IN THE MATTER OF

MOBIL OIL CORPORATION

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

Docket C-3415. Complaint, Feb. l, 1993--Decision, Feb. l, 1993

This consent order prohibits, among other things, a Virginia-based manufacturer and seller of plastic bags from making unsubstantiated degradability and environmental benefit claims.

Appearances

For the Commission: *Michael Dershowitz* and *Mary Koelbel Engle.*

For the respondent: *Judith Oldham* and *John Williams, Collier, Shannon & Scott*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Mobil Oil Corporation, a corporation, 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 Mobil Oil Corporation is a New York corporation with its office and principal place of business located at 3225 Gallows Road, Fairfax, Virginia.

PAR. 2. Respondent has manufactured, advertised, offered for sale, sold, and distributed plastic trash bags to the public under such trade names as Hefty, Kordite, and Baggies. Respondent has also manufactured, advertised, offered for sale, sold, and distributed plastic grocery store bags to grocery stores and supermarkets under

the brand names Marketote and Minitote and under the stores' private labels.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials, including package labeling, for plastic trash and grocery store bags, including, but not necessarily limited to, the attached Exhibits A, B, and C.

The aforesaid package labeling (Exhibit A) contains the following statements:

DEGRADABLE

[Hefty Degradable Bags] contain a special ingredient that promotes their breakdown after exposure to elements like sun, wind, and rain.

This ingredient promotes degradation without harming the environment.

Once the elements have triggered the process, these bags will continue to break down into harmless particles even after they are buried in a landfill.

...you don't have to worry that [Hefty Bags] will degrade sitting on your shelf or at the curb. These bags have been specially formulated so they're only activated by exposure to the elements.

Hefty Degradable Bags -- a step in our commitment to a better environment.

Hefty Helps!

The aforesaid grocery store bag labeling contains the following statements:

THIS BAG

* Degrades in sunlight * Landfill safe

* Non-toxic when incinerated * No ground water contamination

* Recyclable

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

1. Compared to other plastic bags, respondent's plastic bags offer a significant environmental benefit when consumers dispose of them as trash; and

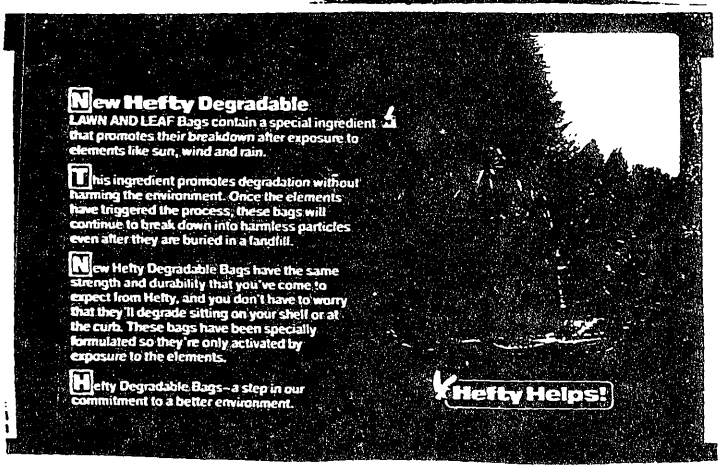
2. Respondent's plastic bags will completely break down, decompose, and return to nature in a reasonably short period of time after consumers dispose of them as trash.

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

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

PAR. 8. 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 of the Federal Trade Commission Act.

