowledgeable employees of respondent, including a qualified engineer, at the licensee's facility for a period of time, not to exceed three (3) months, sufficient to satisfy the licensee's management that its personnel are adequately trained in the manufacture of silicon carbide refractory bricks. Respondent may require reimbursement from the licensee for all of its direct out-of-pocket expenses, including a reasonable labor loss fee for on-site assistance incurred in providing the services required by this paragraph II.F. of this order.

G. If respondent licenses the Carborundum silicon carbide refractory brick technology pursuant to paragraph II.E. of this order,

then respondent shall provide the licensee with all promotional, advertising, and marketing materials regarding silicon carbide refractory bricks prepared by Carborundum at any time during the period commencing twelve (12) months prior to the date this order becomes final, a list of all customers of Carborundum's silicon carbide refractory bricks during the period commencing twenty-four (24) months prior to the date this order becomes final, and a list of Carborundum's suppliers of silicon carbide, other raw materials, and production components used to produce Carborundum's silicon carbide refractory bricks.

H. Respondent shall comply with all terms of the Agreement to Hold Separate attached to this order and made a part hereof as Appendix I. Said Agreement shall continue in effect with respect to the Carborundum fused cast refractories properties to be divested until such time as respondent has divested the Carborundum fused cast refractories properties to be divested, with respect to the Carborundum igniters properties to be divested until such time as respondent has divested the Carborundum igniters properties to be divested, and with respect to the Carborundum silicon carbide properties to be divested until such time as respondent has divested the Carborundum silicon carbide properties to be divested, or until such other time as stated in said Agreement, provided that said Agreement to Hold Separate shall not continue in effect with respect to the Carborundum fused cast refractories properties to be divested if respondent divests, with Commission approval, the Saint-Gobain fused cast refractories properties to be divested, and shall not continue in effect with respect to the Carborundum silicon carbide properties to be divested if respondent licenses, with Commission approval, the Carborundum silicon carbide refractory brick technology.

I. Respondent shall divest each of the Carborundum properties to be divested only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestitures of the Carborundum properties to be divested is to ensure the continuation of the Carborundum properties to be divested as ongoing, viable businesses engaged in the manufacture and sale of fused cast refractories, hot surface igniters, and silicon carbide performance refractories, respectively, and to remedy any lessening

of competition resulting from the Acquisition as alleged in the Commission's complaint.

III.

It is further ordered, That:

A. If respondent has not divested, absolutely and in good faith and with the Commission's approval, each of the Carborundum properties to be divested, or, pursuant to paragraph II.B. of this order, the Saint-Gobain fused cast refractories properties to be divested, or has not licensed, with the Commission's approval, pursuant to paragraph II.E. of this order, the Carborundum silicon carbide refractory brick technology, the Commission may appoint one or more trustees to divest the remaining properties to be divested, along with any reasonable ancillary Carborundum assets and other reasonable arrangements that are necessary to assure the viability and competitiveness of such remaining properties to be divested.

B. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by respondent to comply with this order.

C. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, respondent shall consent to the following terms and conditions regarding the powers, authorities, duties and responsibilities of the trustee:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the

identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the remaining properties to be divested, along with any reasonable ancillary Carborundum assets and other reasonable arrangements that are necessary to assure the viability and competitiveness of such remaining properties to be divested.

3. The trustee shall have twelve (12) months from the date of appointment to accomplish the divestiture or divestitures. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission; provided, however, the Commission may only extend the divestiture period or divestiture periods, as applicable, two (2) times, but not more than one (1) year in the aggregate for each divestiture.

4. The trustee shall have full and complete access to the personnel, books, records and facilities related to the remaining properties to be divested, or any other relevant information, as the trustee may reasonably request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. Respondent shall take no action to interfere with or impede any trustee's accomplishment of the divestiture or divestitures. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or the court for a court-appointed trustee.

5. Subject to respondent's absolute and unconditional obligation to divest at no minimum price, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available for the divestiture of the remaining properties to be divested. If the trustee receives *bona fide* offers for the remaining properties to be divested from more than one acquiring entity or entities, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondent and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the remaining properties to be divested.

7. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising out of, or in connection with, the performance of the trustee's duties under this order, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

8. Within ten (10) 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, respondent shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this order.

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

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

11. The trustee shall have no obligation or authority to operate or maintain the remaining properties to be divested.

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

IV.

It is further ordered, That within thirty (30) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with paragraphs II and III of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying and has complied with those provisions, including the Agreement to Hold Separate. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of substantive contacts or negotiations for the divestitures of the Carborundum fused cast refractories properties to be divested, Carborundum igniter properties to be divested, Carborundum silicon carbide properties to be divested, and divestiture of the Saint-Gobain fused cast refractories properties to be divested or licensing of the Carborundum silicon carbide refractory brick technology, as specified in paragraph II of this order, including the identity of all parties contacted. Respondent also shall include in compliance reports, among other things, copies of all written communications to and from such parties, all internal memoranda, reports and recommendations concerning the divestitures.

V.

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 and on reasonable notice to respondent made to counsel for respondent, Saint-Gobain shall permit any 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 respondent, relating to any matters contained in this order; and

B. Upon ten (10) days, notice to respondent, and without restraint or interference from respondent, to interview officers or employees of respondent, who may have counsel present, regarding such matters.

VI.

It is further ordered, That until the obligations set forth in paragraphs II and III of this order are met, respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation 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.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Hold Separate") is by and between Saint-Gobain/Norton Industrial Ceramics Corporation ("Saint-Gobain"), a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal office and place of business at One New Bond Street, Worcester, Massachusetts, and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

PREMISES

Whereas, on May 26, 1995, Compagnie de Saint-Gobain, the parent company of Saint-Gobain/Norton Industrial Ceramics Corporation, entered into, through its wholly-owned subsidiary Societe Europeenne Des Produits Refractaires ("SEPR"), a Stock Purchase Agreement with The Standard Oil Company, BP International Limited, and BP Exploration (Alaska), Inc., subsidiaries of British Petroleum Company, p.l.c. ("BP") providing for the acquisition (the "Acquisition") of the voting securities of the

companies that together comprise The Carborundum Company ("Carborundum"); and

Whereas, Carborundum, with its principal office and place of business at 1625 Buffalo Avenue, Niagara Falls, New York, manufactures and sells a range of products, including fused cast refractories, hot surface igniters, and silicon carbide performance refractories; and

Whereas, the Commission is now investigating the Acquisition to determine if it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the Agreement Containing Consent Order ("consent order"), the Commission will place it on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of Carborundum, during the period prior to the final acceptance and issuance of the consent order by the Commission (after the sixty (60) day public comment period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of Carborundum and the Commission's right to have Carborundum or the Carborundum properties to be divested continue as viable competitors independent of Saint-Gobain; and

Whereas, even if the Commission determines to finally accept the consent order, it is necessary to hold separate the Carborundum properties to be divested to protect interim competition pending divestiture or other relief; and

Whereas, the purpose of this Agreement and the consent order is to

(i) Preserve Carborundum as a viable and competitive business, independent of Saint-Gobain, and engaged in the research and development, manufacture and sale of fused cast refractories, hot surface igniters and silicon carbide performance refractories pending final acceptance or withdrawal of acceptance of the consent order by

the Commission pursuant to the provisions of Section 2.34 of the Commission's Rules;

(ii) Preserve the Carborundum properties to be divested as viable and competitive businesses, independent of Saint-Gobain, and engaged in the research and development, manufacture and sale of fused cast refractories, hot surface igniters and silicon carbide performance refractories pending divestiture or other relief pursuant to paragraph II or paragraph III of the consent order;

(iii) Preserve Carborundum as a viable and competitive business, independent of Saint-Gobain, and engaged in the research and development, manufacture and sale of fused cast refractories, hot surface igniters and silicon carbide performance refractories and prevent any interim harm to consumers as a result of the Acquisition;

(iv) Remedy the anticompetitive effects of the Acquisition as alleged in the Commission's complaint; and

Whereas, entering into this Hold Separate shall in no way be construed as an admission by Saint-Gobain that the Acquisition is illegal or would have any anticompetitive effects; and

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

Now, therefore, the Parties agree, upon the understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement at the time it accepts the consent order for public comment that, unless the Commission determines to reject the consent order, the Commission will not seek a temporary restraining order, preliminary injunction, or permanent injunction to prevent consummation of the Acquisition, and will grant early termination of the Hart-Scott-Rodino waiting period, as follows:

1. Saint-Gobain agrees to execute and be bound by the attached consent order.

2. The terms "fused cast refractories," "hot surface igniters," "silicon carbide performance refractories," "carborundum fused cast refractories properties to be divested," "Carborundum igniters properties to be divested," "Carborundum silicon carbide properties

to be divested," "Carborundum properties to be divested," and "Acquisition" have the same definitions as in the consent order;

3. Saint-Gobain agrees that from the date this Hold Separate is accepted until the earliest of the dates listed in subparagraphs 3.a. or 3.b., it will comply with the provisions of paragraph 5 of this Hold Separate with respect to Carborundum:

a. Five (5) business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules;

b. The day after the Commission accepts as final the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules.

Provided, however, that Saint-Gobain is not required to hold separate pursuant to this Hold Separate any of the following business groups or businesses of Carborundum: ceramic fiber; microelectronics; structural ceramics; boron nitride; ekonol polyester resin; Carborundum specialty products; irrigation; or Carborundum's silicon carbide refractory manufacturing plants in Germany, The United Kingdom or Australia.

4. Saint-Gobain agrees that from the date this Hold Separate is accepted until the earliest of the dates listed in subparagraphs 4.a., or 4.b., it will comply with the provisions of paragraph 5 of this Hold Separate with respect to each of the Carborundum properties to be divested:

a. Five (5) business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules;

b. The day after the respective divestiture required by the consent order is completed, or, as applicable with regard to the Carborundum silicon carbide properties to be divested, an approved license granted.

5. Saint-Gobain shall hold Carborundum or the Carborundum properties to be divested, as applicable pursuant to paragraphs 3 and 4 (the "Held-Separate Businesses"), as they are constituted on the date the Acquisition is consummated, separate and apart on the following terms and conditions:

a. The Held-Separate Businesses shall be held separate and apart and shall be operated independently of Saint-Gobain (meaning here and hereinafter, Saint-Gobain excluding the Held-Separate Businesses and excluding all personnel connected with the Held-Separate Businesses as of the date this Hold Separate is signed) except to the extent that Saint-Gobain must exercise direction and control over the Held-Separate Businesses to assure compliance with this Hold Separate or with the consent order.

b. Saint-Gobain shall not exercise direction or control over, or influence directly or indirectly, the Held-Separate Businesses, the New Board or Management Committee (as defined in subparagraph 5.d. any of its operations or businesses; provided, however, that Saint-Gobain may exercise only such direction and control over the Held-Separate Businesses as is necessary to assure compliance with this Hold Separate or with the consent order.

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

d. Upon consummation of the Acquisition, Saint-Gobain shall elect a three-person Board of Directors for the Held-Separate Businesses (the "New Board"), or a three-person Management Committee. After the order is made final pursuant to Section 2.34 of the Commission's rules, Saint-Gobain may elect a separate New Board or Management Committee for each of the Held-Separate Businesses. Each New Board or Management Committee for each Held-Separate Business shall consist of at least two Carborundum officers knowledgeable about the Held-Separate Business, one of whom shall be named Chairman of the New Board or Management Committee, and who shall remain independent of Saint-Gobain and competent to assure the continued viability and competitiveness of the Held-Separate Business, and one New Board or Management Committee Member who may also be an officer, agent or employee of Saint-Gobain (the "Saint-Gobain New Board or Management Committee Member"). The Saint-Gobain New Board or Management

Committee Member for each New Board or Management Committee for each Held-Separate Business shall not have any direct responsibility relating to any Saint-Gobain business that manufactures, markets or uses the products, or products that compete with, products manufactured or marketed by such Held-Separate Business. Except for the Saint-Gobain New Board or Management Committee Member, Saint-Gobain shall not permit any director, officer, employee or agent of Saint-Gobain also to be a director, officer, employee or agent of Carborundum. Each New Board or Management Committee member shall enter into a confidentiality agreement agreeing to be bound by the terms and conditions of this Hold Separate.

e. Except as required by law and except to the extent that necessary information is exchanged in the course of complying with this Hold Separate or the consent order, or in the course of defending investigations or litigation or obtaining legal advice, or providing risk management services, Saint-Gobain shall not receive or have access to, or the use of, any Material Confidential Information of the Held-Separate Businesses, not in the public domain, except as such information would be available to Saint-Gobain in the ordinary course of business if the Acquisition had not taken place. Saint-Gobain may receive on a regular basis from the Held-Separate Businesses aggregate financial information necessary and essential to allow Saint-Gobain to file financial reports, tax returns and personnel reports, and such other information, other than information relating specifically to the Carborundum properties to be divested, necessary in the course of evaluating and consummating the Acquisition. Any such information that is obtained pursuant to this subparagraph shall only be used for the purposes set out in this subparagraph. ("Material Confidential Information," as used in this Hold Separate, means competitively sensitive or proprietary information not independently known to Saint-Gobain from sources other than the Held-Separate Businesses or the New Board or Management Committee, as applicable, and includes but is not limited to customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets.) In no event shall Saint-Gobain receive Material Confidential Information relating to any specific customer of Carborundum.

f. Saint-Gobain may retain an independent auditor to monitor the operation of the Held-Separate Businesses. Said auditor may report in writing to Saint-Gobain on all aspects of the operation of the Held-Separate Businesses other than information on customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets.

g. Except as permitted by this Hold Separate, the New Board or Management Committee member appointed by Saint-Gobain who is also an officer, agent, or employee of Saint-Gobain shall not receive any Material Confidential Information of the Held-Separate Businesses or Material Confidential Information of any person other than Saint-Gobain and shall not disclose any such information obtained through his or her involvement with the Held-Separate Businesses to Saint-Gobain or use it to obtain any advantage for Saint-Gobain. The Saint-Gobain New Board or Management Committee Member shall participate in matters that come before the New Board or Management Committee only for the limited purpose of considering any capital investment of over \$250,000 for the Carborundum fused cast refractories properties to be divested, any capital investment over \$150,000 for the Carborundum igniters properties to be divested, any capital investment over \$150,000 for the Carborundum silicon carbide properties to be divested, approving any proposed budget and operating plans, authorizing dividends and repayment of loans consistent with the provisions hereof, reviewing any material transactions described in paragraph 5.g., and carrying out Saint-Gobain's responsibilities under the Hold Separate and the consent order. Except as permitted by the Hold Separate, the Saint-Gobain New Board or Management Committee Member shall not participate in any other matter.