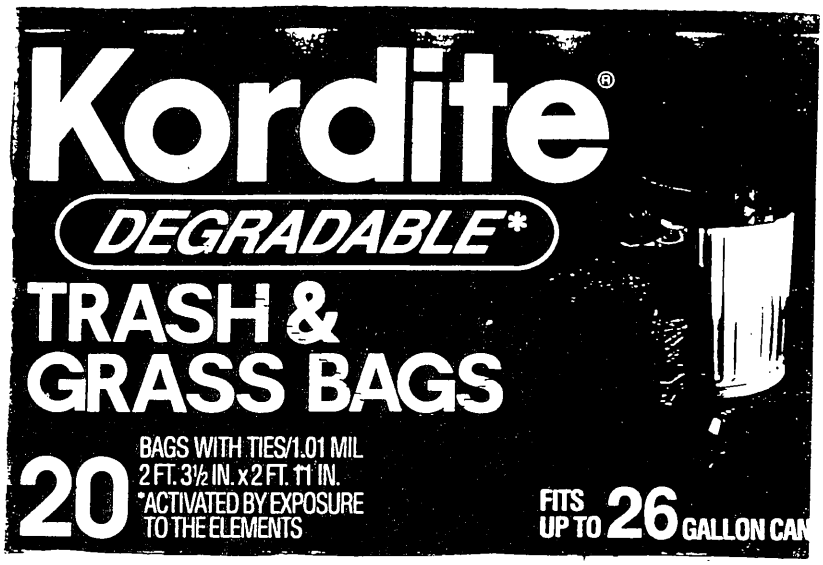
EXHIBIT A



BACK PANEL

EXHIBIT B

FRONT PANEL:



BOTTOM PANEL:

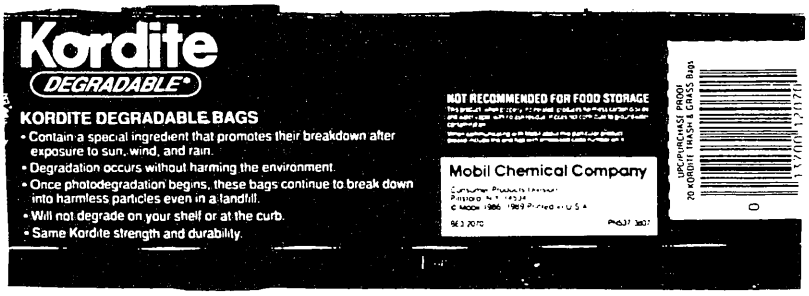


EXHIBIT C

BAGGIES®
DEGRADABLE*
TRASH
BAGS

- Contain a special ingredient that promotes their breakdown after exposure to sun, wind, and rain.
- Degradation occurs without harming the environment.
- Once degradation begins, these bags continue to break down into harmless particles even in a landfill.
- Will not degrade on your shelf or at the curb.
- Same Baggies strength and durability.

Mobil Chemical Company

Consumer Products Division, Pittsford, New York, 14534

547-2287 BE5-4012

UNIQUE VALUE!

- Strength plus convenience
- Baggies unique dispenser opening keeps bags ready for use.
- Convenient, durable, puncture resistant and tough Baggies. A real value.

Baggies bags also available in other sizes.

LARGE TRASH
Up to 33 gallons

TALL KITCHEN
Up to 13 gallons

CAUTION:
PLASTIC BAGS CAN CAUSE SUFFOCATION
PLEASE KEEP THIS PRODUCT AND ALL PLASTIC BAGS OUT OF THE REACH OF CHILDREN. DO NOT PERMIT CHILDREN TO PLAY WITH THEM AND DO NOT USE THEM IN CRIBS, PLAYPENS OR CARRIAGES.

DECISION AND ORDER

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

The respondent, 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 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 Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Mobil Oil Corporation is a Delaware corporation with its office and principal place of business at 3225 Gallows Road, Fairfax, Virginia.

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

DEFINITION

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

"*Mobil plastic bag*" means any plastic grocery bag, or any plastic "disposer" bag, including but not limited to trash bags, lawn bags, and kitchen bags, that is offered for sale, sold, or distributed to the public by respondent, its successors and assigns, under the "Hefty," "Kordite," or "Baggies" brand name or any other brand name of respondent, its successors and assigns; and also means any such plastic bag sold or distributed to the public by third parties under private labeling agreements with respondent, its successors and assigns.

I.