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

i. Saint-Gobain shall not change the composition of the New Board or Management Committee unless the Chairman of the New Board or Management Committee consents, or unless it is necessary to do so in order to assure compliance with this Hold Separate or with the consent order. The Chairman of the New Board or Management Committee shall have the power to remove members of the New Board or Management Committee for cause and to require Saint-

Gobain to appoint replacement members of the New Board or Management Committee. Saint-Gobain shall not change the composition of the management of the Held-Separate Businesses except that the New Board or Management Committee shall have the power to remove management employees for any legal reason. If the Chairman ceases to act or fails to act diligently, a substitute Chairman shall be appointed in the same manner as provided in paragraph 5.d. Saint-Gobain shall circulate to the management employees of Carborundum and appropriately display a notice of the Hold Separate and the Consent Agreement at a conspicuous place at all offices and facilities of the Held-Separate Businesses.

j. All earnings and profits of the Held-Separate Businesses shall be retained separately by Carborundum or the Carborundum properties to be divested, as applicable. If necessary, Saint-Gobain shall provide the Held-Separate Businesses with sufficient working capital to operate at current rates of operation, upon commercially reasonable terms.

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

6. For the purpose of determining or securing compliance with this Hold Separate, subject to any legally recognized privilege, and upon written request and ten days, notice to Saint-Gobain, Saint-Gobain shall permit any duly authorized representative(s) of the Commission:

a. Access during the office hours of Saint-Gobain 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 Saint-Gobain or Carborundum relating to compliance with this Hold Separate;

b. Without restraint or interference from Saint-Gobain, to interview Saint-Gobain's or Carborundum's officers, directors or

employees, who may have counsel present, regarding any such matters.

7. This agreement shall be binding upon acceptance by Saint-Gobain and the Commission.

IN THE MATTER OF

BUDGET RENT A CAR SYSTEMS, INC.

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

Docket C-3674. Complaint, June 17, 1996--Decision, June 17, 1996

This consent order prohibits, among other things, an Illinois-based corporation from failing to disclose, clearly and prominently, any representation relating to the renter's liability for loss of or damage to a rental vehicle, and from failing to post at each Budget rental location a sign, clearly and prominently, containing the disclosure statement. In addition, the consent order prohibits the respondent from misrepresenting: the obligation of the renter to make any payment as a result of loss of or damage to a rental vehicle; and the value of a vehicle that has been lost or damaged.

Appearances

For the Commission: *Randall Brook, Charles Harwood and Robert Schroeder.*

For the respondent: *Robert Aprati*, in-house counsel, Lisle, IL. and *Lisa Jose Fales, Collier, Shannon, Rill & Scott*, Washington, D.C.

COMPLAINT

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

PARAGRAPH 1. Respondent Budget Rent a Car Systems, Inc., is a Delaware corporation with its principal office and place of business located at 4225 Naperville Road, Lisle, Illinois.

PAR. 2. Respondent has advertised, offered for rent, and rented, directly and through franchisees, vehicles to consumers.

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

PAR. 4. In connection with the renting of vehicles, respondent has disseminated or caused to be disseminated promotional and informational material through advertisements, an 800-number that contains recorded messages, respondent's own telephone reservation system, third-party computerized reservation systems operated by airline and travel agency employees, and point of sale disclosures.

PAR. 5. Some of respondent's promotional and informational material including, but not limited to, the vehicle rental contract, brochure, and telephone script attached as Exhibits A - C, describe the renter's liability for loss of or damage to vehicles under various circumstances.

PAR. 6. In connection with the renting of vehicles, respondent has offered renters in most states a choice of either accepting or declining an option called the loss damage waiver ("LDW"). If a renter accepted LDW, respondent would add an additional fee to the total rental charge. In 1993 respondent typically charged renters approximately \$13 per day for LDW. LDW is not insurance but instead waives respondent's claim against the renters for damages in the event the vehicle is damaged or stolen during the pendency of the rental agreement.

PAR. 7. The renter's own vehicle insurance company or credit card issuer will often pay for loss of or damage to rental vehicles when a renter declines to purchase LDW. Respondent's informational materials, referred to in paragraph five, and numerous public sources of information, have made this fact known to potential renters.

PAR. 8. In numerous instances respondent has sought and obtained from renters who declined LDW and who have been involved in accidents as much as \$4,500 more than the vehicle's repair cost or market value. This charge is called "loss of turnback". "Turnback" is a sales incentive some manufacturers offer Budget. It occurs when the manufacturer, using a pre-negotiated formula, agrees to repurchase a used vehicle from Budget. The formula's repurchase price can be much higher than the car's market value. Respondent did not inform the renter about this potential extra charge for loss of turnback until respondent made a claim against the renter for loss or damage. Insurance companies and credit card issuers usually refuse to pay respondent's claim for loss of turnback because it exceeds the vehicle's cost of repairs or its fair market value.

PAR. 9. In the informational materials referred to in paragraph five, respondent has represented that renters were liable for loss of or

damage to the rental vehicle if they did not purchase LDW. Respondent failed to disclose that it might include, in a damage or loss claim against renters who decline LDW, as much as \$4,500 for loss of turnback. This fact would have been material to consumers' decisions to rent a vehicle from respondent and to purchase LDW. The failure to disclose this material fact, in light of the representations made, was, and is, a deceptive act or practice.

PAR. 10. In the informational materials referred to in paragraph five, respondent has represented that only two charges related to damages, a loss of use fee and the insurance policy deductible, might not be covered by the renter's vehicle insurance. Respondent failed to disclose that the renter's vehicle insurance would likely not cover a loss of turnback charge. This fact would have been material to consumers' decisions to rent a vehicle from respondent and to purchase LDW. The failure to disclose this material fact, in light of the representations made, was, and is, a deceptive act or practice.

PAR. 11. In numerous instances where vehicles were damaged, respondent has sent, or caused to be sent, written communications to renters who declined LDW demanding that they reimburse respondent for "loss of turnback."

PAR. 12. By demanding reimbursement for loss of turnback, respondent has represented, directly or by implication, that the signed rental contract entitled it to collect this charge.

PAR. 13. In truth and in fact, the signed rental contract did not entitle respondent to collect loss of turnback. Therefore, the representation set forth in paragraph twelve was, and is, false and misleading.

PAR. 14. In numerous instances where vehicles were stolen or declared "totaled," respondent has charged renters who declined LDW for loss based on "Budget book value" or "net vehicle cost."

PAR. 15. In charging a renter for loss based on the "Budget book value" or "net vehicle cost" when a vehicle was stolen or declared a total loss, respondent has represented, directly or by implication, that it was charging the fair market value of the vehicle.

PAR. 16. In truth and in fact, respondent was not charging the fair market value of the vehicle. Instead, it was charging the value that included loss of turnback. Therefore, the representation set forth in paragraph fifteen was, and is, false and misleading.

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

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Complaint

EXHIBIT A



EXHIBIT A

CREDIT IDENTIFICATION OR BILLING INSTRUCTIONS CREDIT CARD/DIRECT BILL NO./P.O. NO./EXP. DATE		APPROVAL DATE/METHOD/RENTAL CAR TYPE/CLASS/RETURN DATE	RENTAL RATE	MINIMUM RENTAL	MAXIMUM RENTAL	SECURITY
RENTER						
RESIDENCE						
CITY/STATE/ZIP		MILES IN		TIME IN		
HOME PHONE	JOB REFERENCE NO.	MILES OUT		TIME OUT		
LICENSE NO. EXP. DATE/STATE		MILES DOWN	RENTAL TIME	RENTAL		
COMPANY		MIN. YEAR RENTAL				
COMPANY PHONE NO. CORPORATE RATE NO.						
LOCAL CONTACT/PHONE NO.		WEEKEND ALLOWANCE				
ADDITIONAL DRIVER/D.O.B.						
LICENSE NO. EXP. DATE/STATE		WEEKLY COLLECTOR				
REMARKS						
DUE BACK	AUTHORIZED RETURN	RENTER'S INITIAL				
		X				
<p>LOSS DAMAGE WAIVER (LDW) - Renter agrees before to accept or decline the optional LDW at the rate shown for each day or fraction thereof. If Renter declines LDW, Renter will be responsible for the FULL VALUE for other damage within 60 days of any loss of or damage to the Vehicle, including loss of use and related expenses, regardless of fault, except as provided in Paragraph 7 on the reverse side of Rental Agreement LDW. Renter will not be responsible for such loss of damage, except as provided in Paragraph 7 on the reverse side of Rental Agreement LDW. LDW IS NOT INSURANCE. LDW DOES NOT COVER THE RENTER'S LIABILITY FOR DAMAGE TO THE VEHICLE DUE TO THEFT, VANDALISM OR COLLISION DAMAGE.</p>		<p>ATTENTION:</p> <ul style="list-style-type: none"> DAILY RATE IS BASED ON HOUR DAY RENTAL CHARGE DISCOUNT RATES ONLY FOR UNPICKED PERIOD RATES DO NOT INCLUDE TAXES NO SERVICE CHARGE 		<p>RENTER AGREES TO PURCHASE OPTION USE RENTAL OR WHEELS ONLY</p>		<p>RENTAL LOCATION CHARGE</p>
RENTAL AGREEMENT NO.		SUB TOTAL				
BAL. NO. TYPE/AMOUNT		LESS DEPOSIT				
NET DUE RENTER						
CHARGES SUBJECT TO						

Complaint

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EXHIBIT A

The Renter agrees to all terms of this Rental Agreement.

VEHICLE. The vehicle, which includes less than acquisition, accessories, and other equipment, is being rented to the Renter. There is no warranty of any kind, express or implied, as to the merchantability or fitness for any particular purpose of any vehicle delivered by this agreement.

VEHICLE RETURN. Renter will return the vehicle to the location specified in the agreement.

REPOSSESSION OF VEHICLE. If the Renter fails to comply with the terms of this agreement, the lessor may repossess the vehicle at any time and without notice.

AUTHORIZED DRIVERS. Only the Renter and the Authorized Drivers named in the agreement are authorized to operate the vehicle. Any other person operating the vehicle without the Renter's written consent is an unauthorized driver.

USE RESTRICTIONS. Renter and Authorized Drivers agree that the vehicle will not be used or operated by anyone:

- A. Who is an unauthorized driver; or
- B. In a willful or wanton manner; or
- C. While intoxicated or under the influence of drugs or other substances which would impair driving ability; or
- D. For any felony, including transportation of drugs or contraband; or
- E. To tow or push anything, to carry persons or property for hire, or to engage in a speed contest; or
- F. If obtained by fraud or misrepresentation; or
- G. Outside the continental United States; or
- H. Off regularly maintained roadways; or
- I. To carry hazardous or explosive substances; or
- J. To transport weight in excess of Vehicle's maximum payload capacity; or
- K. Where insufficient clearance of height or width exists; or
- L. Who does not know how to operate a stick shift driven vehicle; or
- M. Improper loading; or
- N. Who leaves the Vehicle and fails to remove the keys or close and lock all doors, windows and the trunk and the Vehicle is stolen.

ABILITY INSURANCE. THERE IS NO COVERAGE OF ANY OF THE USE RESTRICTIONS IN PARAGRAPH 5 ABOVE. Renter will obtain separate coverage for the use restrictions which are provided with the Vehicle. Coverage will be provided by the Renter's Automobile liability insurance policy, if the Renter's Automobile liability insurance policy provides coverage for protection against damage to the vehicle which would result in property damage. Coverage will be provided by the Renter's liability insurance policy, if the Renter's liability insurance policy provides coverage for damage to the vehicle.

REPAIRS AND MAINTENANCE. Renter will be responsible for all repairs and maintenance of the vehicle. Renter will be responsible for all damage to the vehicle, including damage to the interior, exterior, and engine. Renter will be responsible for all damage to the vehicle, including damage to the interior, exterior, and engine. Renter will be responsible for all damage to the vehicle, including damage to the interior, exterior, and engine.

ACCIDENTAL FIRE, ACTS OF NATURE. Renter will be responsible for all damage to the vehicle, including damage to the interior, exterior, and engine.

RESPONSIBILITY FOR LOSS OF OR DAMAGE TO THE VEHICLE: IF RENTER DECLINES OPTIONAL LOSS DAMAGE WAIVER (LOW), RENTER IS RESPONSIBLE FOR THE FULL VALUE (or lesser amount indicated on reverse side) of any loss of or damage, including loss of or damage

due to collision, vandalism and theft, and loss of use and other expenses, to the Vehicle, regardless of fault, except as provided in Paragraph 7.

If Renter or any Authorized Driver purchases LOW, Renter's use restriction in Paragraph 5. Renter will be responsible for the FULL VALUE (or lesser amount indicated on reverse side) of any loss of or damage (except as provided in Paragraph 7), including actual and consequential damages, costs and other fees, and LOW will be void.

DAMAGED VEHICLE. If the vehicle is damaged, Renter will be responsible for the cost of repairs and replacement of any damaged parts. Renter will be responsible for the cost of repairs and replacement of any damaged parts.

REFUELING SERVICE CHARGE. If the vehicle is returned with less than a full tank of fuel, Renter will be responsible for the cost of refueling the vehicle. Renter will be responsible for the cost of refueling the vehicle.

RENTER RESPONSIBILITY FOR PROPERTY. Renter is responsible for the safekeeping of the vehicle and for any damage to the vehicle. Renter is responsible for the safekeeping of the vehicle and for any damage to the vehicle.

FAILURE TO RETURN VEHICLE. If the vehicle is not returned by the time specified in the agreement, Renter will be responsible for the cost of the rental of the vehicle for the period of the delay. Renter will be responsible for the cost of the rental of the vehicle for the period of the delay.

VEHICLE REPAIRS. Renter will not permit any repair or replacement of any part of the vehicle without the prior consent of the lessor. Renter agrees to pay for all repairs and replacement of any part of the vehicle without the prior consent of the lessor.

MISCELLANEOUS. Renter will pay all costs, including reasonable attorneys' fees and court costs, in defending against, settling, or resolving any claims, demands and lawsuits resulting from the issuance of a warrant for the arrest of Renter or any Authorized Driver. Renter will pay all costs, including reasonable attorneys' fees and court costs, in defending against, settling, or resolving any claims, demands and lawsuits resulting from the issuance of a warrant for the arrest of Renter or any Authorized Driver.

ENTIRE AGREEMENT. This Rental Agreement constitutes the entire agreement between the Renter and the lessor. Renter agrees to all terms of this Rental Agreement.

EXHIBIT B

Exhibit B

Budget

LOSS DAMAGE
WAIVER (LDW)



EXHIBIT B

QUESTIONS FREQUENTLY ASKED CONCERNING THE LOSS DAMAGE WAIVER OPTION

WHAT EXACTLY IS LDW?

Simply stated, it's an easy way to make it possible that you may never have to pay a cent out of your own pocket if the vehicle you rent is stolen, vandalized or damaged in an accident.

WHY DOES BUDGET OFFER LDW?

It's another way we make sure your experience with Budget is a totally enjoyable one. LDW is another service that lets us do that. Although it's optional, we think the security LDW provides makes it well worth while. It's up to you to return your vehicle in the same condition it was in at the start of the rental, except for normal wear and tear and damage caused by accidental fire or acts of nature. Unfortunately, events do occur. And the last thing you need to worry about when you rent a vehicle is paying for its loss or damage. With LDW, you don't have to give it a second thought. You're relieved of all financial responsibility for loss or damage to the vehicle so long as you have not violated the terms of the Rental Agreement you signed.

HOW MUCH DOES LDW COST?

The daily charge for LDW is stated on the front of the Rental Agreement. If you accept LDW, this charge will be added to your rental for each rental day during the rental period.

WON'T MY OWN INSURANCE COVER ME?

Maybe. It all depends on where you live and what kind of policy you have. Some policies exclude rental vehicles. Or cover rental vehicles only when your vehicle is out of service and the rental is used as

a replacement. Other policies charge an additional premium for coverage of rental vehicles. Only your insurance agent can tell you for sure what kind of coverage you have. But remember, even if you're covered and something happens to the rental vehicle, you're responsible for any amount your insurance company doesn't pay.

WHAT HAPPENS IF I REFUSE LDW?

In the event of an accident or loss, you may end up paying a lot more than you bargained for. Even if your insurance covers you, you may still have to pay your deductible. You may be faced with an increased premium because you filed a claim. And, of course, if your insurance doesn't cover you, you're responsible for the full value of any loss or damage to the vehicle, plus additional costs.

WHAT DO I GET IF I ACCEPT LDW?

You'll get the peace of mind of knowing that we'll pay for the full value of any loss or damage, so long as you do not violate the terms of the Rental Agreement you signed. Again, the choice is entirely yours. But when you consider the frustration and money LDW may save you, we're sure you'll agree that accepting is a wise choice, indeed.

Under the terms of the Rental Agreement, in the event of loss or damage to the vehicle, you're responsible for the full value of such loss or damage, plus costs. The only exceptions are accidental fire or acts of nature, however, you must not breach any provision of the rental agreement. When you accept the optional LDW from Budget, you may be fully relieved of this responsibility.

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Complaint

EXHIBIT C

INTRODUCTION

Thank you for calling 1-800-RENT SMART. If you are calling for brochures please write to:

Budget Rent Smart
8700 W. Bradley Rd.
Milwaukee, WI 53224

This toll-free service has been developed by Budget Rent a Car to help you make smart rental decisions, save money, and add value to your vacation or business trip. If you are calling from a touch-tone phone, please press "1" now. If you are calling from a rotary phone, please wait and Budget service representative will be happy to take your call.

1-800 RENT SMART

INTRODUCTION:

Thank you for calling 1 - 800 - RENT SMART. This toll-free service has been developed by Budget Rent a Car to help you make smart rental decisions, save money, and add value to your vacation or business trip.

If you are calling from a touch-tone phone, please press "1" now. If you are calling from a rotary phone, please wait and a Budget service representative will be happy to take your call.

MENU:

- For information on LOSS DAMAGE WAIVER, press "1"
- For information on PERSONAL ACCIDENT INSURANCE or PERSONAL EFFECTS COVERAGE, press "2".
- For information on SUPPLEMENTAL LIABILITY INSURANCE, press "3".
- For information on REFUELING SERVICE OPTIONS, press "4".
- For information on RETURN POLICIES, press "5".
- For information on METHODS OF PAYMENT, press "6".
- For information on CAR RENTAL PRICING, press "7".
- For information on AGE RESTRICTIONS, press "8".
- For information on the BUDGET GUARANTEE, press "9".
- For more information or to make a reservation, consult your travel agent or press "0" now.

LOSS DAMAGE WAIVER

The optional Loss Damage Waiver (LDW) offered by car rental companies is not insurance. It's an option car rental companies offer renters to waive their financial responsibility in the event the car is damaged or stolen while on rent. Budget recommends that you decide whether or not you need LDW before you pick up your car and, if you don't need it, don't buy it. Here's some basic information you need to know in order to make the smart choice.

If you're renting for business, you probably don't need LDW. Check with your corporate travel arranger and follow their guidelines and recommendations.

If you're renting for personal reasons, check your own automobile insurance policy. Many policies do cover rental cars, but - if you decline - the LDW and rely on your own insurance, you would probably still be responsible for paying your usual deductible. Also, "loss of use" fees are not normally covered by personal auto insurance policies. Loss of use means reimbursing the car rental company for the revenue it's lost by having the car out of service while repairs are being made.

Some credit cards offer protection if you use their card to pay for your rental. If your credit card offers coverage, check to see if it offers primary coverage, which initially pays for loss or damage up to set limits, or secondary coverage, which pays only after the primary coverage - such as your auto policy - pays.

At most Budget locations, the cost of LDW is \$12.99 a day. If you accept the LDW, \$12.99 will be added to your total rental cost for each rental day.

To continue to hear more about LDW, press "1" now.

If you accept LDW, and comply with the terms of the rental agreement, you're relieved of all financial responsibility for loss or damage to the car, including collision, theft and vandalism during the rental.

If you decline LDW, you may be responsible for up to the full value of the car if it is damaged, vandalized or stolen during the rental. You may also be responsible for paying "loss of use" charges.

LDW is not available in all states and certain restrictions may apply in some states. Specific information on availability of the optional LDW can be obtained when making a reservation.

Remember to check out your options in advance, and - if you don't need LDW - don't buy it.

For more information or to make a reservation, consult your travel agent or press "0" now.

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 Seattle 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 general counsel, 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure 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 Budget Rent A Car Systems, Inc., is a Delaware corporation with its principal office and place of business located at 4225 Naperville Road, Lisle, Illinois.

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

ORDER

DEFINITIONS

For purposes of this order:

A. "*Turnback*" means any preset price, premium, bonus, or formula that could result in respondent receiving more than the vehicle's fair market value upon repurchase by the vehicle's original vendor, financier, or their designee.

B. "*Fair market value*" means the vehicle's price as listed in an industry-wide and generally accepted publication or directory of used car values, or the resale price received in a commercially reasonable sale.

C. "*LDW*" means any option that respondent offers that limits or eliminates a renter's liability to respondent for loss of or damage to the respondent's vehicle during the pendency of the rental agreement.

D. "*Insurance*" means the renter's own standard vehicle insurance, and any alternative, supplemental, or secondary coverage the renter possesses that provides coverage for rented vehicles including, but not limited to, the coverage currently furnished by many credit card companies.

I.

It is ordered, That respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the promoting, offering for rental, or rental of any vehicle, in or for any rental location where it seeks loss of turnback or turnback value in any form for vehicles rented in that location, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, does forthwith cease and desist from:

A. Failing to disclose, clearly and prominently, in connection with any representation relating to the renter's liability for loss of or damage to a rental vehicle, including any representation about LDW, that in the event of loss of or damage to a vehicle for which LDW was declined, respondent may charge the renter between \$x and \$y [specify range of dollar amounts Budget may seek] more than the cost of repairs or the fair market value of the vehicle, that many insurance companies will not pay this charge, and that the renter will have to pay it. This paragraph applies specifically to, but is not limited to, Budget's rental contracts and to any representation relating to the price or terms of LDW made through respondent's inputs in the "company-specific location" part of third-party, computerized

reservation systems, such as "Apollo," "PARS," "Sabre," or "System One."

Provided, however, that if respondent uses a "short-form" rental contract or other document or electronic form of agreement that makes it impractical to place the required disclosure within the document or form, respondent shall devise other means to ensure that each renter receives the substance of the disclosure before entering into the rental agreement. The other means could include, but are not limited to, a separate disclosure document to be signed or initialed by the renter.

B. Failing to post at each Budget rental location a sign or placard clearly and prominently containing the following language:

If you decline LDW and the rental car is damaged or stolen, we may charge you between \$x and \$y [specify range of dollar amounts Budget may seek] more than the cost of repairs or the fair market value of the vehicle. Many insurance companies will not pay this. If yours doesn't, you will have to pay it.

The sign or placard shall be of a size, and posted in a manner, reasonably calculated to elicit prospective renters' attention.

C. Failing to disclose, in a clear and prominent manner in any communication seeking payment of any charge for loss of or damage to a rental vehicle, any part of the charge that is attributable to loss of turnback including, but not limited to, instances where the vehicle is totaled or stolen and respondent is seeking compensation based in whole or part on any turnback amount. This disclosure shall include an explanation of what loss of turnback means and how it was calculated.

II.

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the promoting, offering for rental, or rental of any vehicle, in or for any rental location where it seeks loss of turnback or turnback value in any form for vehicles rented in that location, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, does forthwith cease and desist from misrepresenting, in any manner, directly or by implication:

- (1) The obligation of the renter to make any payment as the result of the loss of or damage to a rental vehicle; and
- (2) The value of a vehicle that has been lost or damaged.

III.

It is further ordered, That no provision of this order is intended to preempt any state law, regulation, or administrative interpretation that may limit or prevent respondent from collecting loss of turnback from a renter.

IV.

It is further ordered, That respondent shall pay into an interest-bearing escrow account designated by the Commission, under the control of the Commission's designated agent, the sum of \$75,000 on or before five days from the date of service of this order. This shall fully satisfy all monetary claims asserted by the Commission in the complaint filed herein against this respondent and shall be used to provide redress to consumers who made a payment to respondent and to pay any attendant expenses of administration. If the Commission determines, in its sole discretion, that redress to consumers is wholly or partially impracticable, any funds not so used shall be deposited into the United States Treasury. No portion of respondent's payment shall be deemed a payment of any fine, penalty, or punitive assessment. Respondent shall be notified as to how funds are disbursed but shall have no right to contest the manner of distribution chosen by the Commission.

V.

It is further ordered, That respondent shall, for three years from the date of service upon it of this order, distribute, or cause to be distributed, a copy of this order to all present and future division, regional, branch, and subrogation managers who have management responsibilities relating to the collection of collision or theft damages from renters.

VI.

It is further ordered, That respondent shall, for three years from the date of service of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying all documents relating to compliance with this order.

VII.

It is further ordered, That respondent shall, for 10 years from the date of service of this order, notify the FTC in writing at least 30 days prior to the effective date of any proposed change in its corporate structure, such as dissolution, assignment, or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries, or any other changes in the corporation that may affect compliance obligations arising out of this order.

VIII.

It is further ordered, That respondent shall, within 60 days from the date of service 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.

IX.

It is further ordered, That this order will terminate on June 17, 2016, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years; and

B. This order if the complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if the complaint is dismissed or a federal court rules that the respondent did not violate any provision of the

order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date the complaint is filed and the later of the deadline for appealing the dismissal or ruling and the date the dismissal or ruling is upheld on appeal.

IN THE MATTER OF
NORDICTRACK, INC.

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

Docket C-3675. Complaint, June 17, 1996--Decision, June 17, 1996

This consent order prohibits, among other things, a Minnesota-based manufacturer of exercise equipment from misrepresenting the benefits, efficacy, or performance of such products in promoting weight loss or weight maintenance, and requires the respondent to possess reliable evidence to substantiate such claims in the future.

Appearances

For the Commission: *Kerry O'Brien, Linda Badger and Jeffrey Klurfeld.*

For the respondent: *Pamela Deese, Robins, Kaplan, Miller & Ciresi, Washington, D.C.*

COMPLAINT

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

PARAGRAPH 1. Respondent NordicTrack, Inc. is a Minnesota corporation, with its principal office or place of business at 104 Peavey Road, Chaska, Minnesota.

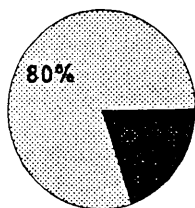
PAR. 2. Respondent has manufactured, advertised, labelled, offered for sale, sold, and distributed various exercise equipment to consumers, including its cross-country ski exercisers.

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

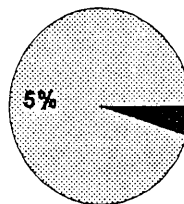
PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements for its cross-country ski exerciser,

including but not necessarily limited to the attached Exhibits A-E. These advertisements contain the following statements and depictions:

- A. NordicTrack simply gives you a better work-out in less time and that makes losing weight easy. Here's proof. In a recent survey, people who purchased their NordicTrack to lose weight, said they lost an average of 17 pounds, {depicting a woman exercising on a NordicTrack losing weight as she continues to use the machine} {on screen: Lost an Average of 17 lbs. Individual results vary.} and what's more, 80% said they kept it off for at least one year. Now that is true success especially when you compare that to diets where only 5% keep the weight off after a year.
{on screen: Weight off for one year



NordicTrack



Dieting}

But even more impressive is how easy it is to attain those benefits for yourself. . . .

. . . .
A lot of people use NordicTrack to lose weight. If that's your fitness goal, then be sure and stay with us because when we come back you'll learn about NordicTrack's incredible, proven weight loss program ...

. . . .
. . . you will get results. That's something you really can't get from diet centers or ordinary exercise machines. But you can with NordicTrack. Just look at these statistics. Seven of every 10 people who bought NordicTrack to lose weight, lost an average of 17 pounds.

{on screen: 7 in 10 lost 17 lbs! Individual results vary.}

. . . And if you're really concerned about losing weight, this statistic is really impressive. 80% of those who lost weight using NordicTrack kept it off for one year or more.

{on screen: 80% kept the weight off for over one year. Study of owners who purchased NordicTrack to lose weight}

You too can lose weight because NordicTrack is a proven formula for taking weight off and keeping it off. (Exhibit A: infomercial)

- B. In fact, research shows that of those who bought a NordicTrack to lose weight, 7 in 10 lost an average of 17 pounds. And 80% of them kept it off for over a year. (Exhibit B: print ad) (emphasis in original)
- C. Diets alone don't work.

Diets don't keep the weight off. But studies reveal that 8 in 10 people who bought a NordicTrack for weight control lost an average of 17 pounds. And after a year, they still kept it off!

Our calorie-blazing workout is the best way to lose and keep off the weight (and waist).

The easy way to melt pounds away.

NordicTrack's *patented flywheel and one-way clutch system* provides a smooth workout that takes as little as 20 to 30 minutes, 3 times a week.

(Exhibit C: print ad)

- D. NordicTrack: Fastest way to melt your winter fat. ... And it takes as few as 20 minutes, three times a week. Lose weight fast with "The World's Best Aerobic Exerciser®." . . . That's why NordicTrack users recently lost an average of 18 lbs. - in just 12 weeks. (Exhibit D: print ad) (emphasis in original)

- E. HOW 20 MINUTES CAN CHANGE YOUR LIFE.

NordicTrack gives you more of a workout in less time than any other in-home exerciser. It's the best way to get the exercise you need to enjoy a long, healthy life. It's the only way to get the total-body workout that has changed the way America exercises. And all it takes is 20 minutes, three times a week.

....

When you begin your regular NordicTrack workouts, you'll be proud of how fast you achieve your goals.

- If weight loss is your goal, research shows that on average, people can lose 18 pounds in just 12 weeks with NordicTrack.

(Exhibit E: print ad)

PAR. 5. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-E, respondent has represented, directly or by implication, that:

- A. Seventy or eighty percent of those who purchased a NordicTrack cross-country ski exerciser to lose weight lost an average of seventeen pounds;
- B. Eighty percent of those who purchased a NordicTrack cross-country ski exerciser to lose weight and lost weight using it maintained all of their weight loss for at least a year;
- C. Eighty percent of those who purchased a NordicTrack cross-country ski exerciser to lose weight maintained all of their weight loss for at least a year;
- D. Consumers who use NordicTrack cross-country ski exercisers for twenty minutes a day, three times per week, lose an average of eighteen pounds in twelve weeks.