A. *It is ordered*, That respondent Mobil Oil Corporation, a corporation, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any Mobil plastic bag, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, by words, depictions, or symbols:

(1) That any such plastic bag is "degradable," "biodegradable," or "photodegradable"; or

(2) Through the use of "degradable," "biodegradable," "photodegradable," or any other substantially similar term or expression, that the degradability of any such plastic bag offers any environmental benefits when disposed of as trash in a sanitary landfill, unless at the time of making such representation, respondent possesses and relies upon a reasonable basis for such representation,

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

B. *Provided, however*, respondent will not be in violation of this order, in connection with the advertising, labeling, offering for sale, sale, or distribution of plastic grocery bags, if it prints a diamond-shaped symbol on such bags in compliance with Florida state law, and/or truthfully states that such bag "Complies with Florida law."

C. *Provided, further*, respondent will not be in violation of this order, in connection with the advertising, labeling, offering for sale, sale, or distribution of plastic bags, if it truthfully represents that its plastic bags are designed to degrade or break down, and become part of usable compost, along with the bag's contents, when disposed of in programs that collect yard or other waste for composting (that is, the accelerated breakdown of waste into soil-conditioning material), provided that the labeling of such bags and any advertising referring to the degradability of such bags discloses clearly, prominently, and in close proximity to such representation:

(1)(a) That such bags are not designed to degrade in landfills, or

(1)(b) In those states in which composting facilities are required for yard waste, that composting bags are only designed to degrade in such composting facilities; and further discloses (2)(a) that yard waste composting programs may not be available in the consumer's area, or

(2)(b) The approximate percentage of the U.S. population having access to yard waste composting programs.

For purposes of this provision, a disclosure elsewhere on the product package shall be deemed to be "in close proximity" to such representation if there is a clear and conspicuous cross- reference to the disclosure. The use of an asterisk or other symbol shall not constitute a clear and conspicuous cross-reference. A cross-reference shall be deemed clear and conspicuous if it is of sufficient prominence to be readily noticeable and readable by the prospective purchaser when examining the package. If such representation appears in more than one place on a package, it shall be sufficient if the above-required disclosures appear only on the principal display panel of the package, as "principal display panel" is defined in the Fair Packaging and Labeling Act, 15 U.S.C. 1459(f) (1988).

If the advertising and labeling of respondent's plastic bags otherwise comply with subpart A of part I of this order, respondent will not be in violation of this order if it does not make the disclosures in this proviso (subpart C).

II.

It is further ordered, That respondent Mobil Oil Corporation, a corporation, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising or labeling of any Mobil plastic bag, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from using the terms "safe for the environment," "no harm to the environment," "no injury to the environment," "no risk to the environment," "friendly to the environment," or any rearrangement of such terms, *e.g.*, "environmentally safe," "environmentally harmless," "environmentally risk-free" or "environmentally friendly," unless: (1) respondent discloses clearly, prominently, and in close proximity thereto with reasonable specificity what is meant by such term, and (2) at the time of making such representation, respondent possesses and relies upon a reasonable basis, consisting of competent and reliable scientific evidence that substantiates such representation.

To the extent such evidence of a reasonable basis consists of scientific or professional tests, analyses, research, studies, or any other evidence based on expertise of professionals in the relevant area, such evidence shall be "competent and reliable" only if those tests, analyses, research, studies, or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, and using procedures generally accepted in the profession to yield accurate and reliable results. For purposes of this provision, a disclosure elsewhere on the product package shall be deemed to be "in close proximity" to such terms if there is a clear and conspicuous cross-reference to the disclosure. The use of an asterisk or other symbol shall not constitute a clear and conspicuous cross-reference. A cross-reference shall be deemed clear and conspicuous if it is of sufficient prominence to be readily noticeable and readable by the prospective purchaser when examining the package.

III.

Nothing in this order shall prevent respondent from using any of the terms cited in parts I and II, or similar terms or expressions, if necessary to comply with any federal rule, regulation, or law governing the use of such terms in advertising or labeling.