PAR. 6. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-E, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 7. In truth and in fact, at the time it made the representations set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Respondent based its success rate claims on studies which suffered from various methodological flaws. The results of the studies reflect the experiences of only a highly selected population of purchasers who were able to integrate the NordicTrack cross-country ski exerciser into their regular, weekly, exercise regime. One such study involved putting thirty-eight participants through a rigorous twelve-week exercise program. Respondent based weight-loss claims on the average weight loss experienced by the twenty participants (53%) able to complete the program. The studies also failed to take into account changes in the dietary habits of purchasers. Furthermore, the studies were based on self-reported body weights, unadjusted for bias, which may yield inaccurate results. As a result of these methodological flaws, respondent's studies did not constitute a reasonable basis that substantiated the representations set forth in paragraph five. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-E, respondent has represented, directly or by implication, that competent and reliable research or studies prove the representations set forth in paragraph five.

PAR. 9. In truth and in fact, competent and reliable research or studies do not prove the representations set forth in paragraph five. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that

only five percent of those who lose weight on diets keep the weight off after a year.

PAR. 11. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph ten, respondent possessed and relied upon a reasonable basis that substantiated such representation.

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

PAR. 13. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

NordicTrack Infomercial
"Change Your Life With NordicTrack" 28:30

ANNOUNCER: The following is a paid advertisement, presented by NordicTrack, Incorporated.

KAY TAYLOR, Nordictrack owner: I feel healthy. I feel full of energy. I feel like everybody should have one. (laughs)

JACKIE CASHION, Nordictrack owner: After the workout you can feel your arms, your upper back, your lower back, your hips, legs, abdomen, everything. It's really a whole body workout, and you just can't get that with any other kind of machine.

MIKE HORSFALL, Nordictrack owner: NordicTrack has helped me stick with a fitness program. And if I can do it, you can do it.

ANNOUNCER: What do all these, and 3 million people like them have in common? What makes them healthier and happier than they've ever been? The answer is NordicTrack, the world's best aerobic exercise machine. All across America, people have discovered that NordicTrack is the key to taking control of their lives. Today, you'll learn how you can dramatically improve your life, and how you can benefit from finding the NordicTrack body inside you. You'll discover how NordicTrack is the best way to lose weight, shape your body, condition your heart, and increase your energy so you'll look and feel your best. NordicTrack -- America's leading fitness company, with the machine that's been featured in Shape, Men's Health, Fitness, USA Today Magazine, and featured in

leading publications everywhere. The superior choice recommended by Consumer's Digest, the Made in America Foundation, and the American Fitness Association. And used by people like you everywhere, who have changed their lives for the better.

BOB SEAGREN: Hi I'm Bob Seagren. And today, NordicTrack and I would like to invite you to learn more about the world's best aerobic exerciser, why it's so effective, and how it can change your life too.

You know, a few years ago, around 26 to be exact, I didn't have much trouble staying in shape. A couple of decades and a few pounds later, staying fit wasn't quite so easy. So I began looking for the best aerobic exercise anywhere. And a couple of years ago, I found it. In fact, I like it so much, I went on television to talk about it: "Once I tried NordicTrack, I was hooked. Its total body motion relaxed my muscles and helped me release pent up tension. And mentally, I felt better." {scenes from "Inside Track to Fitness"} That was two years ago. At the time, almost a million people had already discovered that NordicTrack could change their lives. Since then, nearly 2 million more have gotten on track, and changed their lives with the benefits of NordicTrack. Benefits like proven weight loss, and faster cardiovascular conditioning. Because the NordicTrack workout actually burns more calories with less effort. That's why NordicTrack users get better results with a machine they also love to use. But you don't have to be a cross-country skier or even an athlete to enjoy the benefits of NordicTrack. You just need a desire to change your life.

For eighteen years now, people just like you have been using NordicTrack because it works. And today, we'll talk with some of these people about the changes they've made in their lives when they took that first step onto a NordicTrack. We'll also visit with the father of aerobic exercise, Dr. Kenneth Cooper. When we come back, they'll explain why NordicTrack is the world's best aerobic exercise machine, and how easy it can be for you to improve the way you look and feel, and get your life on the right track.

DRAMATIZATION: When Brian first joined the company, I thought, "He's cute. Kinda chunky, but cute."

Gwen was the first person I met when I started my new job. And she had a nice personality, but she didn't really look like my type.

Then I began to notice a difference in Brian. He was looking -- great. I could tell he was losing weight, but it was more than that.

Yeah, I had dropped some pounds. But so had Gwen. And she looked TERRIFIC. He was just so full of life. It's like he found his secret. Um -- I wanted to know more about it. And more about him, too.

So I finally asked her what she had been doing, because whatever it was, it was working.

It was NordicTrack. (both laugh.)

I lost 15 pounds in just two months.

Now I'm a size 8, and I'm loving my new life.

Our new life.

Our new life.

BOB SEAGREN: NordicTrack; not only can it change your shape it can change your life.

907

Complaint

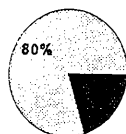
You know, NordicTrack works far more effectively than other exercise equipment, because only NordicTrack accurately simulates the best aerobic exercise in the world -- cross-country skiing. On a NordicTrack, you can burn up to 1,100 calories an hour because it works on all your muscle groups, both lower and upper body, unlike ordinary exercisers. In fact, four separate studies have proven that NordicTrack burns more calories, up to 51% more than stationary bicycles. Up to 39% more than shuffle-type skiers, up to 61% more than stairsteppers. And, at normal exercise levels, up to 32% more calories than ordinary treadmills.

NordicTrack simply gives you a better work-out in less time and that makes losing weight easy. Here's proof. In a recent survey, people who purchased their NordicTrack to lose weight, said they lost an average of 17 pounds, {depicting a woman exercising on a NordicTrack losing weight as she continues to use the machine}

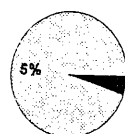
{on screen: Lost an Average of 17 lbs. Individual results vary.}

and what's more, 80% said they kept it off for at least one year. Now that is true success especially when you compare that to diets where only 5% keep the weight off after a year.

{on screen: Weight off for one year



NordicTrack



Dieting}

But even more impressive is how easy it is to attain those benefits for yourself. That's why I'm talking with NordicTrack owners who perhaps just like you are looking for a better way to get in shape and stay that way for life. People like Diane Hall. Hi Diane.

DIANE HALL, NordicTrack owner: Hi Bob.

BOB SEAGREN: Diane, how did you become a NordicTrack owner?

DIANE HALL: My husband and I knew we needed to get into some sort of fitness program. We saw the show on TV, so we called for the free tape, and watched that, and we were sold.

BOB SEAGREN: What do you like most about NordicTrack?

DIANE HALL: I think the biggest surprise was that I lost 20 pounds without any dieting at all. I think that's a wonderful benefit.

BOB SEAGREN: And now let's hear what some other people have to say about the world's best aerobic exercisers.

KAY TAYLOR: It's actually fun. I mean it doesn't get boring to me, and I can just work at it, and I know what it's doing, because I can feel it.

MIKE HORSFALL: Having the NordicTrack there, and because its fun to use, it has kept me on some sort of exercise regime which is even more important the older you get.

CHAR STUART, Nordictrack owner: Its making me a healthier person. And I truly believe it is. It's just very easy to use.

BOB SEAGREN: You know the NordicTrack really is easy to use. You just step on the wooden skis. Your feet fit comfortably into the toe cuffs, and you'll begin walking. It's a nice, natural gliding motion, as you shift your weight from side to side. Your hips rest comfortably against a contoured pad. And when you're ready, just add your arms. They'll swing in a smooth, natural unrestricted arc -- it's really as easy as that. The NordicTrack is not jarring like some machines. It's all low impact. So it won't damage your ligaments or joints. And like Diane and millions of other users have discovered, NordicTrack makes a regular exercise routine easy, because in as little as 20 minutes three times/week, you can get the world's best total body workout right in the comfort of home. No wonder 7 out of 10 owners still use their NordicTracks regularly, 5 years after buying them. That's right, 7 out of 10, and here's why.

JACKIE CASHION: NordicTrack is the machine that you can use for the rest of your life. Um, it's low impact, and it gives you a really good workout. You don't have to worry about hurting yourself.

MIKE HORSFALL: I tend to not be motivated by things that aren't very much fun, and NordicTrack is fun.

CHAR STUART: It's so convenient, it makes you not mind exercising.

BOB SEAGREN: It's obvious by now that NordicTrack is incredibly effective. Study after study rates it as the best aerobic exercise machine in the world, That's because research has proven that cross-country skiing is the world's most effective exercise, and NordicTrack simulates it best. And while there are other exercise machines on the market only NordicTrack's legendary flywheel design, and its patented upper arm exerciser, give you the smooth, total body motion of cross-country skiing. That's what makes NordicTrack a NordicTrack.

You won't get it with a stairstepper; you won't get it with a bike, or a treadmill. You only get it with NordicTrack.

You know, getting fit isn't just about changing the way you look, its also about changing the way you feel. You can feel healthier. You can feel more energetic. All it takes is a few minutes, three times a week. And, one simple phone call.

BARBARA at Nordicttrack: Hi, here at NordicTrack, we get thousands of calls everyday from people wanting to feel better, look better, and take control of their lives. And everyday we give them the help it takes to achieve those goals. Because when you buy a NordicTrack, you're not only getting the world's best aerobic exercise machine, you're also getting the help and support of a company that's been a recognized leader in aerobic conditioning for more than 18 years. So if you're not sure how to use your equipment, need help planning a fitness program, or have other questions for our fitness counselors, just call our toll-free support line. We're there to help you succeed. It takes as little as 20 minutes/day, 3 times/week. And you'll be on your way to success. And your NordicTrack body.

ANNOUNCER: Call our toll-free number on your screen now, and we'll send you absolutely free, this 30 minute video, plus this 16 page brochure with information on how to achieve your individual fitness goals with any one of our 7 NordicTrack models. Every NordicTrack is backed by our two year limited warranty, and lifetime assurance program. Call now, and learn how easy it is to own a NordicTrack with our new easy-pay plan.

BARBARA AT NORDICTRACK: You can take control, and improve your life. It's as easy as picking up the phone, and calling the number on your screen now. Get on the right track; the track to better health, because you can change your life.

BOB SEAGREN: Cross-country skiing -- fluid, natural, and because it uses all the body's major muscle groups, the best aerobic exercise in the world.

Hi, I'm Bob Seagren. Aerobic exercise has been popular for years, because it's recognized everywhere as the best way to lose fat, get your heart in shape, and control your weight. But not all aerobic exercise is created equal. That's why we spoke with Dr. Ken Cooper, of the Cooper Aerobics Institute in Dallas, Texas. Dr. Cooper's pioneering research, and promotion of aerobic conditioning, has earned him the recognition as the founder of the modern aerobics movement. Let's hear what the man who literally wrote the book on aerobics has to say about the best aerobic exerciser in the world.

DR. KENNETH COOPER: Why is cross-country skiing so good? Any exercise that involves the arms and legs gives you synergistic effect. What does that mean? One plus one equals three. Any time you can combine the arms and legs into the activity, you get more benefit in a shorter period of time. So I'm safe in saying that the best aerobic activity, bar none, is cross-country skiing. Alright, if that is true, how does it relate to something like the NordicTrack? Well, the answer is that we can't all go out and cross-country ski; it's not readily available, but these new devices like the NordicTrack so simulate cross-country skiing that the results are almost the same. I've been promoting NordicTrack for years and years. And always complimentary because it's a good device.

BOB SEAGREN: As you can see, aerobic exercise is an important way to improve your life. But as we've just discovered, not all aerobic exercise is created equal. And the same holds true for aerobic exercise equipment. You see, stationary bicycles mainly work the thigh and hamstrings. Treadmills work the upper and lower leg area, but neglect the upper body. And stairsteppers miss this important area, too.

Only NordicTrack includes all the muscle groups used in cross-country skiing. Ankles, and achilles tendons. Calf muscles. Hamstrings. Thighs. And the gluteus muscles. But unlike others, NordicTrack also works and tones the muscles of the back, abdomen, shoulders, biceps, triceps, and pectorals. By working the muscles above your waist, NordicTrack increases your body's oxygen consumption dramatically. That's why you'll burn more calories on a NordicTrack than with ordinary equipment. Up to 51% more than stationary bicycles, 32% more than ordinary treadmills at normal exercise levels. And up to 61% more than stairsteppers.

With ordinary exercise equipment, you'll have to work longer, harder, or both just to achieve the same aerobic benefits as 20 minutes on a NordicTrack. This total body approach has another positive benefit to keeping your workout on track. NordicTrack feels less stressful because your workout is spread across more muscles. In three separate head-to-head tests, NordicTrack was consistently rated as feeling more comfortable to use and less stressful than other exercisers.

And quite honestly, if you're like me, that means you're more likely to stick with it. So if you're going to invest money, invest in the machine that gives you proven results, NordicTrack.

TIFFANY WAGGONER, NordicTrack owner: I know absolutely that I'm stronger than I've been in a very long time.

KAY TAYLOR: I lost 10 pounds since I started with my NordicTrack.

JACKIE CASHION: You have not a lot of time, and you want to get a good workout. NordicTrack's the best.

BOB SEAGREN: Here's another reason NordicTrack is superior to ordinary exercise equipment. It's a low impact, non-jarring workout, that's easy on your joints and ligaments. Unlike the strain your knees take on a stairstepper, or the pounding your back and hips take on a treadmill. All of which explains why the NordicTrack is preferred 6 to 1 over ordinary equipment. And, why people like Clem Birch have gotten on track to a better life. Hi Clem.

CLEM BIRCH, NordicTrack owner: Hi Bob, how are ya?

BOB SEAGREN: Good. Clem, what made you buy a NordicTrack?

CLEM BIRCH: Well, actually, my doctor recommended that I buy it. After my second heart attack, he said, get a NordicTrack.

BOB SEAGREN: Why did your doctor recommended NordicTrack?

CLEM BIRCH: Well, first thing he told me was that he himself used one, three times/week. And he told me it was the most efficient way for me to exercise that would be easiest on my bones and body structure.

BOB SEAGREN: Clem, what would you say to someone considering buying a NordicTrack?

CLEM BIRCH: I'd say the same thing my doctor said, go get a NordicTrack, it is really the best exercise machine on the street.

BOB SEAGREN: Has using the NordicTrack changed your life?

CLEM BIRCH: Yeah, it's changed my life. It lets me live it everyday.

BOB SEAGREN: Clem, thank you very much. You know it's a story we hear time and time again. That's because NordicTrack is the better way to get your heart in shape.

Recent University and clinical research concluded that NordicTrack conditions your cardiovascular system 24% more efficiently than exercise bikes, 32% better than treadmills, and over 35% more than stairsteppers.

Research shows that in 12 weeks, NordicTrack users were able to decrease their blood pressure 12%. With results like this, isn't it time you decided to change your life -- with NordicTrack.

A lot of people use NordicTrack to lose weight. If that's your fitness goal, then be sure and stay with us because when we come back you'll learn about NordicTrack's incredible, proven weight loss program with the satisfaction guarantee. Stay tuned.

DRAMATIZATION: I turned 40 today. 40. I used to dread the thought of it. I used to think whoever said life begins at 40 was nuts. And then about a year ago, I went in for a physical. The doctor said I had problems. High cholesterol. High blood pressure. Weight. Stress. You get the idea. Said I was a walking time bomb -- that had better do something now about getting into shape.

Hey, it wasn't like I hadn't tried. You know, the health club, jogging, but there was always an excuse, and nothing seemed to work, and I never had the time. Then I discovered NordicTrack. Just 20 minutes, 3 times a week at home. Easy. And right at home. And my blood pressure - down. Cholesterol - down. And you know what? I've kept my weight off. And more importantly, I feel just great. So that person who said life begins at 40, well, they were right. Thanks, NordicTrack.

BARBARA at Nordictrack: Satisfied owners write us all the time, telling us about how much they love their NordicTrack. Some of them have been in use for as long as 15 years. The fact that a NordicTrack will last so long shouldn't be a surprise. You see, each NordicTrack is built by hand, right here in the United States, by people who take pride in making your machine solid and durable, as well as beautiful. This level of craftsmanship is unsurpassed in the fitness equipment industry. It's what sets NordicTrack apart from the rest. So when you buy one of our machines, you get not only the world's best aerobic exerciser, you also get the commitment and support of a company that's been helping people achieve better health for years. That's why now more than 3 million people use a NordicTrack. It's built to last, by the company that invented the aerobic cross-country ski exerciser.

ANNOUNCER: Call our toll-free number on our screen now. And we'll send you absolutely free this 30 minute video, plus this 16 page brochure with information on how to achieve your individual fitness goals with any one of our seven NordicTrack models. Every NordicTrack is backed by our 2-year limited warranty, and lifetime assurance program. Call now, and let our affordable new easy pay plan put you on track, so call now.

BARBARA at Nordictrack: Just 20 minutes a day, 3 times a week, and you'll be on your way to discovering the NordicTrack body inside you. Start by calling the number on your screen now. We'll send you your free NordicTrack brochure and video, and help you get on the right track, the track to better health and a better life. Call now.

BOB SEAGREN: Inside everybody is a better body, a NordicTrack body. Millions of people have discovered it, they've experienced how good it feels to be toned, and alert, instead of overweight and sluggish. And you can discover, too, just how easy it is to attain your NordicTrack body, thanks to the world's best aerobic exerciser. When I was in training for the Olympics back in the late 60's, keeping weight off wasn't a concern. But losing weight is something just about all of us face at one point in our lives. And while diet plays an important role, research proves over and over that a consistent aerobic exercise program is the key to success.

As we've learned, there is absolutely no better aerobic exercise than cross-country skiing. We've also learned that only NordicTrack, with its legendary flywheel design, realistically simulates the fluid motion of cross-country skiing, giving you a total body toning and conditioning workout. That's why the makers of NordicTrack can confidently offer you this: it's called the proven weight loss program, and your satisfaction is guaranteed. Here's how it works:

Call to order a NordicTrack. Use it for 30 minutes, 4-5 times a week, and you can say good bye to 10 pounds in 60 days. That's right, 10 pounds in 60 days. If you're not completely satisfied, return your machine, and NordicTrack will refund the purchase price in full. Your satisfaction is guaranteed. And you will get results. That's something you really can't get from diet centers or ordinary exercise machines. But you can with NordicTrack. Just look at these statistics. Seven of every 10 people who bought NordicTrack to lose weight, lost an average of 17 pounds.

{on screen: 7 in 10 lost 17 lbs! Individual results vary.}

That's because NordicTrack uses all the body's major muscle groups, burning more fat and calories with less effort. This also makes for faster cardiovascular

conditioning. And if you're really concerned about losing weight, this statistic is really impressive. 80% of those who lost weight using NordicTrack kept it off for one year or more.

{on screen: 80% kept the weight off for over one year. Study of owners who purchased NordicTrack to lose weight}

You too can lose weight because NordicTrack is a proven formula for taking weight off and keeping it off.

Looking better, feeling better, that's what NordicTrack is all about. It's a way to take control of your life and become a happier, healthier person.

Better health is something everybody's talking about these days. There are lots of programs and equipment that claim to help. But why do more than 11,000 doctors recommend NordicTrack to their patients? Well, to answer that question, we interviewed Dr. Ken Cooper, of the Cooper Aerobics Institute in Dallas, Texas.

DR. KENNETH COOPER: For years I asked people what motivates them to continue exercising. Nearly all the people come back with the same answer: it makes me feel good. They are less depressed, they are less (?). They have an improved self image, a much more positive attitude towards life, and fewer somatic complaints. You're different psychologically when you're fit. And time is a big factor as far as exercise is concerned, people tell me they don't have the time, they don't have the place, they don't have the energy, they don't have the equipment, they don't have the money, whatever it may be, so if we could make sometime efficient, and you get more benefit in a short period of time, the Americans want to hear that. And that's the advantages of the equipment such as a NordicTrack that incorporates the arms and legs of the activity. You get more benefit in a shorter period of time.

BOB SEAGREN: Two years ago when I discovered this remarkable exerciser, I went on TV to talk about it. At that time, over a million people were using NordicTrack, with its legendary flywheel, patented upper arm exerciser, hand built durability, and beauty. The only machine that accurately simulates cross-country skiing, the world's best aerobic exercise. Since that show two years ago, nearly 2 million more have gotten on track. Today we have somebody who has changed his life for the better, John Kirk. Hi John.

JOHN KIRK, NordicTrack owner: Hello, Bob.

BOB SEAGREN: Please sit down. John, what motivated you to buy a NordicTrack?

JOHN KIRK: The fact that I had gotten obese. I went to a company physical, and my doctor told me those very same words.

BOB SEAGREN: Have you lost weight with the NordicTrack?

JOHN KIRK: Yes, I have. I was able to take off 57 pounds, and I've managed to keep it off for two years now.

BOB SEAGREN: What would you say to someone considering buying a NordicTrack?

JOHN KIRK: Well, I would say don't compromise with anything but a NordicTrack.

BOB SEAGREN: John, thanks for being with us.

JOHN KIRK: You're welcome, Bob.

DRAMATIZATION: Dear NordicTrack: 11 years ago, my husband and I realized we had to do something about the way we looked and felt. Frank had high blood pressure. I needed to lose some weight. Our doctor recommended we buy

NordicTrack, and we did. I can't imagine living these past 11 years without it. Frank's blood pressure is down, and both of us lost weight. The real miracle is how we feel. All the things that we love to do that we never even considered before NordicTrack. And now that we're grandparents, we need our extra energy more than ever. It's also a real pleasure to realize that someone still makes a product that lasts. Frank always talks about how solid and smooth it still is. I just like how the wood looks, so beautiful. So, even though I had wanted to write and thank you for a long time, the real reason for this letter is that I wish to order a NordicTrack for my daughter. She wants to lose a few pounds, and feel like her old active self again. You see, she just gave us a beautiful new grandson. Take it from me, nobody's going to need that extra energy more than her.

BOB SEAGREN, NordicTrack truly is the world's best aerobic exerciser. It works muscles that bikes, stairsteppers, and treadmills miss entirely. It burns more calories, up to 1100 per hour. Burns fat faster. Conditions your heart faster. Yet it's low impact, and feels more comfortable to use. And because it's easy to get results, you'll stick with it. Remember, after 5 years, 7 in 10 NordicTrack owners still use their machines regularly. They changed their lives, you can too.

With NordicTrack, you'll get the legendary flywheel, adjustable resistance for both legs and arms, to tailor your workout. And, unlike most other fitness equipment made of plastic and aluminum, the NordicTrack is constructed of wood and steel for strength and durability. You also get optional features such as: independently calibrated upper and lower body resistance; adjustable elevation to vary the intensity of your workout. Computerized electronics to monitor your progress. Carved ski tips with brass accents. And authentic ski grips, for a more realistic simulation of cross-country skiing. Wheels, for portability. Folding for easy storage. The beautiful craftsmanship of a quality product handmade in America. And a 3 point lifetime assurance program that includes your in-home trail, a two-year limited warranty, and a toll free customer hotline. Prices are very affordable, starting at just \$339.95, less than what you'd pay for a year at a typical health club, and half the price of most treadmills. Only NordicTrack offers proven results.

If you want to lose weight, reduce stress, increase your energy and stamina, or simply feel better, give us a call, and see how easy it is to get on track for live.

BARBARA at Nordictrack: Hi I'm Barbara, here at NordicTrack. For the best aerobic workout, for convenience and affordability, you just can't do better than NordicTrack. But don't take my word for it, every year we get thousands of letters from happy NordicTrack owners. Here's what some of the them say:

ROBERT PENZA, NordicTrack owner: Dear NordicTrack. I have used bikes and rowers, and they did not compare to the total body workout I get from my NordicTrack.

DIANE BURKE, NordicTrack owner: My husband and I are very big fans of our NordicTrack. It has changed our lives. It's great for relieving stress, and the NordicTracks keep me from feeling old.

GERALD P. MCKENNA, NordicTrack owner: I'm 72 years young, and have been "tracking" since 1980.

BARBARA at Nordictrack: At NordicTrack, we don't just make machines, we make a difference in people's lives, and we'd like to make a difference in yours.

ANNOUNCER: Call our toll-free number on your screen now, and we'll send you absolutely free this 30-minute video, plus this 16-page brochure with information

on how to achieve your individual fitness goals with any one of our seven NordicTrack models. And of course, every NordicTrack is backed by our two-year limited warranty, and lifetime assurance program.

BARBARA at Nordictrack: Haven't you put off owning a NordicTrack long enough? Call now.

ANNOUNCER: There's a NordicTrack model to fit every fitness goal and budget. Our new easy pay plan is the affordable way to own a genuine NordicTrack for as little as \$19.95/month.

MICHELLE ANDERSON, NordicTrack owner: What would I tell people about NordicTrack? I'd tell them that it's the best there is. The best exercise, the best investment, for the best you.

JOHN KIKTA, NordicTrack owner: I changed my life with NordicTrack. Now I can play harder, work harder, and just enjoy life more.

ANN PRICE, NordicTrack owner: I changed my life in just 20 minutes a day, three times a week, with NordicTrack.

DONALD BLACK, M.D., NordicTrack owner: I changed my life thanks to NordicTrack. And you can change your life, too.

ANNOUNCER: NordicTrack would like to thank Olympic gold medalist Bob Seagren, Dr. Kenneth Cooper, these fine publications, and our valued NordicTrack owners.

The preceding program was a paid advertisement by NordicTrack Incorporated.

Get Weight Off and Keep it Off with a NordicTrack...

America's most efficient, total-body workout.

Diets Alone Don't Work.

When you eat less, your body automatically slows its metabolism to burn fewer calories. You lose some weight, but you feel tired, grumpy and hungry. As the body strives to regain its normal balance, you splurge — and gain it all back. Discouraged, you begin the cycle again.

The Key To Maintaining Weight Loss.

It's simple. Eat sensible meals, but don't starve. Exercise on a NordicTrack at least 20 minutes a day three times a week. That's it. Regular workouts with the highly efficient NordicTrack speeds up your body's metabolism and makes it possible for you to get weight off and keep it off.

In fact, research shows that of those who bought a NordicTrack to lose weight, 7 in 10 lost an average of 17 pounds. And 80% of them kept it off for over a year.

NordicTrack: The World's Best Aerobic Exerciser*.

Fitness experts agree that cross-country skiing is the world's best aerobic exercise. And the NordicTrack patented fly wheel and one-way clutch mechanism simulates the smooth, total-body action of cross-country skiing to give you the world's best aerobic workout. Better than walking, running or any other in-home exerciser. With a NordicTrack exerciser, you'll work more muscle groups and burn more fat in less time than with an exercise bike, treadmill or stepper. And burn up to 1,100 calories per hour, according to research.



30-day in-home trial

Call **1-800-441-7891** ext. 3200

FREE Video and Brochure

- Please send me a FREE brochure
- Also a FREE VHS videotape

Name _____ Phone _____
 Street _____
 City _____ State _____ Zip _____

Send to: NordicTrack, Dept. 22004, 200 Pevee Road, Chaska, MN 55120-1141

NordicTrack

A CML Company

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Home Magazine


Complaint

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EXHIBIT C



NordicTrack removes love handles... fast!



Why it takes your arms and legs to remove your love handles.

A NordicTrack® exercise works all major muscle groups at the same time. Which means you can melt away more fat in less time than with ordinary exercises.

In fact, NordicTrack burns more fat than stairsteppers, exercise bikes and treadmills. It even burns up to 1,100 calories per hour. And unlike those lower-body exercisers, NordicTrack tones your whole body (including your love handles).

30-day in-home trial!

NordicTrack
A CML Company

We're Changing the Shape of America™

Diets alone don't work.

Diets don't keep the weight off. But studies reveal that 8 in 10 people who bought a NordicTrack for weight control lost an average of 17 pounds. And after a year, they still kept it off.

Our calorie-blasting workout is the best way to lose and keep off the weight (and waist).

The easy way to melt pounds away.

NordicTrack's patented flywheel and one-way clutch system provides a smooth workout that takes as little as 20 to 30 minutes, 3 times a week.

Handle your love handles with NordicTrack

Call 1-800-441-7891 Ext. 1874A

FREE Information

Please send me a FREE brochure
 Also a FREE VHS videotape

Name _____ Phone () _____
 Street _____
 City _____ State _____ Zip _____

Send to: NordicTrack, Dept. 1874A
 104 Peppery Road, Chaska, MN 55318-4355
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NORDICTRACK, INC.

Complaint

EXHIBIT D

NordicTrack: Fastest way to melt your winter fat.

You'll burn more fat in less time than with stairsteppers, exercise bikes or treadmills.

During winter, fat builds up and pounds add up. And these ordinary exercises that work just your lower body don't use enough of your muscles to effectively burn the fat. But the NordicTrack® exercise works every major muscle group in your body. That's why research shows you'll burn **20% more fat** than with any standard exercise. NordicTrack burns your body fat:

Hard on fat, easy on your body.
Our patented **flexed and free way** closed system often **uses less motion** than stairsteppers and treadmills. Research has shown that NordicTrack is easier to use than exercise bikes.

Our total body workout spreads the effort across your entire body, so no muscle gets strained. And it takes as few as 20 minutes, three times a week.

This Year Get In Shape For Good!
30-day in-home trial!

NordicTrack Burns More Calories Than Exercise Bikes or Stairsteppers
Stairsteppers **burn 87% LESS**
Exercise Bikes **burn 51% LESS**

NordicTrack
Lose weight fast with "The World's Best Aerobic Exercise"™.

NordicTrack has simulated cross-country skiing which fitness experts agree is the best aerobic workout, but none. That's why NordicTrack users consistently report an increase of 10 lbs. in just 12 weeks. Why wait for an inferior workout? Get on Track™ with NordicTrack!

Call 1-800-441-7891
Ext. 37764

FREE Video and Brochure

Please send me a FREE brochure
 Also a FREE 30-day in-home trial

Name () _____
Street _____
City _____ State _____ Zip _____
Card for NordicTrack, Dept. 11702, 601 24p
© 1990 NordicTrack, Inc. All rights reserved. *See your local NordicTrack dealer for more information.