IV.

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

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

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

V.

It is further ordered, That respondent shall distribute a copy of this order within sixty (60) days after service of this order upon it to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation of labeling and advertising and placement of newspaper, periodical, broadcast, and cable advertisements covered by this order.

VI.

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

VII.

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

Commissioner Owen dissenting as to the "specificity" requirement.

STATEMENT OF COMMISSIONER DEBORAH K. OWEN

As in other degradability cases,[1] the consent order in this matter requires Mobil to provide specificity with respect to certain claimed general environmental benefits. According to the Notice to Aid

[1] *First Brands, Inc.*, C-3358 (Final Order Issued Jan. 3, 1992); *American Enviro Products, Inc.*, C-3376 (Final Order Issued Mar. 18, 1992).

Public Comment, the purpose of the provision is to "ensure compliance" with the order. In Archer Daniels Midland, File No. 902-3283, the Commission for the first time in its recent series of degradability cases accepted for comment an order that did not include the specificity requirement. If Archer Daniels Midland is a harbinger that the Commission intends to pursue a future policy of not mandating "specificity" in cases of this nature, I would prefer to have modified the order against Mobil to delete the specificity requirement prior to making the order final.

IN THE MATTER OF

CLINIQUE LABORATORIES, INC.

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

Docket C-3027. Consent Order, July 23, 1980--Modifying Order, February 8, 1993

This order reopens the proceeding and modifies a 1980 consent order (96 FTC 51) by deleting a provision that restricts the respondent's ability to prescribe to dealers the prices at which they should advertise their products, in connection with cooperative advertising and promotional programs. The Commission concluded that reopening the order and deleting the provision of paragraph III(2) is in the public interest.

ORDER GRANTING PETITION TO REOPEN AND MODIFY ORDER

Clinique Laboratories, Inc. ("Clinique") has filed a Petition To Reopen Proceeding And Modify Consent Order ("Petition") in Docket No. C-3027, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) ("FTC Act"), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51 ("Rules"). Clinique asks the Commission to reopen and modify the consent order issued by the Commission on July 23, 1980, 96 FTC 51 ("order"). Specifically, Clinique requests that the Commission delete paragraph III(2) of the order, which prohibits Clinique from suggesting to its dealers the prices to be included in any advertising, mailer, or promotional material unless Clinique informs the dealers, in writing, that they may change the prices Clinique has suggested. 96 FTC at 56.[1] In support of its petition, Clinique argues that the modification is warranted by changed conditions of law and by the public interest. Clinique's petition was placed on the public record

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[1] In the alternative, Clinique asks that the Commission modify paragraph III(2) of the order "to exclude cooperative advertising and promotion from its reach." Public Record ("PR") p. 4. The Public Record includes Clinique's petition, supporting affidavits and other materials.

for thirty days, pursuant to Section 2.51 of the Commissions Rules. No public comments were received. For the reasons discussed below, the Commission has determined that Clinique has not shown that changed conditions of law or fact require reopening the order, but that Clinique has demonstrated that it is in the public interest to reopen and modify the order by deleting paragraph III(2).

I. The Complaint And Order

The complaint in this case alleged that Clinique violated Section 5 of the FTC Act, 15 U.S.C. 45, by engaging, in combination with some of its dealers, in courses of action "to fix and maintain certain specified uniform prices at which products will be resold." 96 FTC at 53. Paragraph I of the order prohibits Clinique, its successors and assigns, from engaging in any of nine specified acts and practices related to vertical price fixing.[2] 96 FTC at 55.

Paragraph II(3) of the order also prohibits Clinique from suggesting or recommending to any dealer any resale price on any list or order form, or in any catalog or stock control book, unless it "conspicuously state[s]" on each page that "THE RETAIL PRICES QUOTED HEREIN ARE SUGGESTED ONLY. YOU ARE COMPLETELY FREE TO DETERMINE YOUR OWN RETAIL PRICES."