NordicTrack
A Cal Company

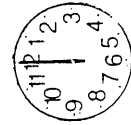
EXHIBIT D

Complaint

121 F.T.C.

EXHIBIT E-1

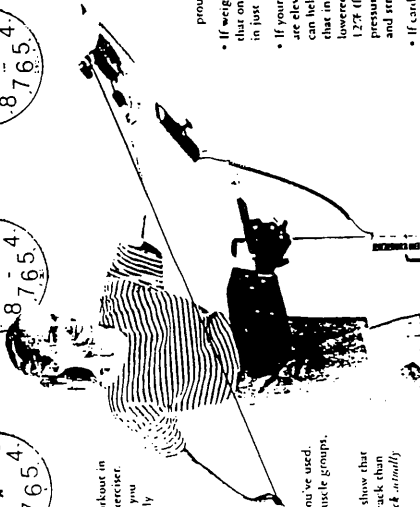
HOW 20 MINUTES CAN CHANGE YOUR LIFE.



NordicTrack gives you more of a workout in less time than any other in-home exerciser. It's the best way to get the exercise you need to enjoy a long, healthy life. It's the only way to get the total-body workout that has changed the way America exercises. And all it takes is 20 minutes, three times a week.

With its natural, smooth, rhythmic motion, the NordicTrack exerciser doesn't feel like any other fitness machine you've used. Since the workout is spread over all your muscle groups, you're not straining any specific muscles.

At the same level of intensity, studies show that you need less effort to use a NordicTrack than with ordinary exercises. See *NordicTrack: a study just came to me.*



When you begin your regular NordicTrack workouts, you'll be proud of how fast you achieve your goals.

If weight loss is your goal, research shows that on average, people can lose 15 pounds in just 12 weeks with NordicTrack.

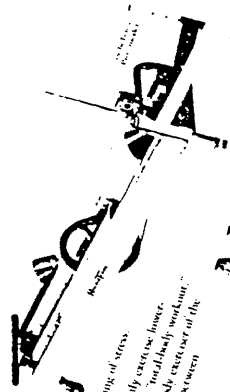
If your blood pressure and cholesterol levels are elevated, exercise with NordicTrack can help bring them down. Research shows that in just 12 weeks, NordicTrack users lowered their blood pressure an average of 12% (from 141/86 to 120/80). Lower blood pressure reduces your risk of heart disease and stroke and helps you feel better.

If cardiovascular fitness is your goal...

EXHIBIT E-1

symptoms
 * And, as your activity increases, your energy and endurance — the source of the runner's high — increase to further self-heal and reduce your feeling of stress.

Unlike many exercise machines that only exercise lower body muscles, NordicTrack provides a "total-body workout." NordicTrack increases aerobic capacity between 8 and 12 percent.



THE ORIGINAL IN-HOME SKI MACHINE IS STILL YOUR BEST CHOICE.
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SINCE 1976, OVER 3 MILLION PEOPLE ACROSS AMERICA HAVE CHANGED THEIR LIVES WITH NORDICTRACK.
 Don't miss out on the time of your life. Call 1-800-441-7891 today.

By the time you finish your NordicTrack workout, a head's been lifted off your shoulders. You're looking forward to the rest of your day, and not the backache you got from your computer. For many, that's the big payoff from NordicTrack and their skis. In fact, after five years, 70% of those who use the machine using their NordicTrack in-home exercise machine still times track. *Prove it! Only NordicTrack works.*

This is the best time of my life. I've been able to enjoy my life and I can't wait to get back to work. All thanks to NordicTrack. I've been able to enjoy my life and I can't wait to get back to work. All thanks to NordicTrack. I've been able to enjoy my life and I can't wait to get back to work. All thanks to NordicTrack.

When I started using NordicTrack, I just ran on the treadmill. I was bored and I was tired. Then I got the NordicTrack. I was able to enjoy my life and I can't wait to get back to work. All thanks to NordicTrack.

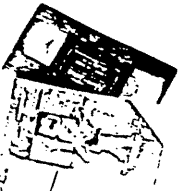
After I saw the other exercise machines, I had to try using the NordicTrack. I was able to enjoy my life and I can't wait to get back to work. All thanks to NordicTrack.

I had to try using the NordicTrack. I was able to enjoy my life and I can't wait to get back to work. All thanks to NordicTrack.

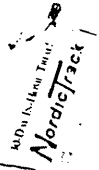
It was great to enjoy my life and I can't wait to get back to work. All thanks to NordicTrack.

My life has changed. I was able to enjoy my life and I can't wait to get back to work. All thanks to NordicTrack.

My life has changed. I was able to enjoy my life and I can't wait to get back to work. All thanks to NordicTrack.



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FOR AS LITTLE AS \$1995* A MONTH... FEEL LIKE 3 MILLION.

REF ID: A10-2417-94 21-83-202

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 San Francisco 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 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 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 NordicTrack, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 104 Peavey Road, in the City of Chaska, State of Minnesota.

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

ORDER

I.

It is ordered, That respondent NordicTrack, Inc., 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 manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any exercise equipment in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication:

A. The percentage of its customers who have successfully lost weight;

B. The percentage of its customers who have successfully maintained weight loss;

C. The number of pounds lost by its customers;

D. The percentage of weight loss maintained by its customers;

E. The rate or speed at which its customers have experienced weight loss;

F. The length of time its customers must use such product to achieve weight loss;

G. The comparative efficacy of any other weight loss method or methods; or

H. The benefits, efficacy, or performance of such product in promoting weight loss or weight loss maintenance;

unless, at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation. For the purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that have been 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 respondent NordicTrack, Inc., 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 manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any exercise equipment 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 existence, contents, validity, results, conclusions, or interpretations of any test, study, or survey relating to weight loss, weight loss maintenance or comparisons with the efficacy of other weight loss methods.

III.

It is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

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

IV.

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 this order.

V.

It is further ordered, That respondent shall, within ten (10) days from the date of service of this order upon it, distribute a copy of this order to each of its officers, agents, representatives, independent contractors, and employees involved in the preparation and placement of advertisements or promotional materials, or who is in communication with customers or prospective customers, or who has any responsibilities with respect to the subject matter of this order; and for a period of five (5) years, from the date of issuance of this order, distribute a copy of this order to all of respondent's future such officers, agents, representatives, independent contractors, and employees.

VI.

It is further ordered, That this order will terminate on June 17, 2016, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

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

VII.

It is further ordered, That respondent shall, within sixty (60) days from the date of 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.

IN THE MATTER OF

IVAX CORPORATION

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

Docket C-3565. Consent Order, March 27, 1995--Modifying Order, June 17, 1996

This order reopens a 1995 consent order -- that permitted the Florida-based corporation to acquire Zenith Laboratories and required the respondent, for ten years, to obtain Commission approval before acquiring stock -- and this order modifies the consent order by terminating the provision requiring Ivax to obtain prior Commission approval before acquiring any interest in any entity that manufactures, or is an exclusive distributor for another manufacturer of, extended release generic verapamil in the United States.

ORDER REOPENING AND MODIFYING ORDER

On February 14, 1996, IVAX Corporation ("IVAX" or "respondent"), the respondent named in the consent order issued by the Commission on March 27, 1995, in Docket No. C-3565 ("order"), filed its Request To Reopen and Modify Consent Order ("Request") in this matter. IVAX asks that the Commission reopen and modify the order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").¹ IVAX's Request asks that the Commission "reopen the order issued on March 27, 1995, in this proceeding and modify the order by deleting paragraph III." Request at 1. The thirty-day public comment period on IVAX's Request ended on March 25, 1996. No comments were received. For the reasons discussed below, the Commission has determined to grant IVAX's Request.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act,

¹ 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The complaint in this case charged that IVAX's proposed acquisition of all of the voting securities of Zenith Laboratories, Inc. ("Zenith"), if consummated, would constitute a violation of Section

5 of the FTC Act and Section 7 of the Clayton Act by substantially lessening competition and tending to create a monopoly in the relevant market. Complaint paragraphs 16, 18-19. The complaint alleged the sale of generic verapamil as the relevant product market and alleged the United States as the relevant geographic market. Complaint paragraphs 11-12.

The complaint alleged that the acquisition would eliminate direct and actual competition between IVAX and Zenith; increase the likelihood that IVAX will unilaterally exercise market power; and increase the likelihood that generic verapamil customers will be forced to pay higher prices and/or endure having reduced amounts of generic verapamil available for purchase. Complaint paragraph 16.

The presumption is that setting aside the general prior approval requirement in this order is in the public interest. No facts have been presented that overcome this presumption, and nothing in the record suggests that IVAX would engage in the same acquisition as alleged in the complaint. Accordingly, the Commission has determined to reopen the proceedings and modify the order by deleting paragraph III which contains the prior approval provision.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and that the Commission's order issued on March 27, 1995, be, and it hereby is, modified by deleting paragraph III, as of the effective date of this order.

Modifying Order

121 F.T.C.

IN THE MATTER OF

ALLEGHANY CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3218. Consent Order, Sept. 9, 1987--Modifying Order, June 27, 1996*

This order reopens a 1987 consent order -- that permitted the New York-based title insurance company to acquire Safeco Title Insurance Co., and required the respondent, for ten years, to obtain Commission approval before acquiring certain title-insurance related assets -- and this order modifies the consent order by terminating the provision requiring notification of acquisitions of copies of title records, but will retain the requirement for acquisitions of original title records.

ORDER REOPENING AND MODIFYING ORDER

On November 15, 1995, Alleghany Corporation ("Alleghany" or "respondent"), the respondent named in the consent order issued by the Commission on September 8, 1987, in Docket No. C-3218 ("1987 order") and in the consent order issued by the Commission on July 11, 1991, in Docket No. C-3335 ("1991 order"), filed its Petition To Reopen and Modify Orders ("Petition") in these matters. Alleghany asks that the Commission reopen and modify the 1987 and 1991 orders pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").¹ Alleghany's Petition requests that the Commission reopen and modify the orders to remove paragraph V of the 1987 and 1991 orders, which currently requires Alleghany to seek the prior approval of the Commission for certain acquisitions. In addition, Alleghany requests that the Commission set aside or modify the prior notice provisions of paragraph VI of the 1987 and 1991 orders. Alleghany's Petition was placed on the public record for thirty days. No comments were

¹ 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

received. For the reasons discussed below, the Commission has determined to grant Alleghany's Petition in part.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification

of the prior approval requirement consistent with the policy announced" in the Statement. *Id.* However, the Commission also stated that "[n]o presumption will apply to existing prior notice requirements, which have been adopted on a case-by-case basis and will continue to be considered on a case-by-case basis under the policy announced in this statement."

The complaint in Docket No. C-3218 alleged that Alleghany's acquisition of Safeco Corporation would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially lessening competition in the production and/or sale of title plant information in Cook County, Illinois, and in Los Angeles County, California.

Paragraph V of the 1987 order requires Alleghany, for ten years, to obtain Commission approval before acquiring any interest in entities with interests in a title plant that serves Cook County, Illinois, or Los Angeles County, California. Paragraph VI of the 1987 order requires Alleghany, for ten years, to give the Commission notice and observe a waiting period before acquiring certain interests relating to title plants servicing any geographic area for which Alleghany also has an ownership interest in a title plant.

The Commission's complaint in Docket No. C-3335 alleged that Alleghany's acquisition of title insurance-related assets of Westwood Equities Corporation would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially lessening competition in the production and/or sale of title plant and back plant information in nine relevant markets. Paragraph V of the 1991 order requires Alleghany, for ten years, to obtain Commission approval before acquiring any interest in certain entities having interests in title plants serving the relevant markets.

Paragraph VI of the 1991 order requires Alleghany, for ten years, to give the Commission notice and observe a waiting period before acquiring certain interests relating to a title plant or back plant serving any geographic area for which Alleghany has an ownership interest in a title plant or back plant.

Under the Commission's Prior Approval Policy Statement, the presumption is that setting aside the prior approval requirement in these orders is in the public interest. Alleghany has shown that these matters do not present the limited circumstances in which narrow prior approval provisions may be appropriate. Accordingly, the Commission has determined to reopen the proceedings and modify the orders to delete paragraph V.

The Policy Statement does not adopt a presumption in favor of reopening existing prior notice provisions.² Accordingly, Alleghany must show that reopening is required by changed conditions of law or fact or warranted in the public interest.³ As developed below, Alleghany has not demonstrated that changed conditions or the public interest require reopening and modifying the orders to set aside completely the existing prior notice provisions.

Alleghany has demonstrated, however, that the public interest requires exempting from the prior notice provisions acquisitions of copies of title records where the seller retains the originals. In contrast to the acquisition of sole rights to title records, such as buying a title plant or back plant, which may be anticompetitive depending on market conditions, the acquisition of copies of records, where the seller retains the original, can be pro-competitive where the transaction otherwise places no restraints on competition between the parties. Acquisitions of copies of records enable the acquirer to compete more effectively by increasing the depth of coverage of its existing records. In addition, acquisitions of copies enable the seller to compete more effectively by lowering its costs yet not removing any records from its control. By inhibiting the potential benefits of such transactions, the costs and delays associated with requiring prior notice of these acquisitions are thus harmful to competition and an unnecessary burden on Alleghany. Accordingly, Alleghany has demonstrated a sufficient affirmative need to have the 1987 and 1991 orders modified in this limited manner. In addition, the balance favors modifying the orders, because there are no reasons to retain the provisions as written, and the proviso is narrowly-tailored to the benefit identified.⁴

Accordingly, *It is ordered*, That these matters be, and they hereby are, reopened; and

It is further ordered, That paragraph V of the orders be, and it hereby is, deleted in its entirety; and

It is further ordered, That paragraph VI of the orders be, and it hereby is, modified, as of the effective date of this order, to add the following to the end of the paragraph:

² Policy Statement at 4-5.

³ See Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 ("Damon Letter"), reprinted in [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,027. Alleghany does not allege changed conditions as a basis for reopening in its Petition.

⁴ Although the proviso language differs slightly from the language proposed by Alleghany, the Petition requests "or language to similar effect." Petition at 13, n.4.

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

Commissioner Azcuenaga dissenting insofar as the Commission modifies the prior notice requirement in paragraph VI, and Commissioner Starek concurring in the result only.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III
CONCURRING IN THE RESULT

In its September 14, 1995, petition, Alleghany Corporation requested reopening and modification of two orders based on the Commission's Prior Approval Policy Statement.¹ On November 15, 1995, Alleghany refiled an identical petition, accompanied by declarations from two executives of Alleghany subsidiaries. The refiled petition maintained its original argument -- that, under the authority of the Policy Statement, the orders' prior approval requirements should be deleted and their prior notice provisions also deleted (or at least modified). Although the two executives' declarations alluded in general terms to the "costs," "burdens," "difficulties," and "delays" occasioned by the orders, nowhere in its petition did Alleghany purport to rely on -- or even refer to -- either the "changed conditions" or the "public interest" standard set forth in Section 5(b) of the Federal Trade Commission Act² and Rule 2.51 of the Commission's Rules of Practice.³

Nevertheless, in today's order the Commission invokes both the Policy Statement and the "public interest" element of Rule 2.51 to address Alleghany's request. The Commission determines that public interest considerations warrant the addition of a proviso to paragraph VI of each order that would generally dispense with the prior notice requirement when the respondent proposes to acquire copies of title records from a seller that retains the original records.

¹ Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions, 4 Trade Reg. Rep. (CCH) ¶ 13,241 ("Policy Statement").

² 15 U.S.C. 45(b).

³ 16 CFR 2.51.

Although I concur in the result reached by my colleagues -- deletion of the prior approval provision and elimination of the prior notice requirement as it pertains to respondent's acquisition of copies -- I do not believe that it was necessary to rely on the public interest element of Rule 2.51. Rather, the Policy Statement by itself furnishes sufficient grounds on which to decide Alleghany's petition. The Commission declared in the Policy Statement that prior notice requirements in existing orders "will continue to be considered on a case-by-case basis *under the policy announced in this [i.e., the Prior Approval Policy] Statement*"⁴ -- an assertion that on its face signifies that existing prior notice provisions will be evaluated under the "credible risk" standard applicable to new prior notice provisions.⁵ The Commission said nothing in the Policy Statement about judging existing prior notice provisions under the more general standards of Rule 2.51.⁶ If a respondent can show that the factors enunciated in the Policy Statement support modification or deletion of a prior notice requirement, the respondent need not additionally demonstrate that the changed conditions/public interest factors of Rule 2.51 are satisfied. Because the Policy Statement criteria are entirely adequate for the treatment of Alleghany's petition, the reference in today's order to public interest factors is surplusage, likely to create confusion.

If today's order indicates that the Commission perceives a need to search outside the text of the Policy Statement for principles to guide its disposition of prior notice requirements, then it might be appropriate to amend the Policy Statement to apprise the public of that view. Contrary to the message sent by today's action, nothing in the wording of the Policy Statement gives any hint that the Commission considers its announced standard for evaluating prior notice provisions as less than self-sufficient.

⁴ Policy Statement, 4 Trade Reg. Rep. (CCH) ¶ 13,241 at 20,992 (*italics added*).

⁵ The standard for whether a newly-issued order should include a prior notice requirement is whether "there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.*

⁶ The Policy Statement's sole (and fleeting) reference to Section 5(b) of the Federal Trade Commission Act and Rule 2.51, *Id.*, seems clearly intended to indicate the *procedural* path that a respondent should follow in seeking reopening and modification of a prior approval or prior notice order. Nowhere in the Policy Statement, however, did the Commission signal an intent to supplant (or even supplement) the Policy Statement's very specific substantive criteria with the more general standards of Section 5(b) and Rule 2.51.

The attached alternate version of a Commission order illustrates what I would have considered an appropriate disposition of Alleghany's petition under the Policy Statement's criteria. It treats the various aspects of Alleghany's request, and it requires reliance on nothing more than the Policy Statement's "credible risk" test to conclude that a prior notice requirement should be retained except as to acquisitions of copies.

ATTACHMENT TO STATEMENT OF
COMMISSIONER ROSCOE B. STAREK, III:
ALTERNATE VERSION OF COMMISSION ORDER

ORDER REOPENING AND MODIFYING ORDER

On November 15, 1995, Alleghany Corporation ("Alleghany"), the respondent named in the consent order issued by the Commission on September 8, 1987, in Docket No. C-3218 ("1987 order") and in the consent order issued by the Commission on July 11, 1991, in Docket No. C-3335 ("1991 order"), filed its Petition To Re-Open and Modify Consent Orders ("Petition") in these matters. Alleghany asks that the Commission reopen and modify the 1987 and 1991 orders pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").¹ Alleghany's Petition requests that the Commission reopen and modify each order to delete paragraph V, which currently requires Alleghany to seek the prior approval of the Commission to acquire any interest in or assets of certain named competitors or in a title plant or back plant in certain parts of the country. Alleghany also requests that the Commission either set aside the prior notice provisions of paragraph VI of each order or limit the prior notice provisions to the geographic markets alleged in the complaints. Finally, Alleghany requests that the Commission add a proviso to the prior notice provisions so as to exempt from coverage acquisitions of copies of title records when the seller retains the original records. Alleghany's Petition was placed on the public record for thirty days. No comments were received. For

¹ 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

the reasons discussed below, the Commission has determined to grant Alleghany's Petition in part.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced in its Statement its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification

of the prior approval requirement consistent with the policy announced" in the Statement. *Id.* However, the Commission also stated that "[n]o presumption will apply to existing prior notice requirements, which have been adopted on a case-by-case basis and will continue to be considered on a case-by-case basis under the policy announced in this statement."

The Commission's complaint in Docket No. C-3218 alleged that Alleghany's acquisition of Safeco Corporation would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission ("FTC") Act by substantially lessening competition in the production and/or sale of title plant information in Cook County, Illinois, and in Los Angeles County, California. The 1987 order required a divestiture in each market. In addition, paragraph V of the 1987 order requires Alleghany, for ten years, to obtain Commission approval before acquiring any stock, share capital, or equity interest in any concern that in turn has any direct or indirect ownership interest in a title plant that services either Cook County, Illinois, or Los Angeles County, California, or acquiring from any concern any assets (other than in the ordinary course of business) of, or ownership interest in, an existing title plant that services either Cook County, Illinois, or Los Angeles County, California. Paragraph VI of the 1987 order requires Alleghany, for ten years, to give the Commission notice, and observe a waiting period, before acquiring any stock, share capital, or equity interest in any concern that in turn has any direct or indirect ownership interest in a title plant servicing any geographic area where Alleghany also has any ownership interest in a title plant servicing that area, or acquiring from any concern any assets of, or ownership interest in, any existing title plant servicing any geographic area where Alleghany also has any ownership interest in a title plant servicing that area.

The Commission's complaint in Docket No. C-3335 alleged that Alleghany's acquisition of most of the title-insurance-related assets of Westwood Equities Corporation, including Ticor Title Insurance Company of California ("Ticor"), would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially lessening competition in the production and/or sale of title plant information in nine markets and back plant information in nine markets. The 1991 order required Alleghany to divest, within twelve months, either its own or Ticor's back plant in nine specified counties, and either its own or Ticor's title plant in nine specified counties, to an acquirer or

acquirers approved by the Commission. Paragraph V of the 1991 order requires Alleghany, for ten years, to obtain Commission approval before acquiring any stock, share capital, or equity interest in First American Title Insurance Company, Lawyers Title Insurance Corporation, Stewart Title Guaranty Company, Commonwealth Land Title Insurance Company, Title Insurance Company of Minnesota, or TRW, Inc., or in any concern that in turn has any direct or indirect ownership interest in a title plant that services any county listed in paragraph IIA or in a back plant that services any county listed in paragraph IIB, or acquiring from any concern any assets (other than in the ordinary course of business) of, or ownership interest in, a title plant that services any county listed in paragraph IIA or a back plant that services any county listed in paragraph IIB. Paragraph VI of the 1991 order requires Alleghany, for ten years, to give the Commission notice and observe a waiting period before acquiring any stock, share capital, or equity interest in any concern that in turn has any direct or indirect ownership interest in a title plant or back plant servicing any geographic area where Alleghany also has any ownership interest in a title plant or back plant servicing that area, or acquiring from any concern any assets (other than in the ordinary course of business) of, or ownership interest in, any existing title plant or back plant servicing any geographic area where Alleghany also has any ownership interest in a title plant or back plant servicing that area.

Consistent with the Commission's Prior Approval Policy Statement, the presumption is that setting aside the prior approval requirement in these orders is in the public interest. Alleghany has shown that these matters do not present the limited circumstances that the Statement identifies as appropriate for retaining narrow prior approval provisions because it has already consummated the transactions that led to the 1987 and 1991 orders and could not attempt them again.

Moreover, although the records in these matters evidence a credible risk that Alleghany could engage in future unreportable, anticompetitive acquisitions now covered by prior approval, there is no need to substitute prior notice for prior approval in paragraph V of the orders. Paragraph VI of each order already requires prior notice for any transaction for which there is a geographic overlap anywhere in the nation, including but not limited to the respective complaint markets covered by the prior approval requirements of paragraph V of each order. Accordingly, the Commission has

determined to reopen the proceedings and modify the orders to delete paragraph V.

The presumption under the Prior Approval Policy Statement does not apply to existing prior notice provisions,² and application of the factors set forth in the Statement has led the Commission to determine that, with one exception described below, the prior notice requirements of paragraph VI should be retained. The markets alleged in the complaints are small local areas, each of which must be analyzed separately. There is a credible risk that Alleghany could make an anticompetitive acquisition of a title plant or a back plant without being required to file under HSR. None of the divestitures that Alleghany made in satisfaction of the 1987 and 1991 orders was valued above the \$15 million HSR threshold. Moreover, Alleghany has not demonstrated that an acquisition of a title plant or a back plant outside the markets alleged in the complaints would raise no antitrust concerns.

The Commission is satisfied, however, that there is no credible risk of an unreportable, anticompetitive acquisition when the transaction merely involves the acquisition of copies of title records while the seller retains the originals. In contrast to the acquisition of sole rights to title records (such as buying a title plant or back plant), which may be anticompetitive depending on market conditions, the acquisition of copies of records -- *i.e.*, where the seller retains the original -- is likely to be procompetitive (or at worst competitively neutral) because the transaction places no restraints on post-acquisition competition between the parties. Acquisitions of copies of records enable the acquirer to compete more effectively by increasing the depth of coverage of its existing records and enable the seller to compete more effectively by lowering its costs while not removing records from its control. Accordingly, the Commission considers prior notice of such transactions unnecessary and has added to paragraph VI of each order a proviso exempting the acquisition of copies.³

Accordingly, *It is ordered*, That these matters be, and they hereby are, reopened; and

It is further ordered, That paragraph V of each order be, and it hereby is, deleted in its entirety; and

² Prior Approval Policy Statement at 4-5.

³ Although the proviso language differs slightly from the language proposed by Alleghany, the Petition requests as an alternative "language to similar effect." Petition at 13 n.4.

It is further ordered, That paragraph VI of each order be, and it hereby is, modified, as of the effective date of this order, to add the following to the end of the paragraph:

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

Modifying Order

121 F.T.C.

IN THE MATTER OF

ALLEGHANY CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3335. Consent Order, July 11, 1991--Modifying Order, June 27, 1996*

This order reopens a 1991 consent order -- that required the New York-based title insurance company to divest certain rights and interests to a Commission-approved acquirer, and, for ten years, to obtain Commission approval before acquiring certain title-insurance related assets -- and this order modifies the consent order by terminating the provision requiring notification of acquisitions of copies of title records, but will retain the requirement for acquisitions of original title records.

ORDER REOPENING AND MODIFYING ORDER

On November 15, 1995, Alleghany Corporation ("Alleghany" or "respondent"), the respondent named in the consent order issued by the Commission on September 8, 1987, in Docket No. C-3218 ("1987 order") and in the consent order issued by the Commission on July 11, 1991, in Docket No. C-3335 ("1991 order"), filed its Petition To Reopen and Modify Orders ("Petition") in these matters. Alleghany asks that the Commission reopen and modify the 1987 and 1991 orders pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").¹ Alleghany's Petition requests that the Commission reopen and modify the orders to remove paragraph V of the 1987 and 1991 orders, which currently requires Alleghany to seek the prior approval of the Commission for certain acquisitions. In addition, Alleghany requests that the Commission set aside or modify the prior notice provisions of paragraph VI of the 1987 and 1991 orders. Alleghany's Petition was placed on the public record for thirty days. No comments were

¹ 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

received. For the reasons discussed below, the Commission has determined to grant Alleghany's Petition in part.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification

of the prior approval requirement consistent with the policy announced" in the Statement. *Id.* However, the Commission also stated that "[n]o presumption will apply to existing prior notice requirements, which have been adopted on a case-by-case basis and will continue to be considered on a case-by-case basis under the policy announced in this statement."

The complaint in Docket No. C-3218 alleged that Alleghany's acquisition of Safeco Corporation would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially lessening competition in the production and/or sale of title plant information in Cook County, Illinois, and in Los Angeles County, California.

Paragraph V of the 1987 order requires Alleghany, for ten years, to obtain Commission approval before acquiring any interest in entities with interests in a title plant that serves Cook County, Illinois, or Los Angeles County, California. Paragraph VI of the 1987 order requires Alleghany, for ten years, to give the Commission notice and observe a waiting period before acquiring certain interests relating to title plants servicing any geographic area for which Alleghany also has an ownership interest in a title plant.

The Commission's complaint in Docket No. C-3335 alleged that Alleghany's acquisition of title insurance-related assets of Westwood Equities Corporation would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially lessening competition in the production and/or sale of title plant and back plant information in nine relevant markets. Paragraph V of the 1991 order requires Alleghany, for ten years, to obtain Commission approval before acquiring any interest in certain entities having interests in title plants serving the relevant markets.

Paragraph VI of the 1991 order requires Alleghany, for ten years, to give the Commission notice and observe a waiting period before acquiring certain interests relating to a title plant or back plant serving any geographic area for which Alleghany has an ownership interest in a title plant or back plant.

Under the Commission's Prior Approval Policy Statement, the presumption is that setting aside the prior approval requirement in these orders is in the public interest. Alleghany has shown that these matters do not present the limited circumstances in which narrow prior approval provisions may be appropriate. Accordingly, the Commission has determined to reopen the proceedings and modify the orders to delete paragraph V.

The Policy Statement does not adopt a presumption in favor of reopening existing prior notice provisions.² Accordingly, Alleghany must show that reopening is required by changed conditions of law or fact or warranted in the public interest.³ As developed below, Alleghany has not demonstrated that changed conditions or the public interest require reopening and modifying the orders to set aside completely the existing prior notice provisions.

Alleghany has demonstrated, however, that the public interest requires exempting from the prior notice provisions acquisitions of copies of title records where the seller retains the originals. In contrast to the acquisition of sole rights to title records, such as buying a title plant or back plant, which may be anticompetitive depending on market conditions, the acquisition of copies of records, where the seller retains the original, can be pro-competitive where the transaction otherwise places no restraints on competition between the parties. Acquisitions of copies of records enable the acquirer to compete more effectively by increasing the depth of coverage of its existing records. In addition, acquisitions of copies enable the seller to compete more effectively by lowering its costs yet not removing any records from its control. By inhibiting the potential benefits of such transactions, the costs and delays associated with requiring prior notice of these acquisitions are thus harmful to competition and an unnecessary burden on Alleghany. Accordingly, Alleghany has demonstrated a sufficient affirmative need to have the 1987 and 1991 orders modified in this limited manner. In addition, the balance favors modifying the orders, because there are no reasons to retain the provisions as written, and the proviso is narrowly-tailored to the benefit identified.⁴

Accordingly, *It is ordered*, That these matters be, and they hereby are, reopened; and

It is further ordered, That paragraph V of the orders be, and it hereby is, deleted in its entirety; and

It is further ordered, That paragraph VI of the orders be, and it hereby is, modified, as of the effective date of this order, to add the following to the end of the paragraph:

² Policy Statement at 4-5.

³ See Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 ("Damon Letter"), reprinted in [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,027. Alleghany does not allege changed conditions as a basis for reopening in its Petition.

⁴ Although the proviso language differs slightly from the language proposed by Alleghany, the Petition requests "or language to similar effect." Petition at 13, n.4.

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

Commissioner Azcuenaga dissenting insofar as the Commission modifies the prior notice requirement in paragraph VI, and Commissioner Starek concurring in the result only.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III
CONCURRING IN THE RESULT

In its September 14, 1995, petition, Alleghany Corporation requested reopening and modification of two orders based on the Commission's Prior Approval Policy Statement.¹ On November 15, 1995, Alleghany refiled an identical petition, accompanied by declarations from two executives of Alleghany subsidiaries. The refiled petition maintained its original argument -- that, under the authority of the Policy Statement, the orders' prior approval requirements should be deleted and their prior notice provisions also deleted (or at least modified). Although the two executives' declarations alluded in general terms to the "costs," "burdens," "difficulties," and "delays" occasioned by the orders, nowhere in its petition did Alleghany purport to rely on -- or even refer to -- either the "changed conditions" or the "public interest" standard set forth in Section 5(b) of the Federal Trade Commission Act² and Rule 2.51 of the Commission's Rules of Practice.³

Nevertheless, in today's order the Commission invokes both the Policy Statement and the "public interest" element of Rule 2.51 to address Alleghany's request. The Commission determines that public interest considerations warrant the addition of a proviso to paragraph VI of each order that would generally dispense with the prior notice requirement when the respondent proposes to acquire copies of title records from a seller that retains the original records.

¹ Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions, 4 Trade Reg. Rep. (CCH) ¶ 13,241 ("Policy Statement").

² 15 U.S.C. 45(b).

³ 16 CFR 2.51.

Although I concur in the result reached by my colleagues -- deletion of the prior approval provision and elimination of the prior notice requirement as it pertains to respondent's acquisition of copies -- I do not believe that it was necessary to rely on the public interest element of Rule 2.51. Rather, the Policy Statement by itself furnishes sufficient grounds on which to decide Alleghany's petition. The Commission declared in the Policy Statement that prior notice requirements in existing orders "will continue to be considered on a case-by-case basis *under the policy announced in this [i.e., the Prior Approval Policy] Statement*"⁴ -- an assertion that on its face signifies that existing prior notice provisions will be evaluated under the "credible risk" standard applicable to new prior notice provisions.⁵ The Commission said nothing in the Policy Statement about judging existing prior notice provisions under the more general standards of Rule 2.51.⁶ If a respondent can show that the factors enunciated in the Policy Statement support modification or deletion of a prior notice requirement, the respondent need not additionally demonstrate that the changed conditions/public interest factors of Rule 2.51 are satisfied. Because the Policy Statement criteria are entirely adequate for the treatment of Alleghany's petition, the reference in today's order to public interest factors is surplusage, likely to create confusion.

If today's order indicates that the Commission perceives a need to search outside the text of the Policy Statement for principles to guide its disposition of prior notice requirements, then it might be appropriate to amend the Policy Statement to apprise the public of that view. Contrary to the message sent by today's action, nothing in the wording of the Policy Statement gives any hint that the Commission considers its announced standard for evaluating prior notice provisions as less than self-sufficient.

⁴ Policy Statement, 4 Trade Reg. Rep. (CCH) ¶ 13,241 at 20,992 (*italics added*).

⁵ The standard for whether a newly-issued order should include a prior notice requirement is whether "there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.*

⁶ The Policy Statement's sole (and fleeting) reference to Section 5(b) of the Federal Trade Commission Act and Rule 2.51, *Id.*, seems clearly intended to indicate the *procedural* path that a respondent should follow in seeking reopening and modification of a prior approval or prior notice order. Nowhere in the Policy Statement, however, did the Commission signal an intent to supplant (or even supplement) the Policy Statement's very specific substantive criteria with the more general standards of Section 5(b) and Rule 2.51.

The attached alternate version of a Commission order illustrates what I would have considered an appropriate disposition of Alleghany's petition under the Policy Statement's criteria. It treats the various aspects of Alleghany's request, and it requires reliance on nothing more than the Policy Statement's "credible risk" test to conclude that a prior notice requirement should be retained except as to acquisitions of copies.

ATTACHMENT TO STATEMENT OF
COMMISSIONER ROSCOE B. STAREK, III:
ALTERNATE VERSION OF COMMISSION ORDER

ORDER REOPENING AND MODIFYING ORDER

On November 15, 1995, Alleghany Corporation ("Alleghany"), the respondent named in the consent order issued by the Commission on September 8, 1987, in Docket No. C-3218 ("1987 order") and in the consent order issued by the Commission on July 11, 1991, in Docket No. C-3335 ("1991 order"), filed its Petition To Re-Open and Modify Consent Orders ("Petition") in these matters. Alleghany asks that the Commission reopen and modify the 1987 and 1991 orders pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").¹ Alleghany's Petition requests that the Commission reopen and modify each order to delete paragraph V, which currently requires Alleghany to seek the prior approval of the Commission to acquire any interest in or assets of certain named competitors or in a title plant or back plant in certain parts of the country. Alleghany also requests that the Commission either set aside the prior notice provisions of paragraph VI of each order or limit the prior notice provisions to the geographic markets alleged in the complaints. Finally, Alleghany requests that the Commission add a proviso to the prior notice provisions so as to exempt from coverage acquisitions of copies of title records when the seller retains the original records. Alleghany's Petition was placed on the public record for thirty days. No comments were received. For

¹ 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

the reasons discussed below, the Commission has determined to grant Alleghany's Petition in part.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced in its Statement its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification

determined to reopen the proceedings and modify the orders to delete paragraph V.

The presumption under the Prior Approval Policy Statement does not apply to existing prior notice provisions,² and application of the factors set forth in the Statement has led the Commission to determine that, with one exception described below, the prior notice requirements of paragraph VI should be retained. The markets alleged in the complaints are small local areas, each of which must be analyzed separately. There is a credible risk that Alleghany could make an anticompetitive acquisition of a title plant or a back plant without being required to file under HSR. None of the divestitures that Alleghany made in satisfaction of the 1987 and 1991 orders was valued above the \$15 million HSR threshold. Moreover, Alleghany has not demonstrated that an acquisition of a title plant or a back plant outside the markets alleged in the complaints would raise no antitrust concerns.

The Commission is satisfied, however, that there is no credible risk of an unreportable, anticompetitive acquisition when the transaction merely involves the acquisition of copies of title records while the seller retains the originals. In contrast to the acquisition of sole rights to title records (such as buying a title plant or back plant), which may be anticompetitive depending on market conditions, the acquisition of copies of records -- *i.e.*, where the seller retains the original -- is likely to be procompetitive (or at worst competitively neutral) because the transaction places no restraints on post-acquisition competition between the parties. Acquisitions of copies of records enable the acquirer to compete more effectively by increasing the depth of coverage of its existing records and enable the seller to compete more effectively by lowering its costs while not removing records from its control. Accordingly, the Commission considers prior notice of such transactions unnecessary and has added to paragraph VI of each order a proviso exempting the acquisition of copies.³

Accordingly, *It is ordered*, That these matters be, and they hereby are, reopened; and

It is further ordered, That paragraph V of each order be, and it hereby is, deleted in its entirety; and

² Prior Approval Policy Statement at 4-5.

³ Although the proviso language differs slightly from the language proposed by Alleghany, the Petition requests as an alternative "language to similar effect." Petition at 13 n.4.

It is further ordered, That paragraph VI of each order be, and it hereby is, modified, as of the effective date of this order, to add the following to the end of the paragraph:

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

Denial of Petition to Reopen

121 F.T.C.

RE: The Coca-Cola Company
Docket No. 9207

January 26, 1996

Dear Mr. Lipsky and Mr. Coffman:

On October 2, 1995, The Coca-Cola Company ("Coca-Cola") filed a Petition to Reopen and Modify Consent Order ("Petition") entered in Docket 9207.¹ Coca-Cola filed the Petition pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and the FTC Policy Statement Concerning Prior Approval and Prior Notice Provisions, issued on June 21, 1995, and published at 60 Fed. Reg. 39,745-47 (August 3, 1995) ("Policy Statement"). In its Petition, Coca-Cola requests that the proceeding be reopened and the order modified so as to delete the prior approval clause that requires Coca-Cola to obtain the approval of the Commission prior to acquiring an interest in the Dr Pepper brand of carbonated soft drink concentrate. The Petition was placed on the public record for comment, and no comments were received. For the reasons discussed below, the Commission has determined to deny Coca-Cola's Petition.

The order that Coca-Cola seeks to modify resulted from Coca-Cola's 1986 attempt to acquire DP Holdings, Inc., which at the time controlled the Dr Pepper brand of carbonated soft drink concentrate. On July 31, 1986, the Commission obtained a preliminary injunction of the 1986 proposed acquisition.² On August 5, 1986, DP Holdings terminated its agreement with Coca-Cola.

On July 15, 1986, the Commission filed its administrative complaint with respect to the proposed acquisition by Coca-Cola. Because Coca-Cola had not acquired the Dr Pepper brand, no divestiture was necessary, and the principal relief sought by complaint counsel in the administrative proceeding, and ultimately ordered by the Commission, was an order with a prior approval requirement. The Commission's final order, issued on June 13, 1994,

¹ Although Coca-Cola's petition characterizes the Commission's order in Docket 9207 as a "consent order," in fact, the order is a litigated order that was modified by the Commission pursuant to a settlement that was reached while a petition for review was pending in the court of appeals.

² *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128 (D.D.C. 1986), dismissed as moot *per curiam* 829 F.2d 191 (D.C. Cir. 1987).

imposed both a prior approval requirement and a prior notice requirement on Coca-Cola with respect to certain acquisitions of carbonated soft drink concentrate companies and brands. Coca-Cola appealed the Commission's decision.

Pending that appeal, in the spring of 1995, Coca-Cola and the Commission's General Counsel's Office negotiated a settlement, resulting in an order with a narrower prior approval clause and a narrower prior notice clause than were included in the Commission's 1994 order. As part of the settlement, Coca-Cola agreed to the dismissal of its petitions for appellate review. The negotiated order, which is now the final order, requires Coca-Cola to seek the Commission's approval prior to acquiring any interest in the Dr Pepper brand of carbonated soft drink concentrate, rather than any brand of carbonated soft drink concentrate as the June, 1994, order had required. It also requires Coca-Cola to give the Commission prior notice of an acquisition of an interest in any carbonated soft drink concentrate company that sells over 10 million cases of soft drinks a year and to which the requirements of the Hart-Scott-Rodino Act do not apply. Coca-Cola has petitioned the Commission to delete only the prior approval clause in the negotiated order.

At the time of the Coca-Cola litigation, the Commission's policy was to require a prior approval requirement in all merger consent orders. *See* O.M. 5.4.4.2., Staff Bulletin 88-01. Early in 1995, the Commission began a re-examination of that policy, ultimately concluding that "a general policy of requiring prior approval is no longer needed," and that the Commission would rely instead principally on the premerger notification and waiting period requirements of the Hart-Scott-Rodino Act. Policy Statement at 2.

The Commission recognized, however, that narrow prior approval or prior notification provisions may be necessary to protect the public interest in some circumstances. As to the former, the Commission concluded that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." Policy Statement at 2.

The Policy Statement also addressed the question of existing orders, such as the one in this case, that contained prior approval requirements. The Commission announced its intention "to initiate a process for reviewing the retention or modification of these existing

requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." Policy Statement at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Policy Statement. *Id.* at 4. Thus, the Policy Statement contemplates that an existing prior approval requirement may be retained where there is a "credible risk" that the respondent may attempt to revive the same or a similar anticompetitive merger.

In this proceeding, the Commission has already found that Coca-Cola's proposed acquisition of Dr Pepper would have been anticompetitive if consummated.³ The Coca-Cola Company, slip op. at 63. Therefore, Coca-Cola's petition to reopen and modify presents the question whether there exists a "credible risk" that Coca-Cola will revive its efforts to acquire Dr Pepper.

While it is settled law that a law violator may not escape a remedial order by merely promising, without more, that it will not repeat the violation (*see SCM Corp. v. FTC*, 565 F.2d 807, 812 (2d Cir. 1977)), Coca-Cola has to this day never disavowed an interest in acquiring Dr Pepper in the future. When counsel for Coca-Cola was asked at the oral argument before the Commission about Coca-Cola's intentions with respect to the acquisition of Dr Pepper, counsel refused to state on the record what those intentions were.⁴ Although Coca-Cola's equivocation on this issue was expressly noted by the Commission in its decision of June 13, 1994 (The Coca-Cola Company, slip op. at 18-19 & n.33), Coca-Cola's petition to reopen and modify maintains Coca-Cola's steadfast refusal to give the Commission any assurance in this regard. In any event, the Dr Pepper brand still exists, Coca-Cola continues in the concentrate business, and Coca-Cola has both the ability and the incentive to

³ Coca-Cola's Petition does not assert that the facts underlying the Commission's original conclusions have changed, or otherwise assert that changed conditions of fact or law require the order to be reopened.

⁴ "When asked at oral argument whether Coca-Cola had made a commitment not to acquire Dr Pepper, the answer was non-responsive and certainly not a clear negative." The Coca-Cola Company, slip op. at 18. (*See, also, id.* at 18, n. 33, for the exchange between then-Chairman Steiger and counsel for Coca-Cola, including a discussion of counsel's subsequent attempt to correct the transcript of the oral argument by changing not his answer to the Chairman's question, but the question itself.)

acquire Dr Pepper if it became available.⁵ There continues to be, therefore, a credible risk that Coca-Cola may revive its efforts to acquire Dr Pepper.

The limited prior approval requirement in the negotiated order simply restricts Coca-Cola's ability to revive an anticompetitive acquisition, and is limited to the assets at issue in the challenged transaction. It is, thus, consistent with the Policy Statement, which anticipates that such prior approval provisions will "typically be limited to the proposed merger or other combination of essentially the same relevant assets that were involved in the challenged transaction." Policy Statement at 3.⁶ Coca-Cola has not made any other argument showing that the order should be further modified.

Because there remains a credible risk that Coca-Cola will attempt to revive an anticompetitive acquisition, it is appropriate in this case to retain the limited prior approval clause described in the Commission's Policy Statement. Therefore, the Commission has denied the Petition of The Coca-Cola Company to reopen and modify the order in Docket No. 9207.

By direction of the Commission, Commissioner Azcuenaga and Commissioner Starek recused.

⁵ The Petition's acknowledgment that the Dr Pepper brand has been bought twice since Coca-Cola's attempt was thwarted shows, contrary to the Petition's inference, that this brand can be readily bought and sold.

⁶ The Commission also notes that, at the time it developed and issued its new policy, Senator Strom Thurmond raised a number of questions with respect to the application of the policy to the order against Coca-Cola. The Commission's June 21, 1995, letter to Senator Strom Thurmond, responding to those questions, stated: "In response to your question whether the settlement with The Coca-Cola Company, Dkt No. 9207 (Commissioner Azcuenaga and Commissioner Starek, recused), reflects a change in policy, we believe it is consistent with the Commission's new policy, although it predates the adoption of that policy." June 21, 1995, letter to Strom Thurmond, by the direction of the Commission, at 2, n.3. Thus, the Commission has previously considered whether the settlement in The Coca-Cola Company is consistent with its new prior approval policy and has concluded that it is.

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