Subparagraph III(2) of the order, prohibits Clinique from suggesting . . . any resale price to any dealer for use or inclusion in

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[2] Specifically, Clinique is prohibited from (1) fixing the resale prices at which any dealer may advertise, promote, offer for sale or sell any product; (2) requesting or requiring any dealer to adopt or adhere to any resale price; (3) requesting or requiring dealers to report dealers who deviate from any resale price; (4) requesting or requiring that dealers refrain from or discontinue selling or advertising any product at any resale price; (5) hindering the lawful use of Clinique's name or trademarks in connection with the sale or advertising of any product at any resale price; (6) conducting surveillance programs "to fix, maintain, control or enforce" resale prices; (7) terminating any dealer because of the resale price at which the dealer has sold or advertised any product; (8) threatening to withhold or withholding earned cooperative advertising credits or allowances from any dealer, or limiting the right of any dealer to participate in any cooperative advertising program, because of the resale price at which the dealer advertises or sells any product, or proposes to sell or advertise any product; and (9) making any payment to any dealer because of the resale price at which any other dealer has sold or advertised any product. 96 FTC at 55.

any advertising, mailer or promotional material which said dealer intends to disseminate to consumers, unless [Clinique], in connection with each advertising, mailer or promotional material makes a written request to said dealer to review said advertising, mailer or promotional material for its resale price(s), and discloses therein in a clear and conspicuous manner the following:

CLINIQUE DEALERS ARE COMPLETELY FREE TO SPECIFY RETAIL PRICES OF THEIR OWN CHOOSING FOR INCLUSION IN THIS [ADVERTISING, MAILER OR PROMOTIONAL MATERIAL]. YOU MAY CHANGE THE PRICES WE HAVE SUGGESTED.

96 FTC at 56.

II. Clinique's Petition

Clinique asks the Commission to delete paragraph III(2) of the order. Clinique argues that the relief it is seeking is required by "changes in the law on cooperative advertising," PR, p. 4, and by the public interest. PR, pp. 9-11. Clinique asserts that under decisions of the Supreme Court and of the Commission since entry of the order in 1980, price-restrictive cooperative advertising programs are to be governed by the rule of reason and are no longer considered per se violations of the law. Clinique further argues that the restriction it asks the Commission to delete is inconsistent with the state of the law.[3]

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[3] In support of its Petition, Clinique cites the following Commission decisions involving, among other things, price-restrictive cooperative advertising issues: *The Advertising Checking Bureau*, 109 FTC 146 (1987); *The Magnavox Company*, 55 Fed. Reg. 12,898 (1990); and *U.S. Pioneer Electronics Corp.*, 5 Trade Reg. Rep. (CCH) paragraph 23, 172 (1992). Clinique also cites the court decisions in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); *In re Nissan Antitrust Litigation*, 577 F. 2d 910 (5th Cir. 1978) *cert. denied*, 439 U.S. 1072 (1979); and *Jack Walters & Sons Corp. v. Morton Buildings, Inc.*, 737 F. 2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

In addition, Clinique cites the Commission's 1987 statement concluding, among other things, that "price restrictions in cooperative advertising programs, standing alone, are not *per se* unlawful." *Withdrawal Of 1980 Policy Statement Regarding Price Restrictions In Cooperative Advertising Programs, reprinted in* 6 Trade Reg. Rep. (CCH) paragraph 39, 057 (announced May 21, 1987).

Clinique asserts that the requested modification is needed "to allow Clinique to compete on a level playing field, and is in the public interest." PR, p. 9. According to Clinique, the paragraph III(2) constraint on price-restrictive cooperative advertising impairs interbrand competition: "By 'free-riding' on a coordinated, multi-dealer cooperative advertising or promotional campaign to highlight price differences among dealers of the same brand, dealers who insert their own prices can destroy Clinique's ability to mount effective cooperative campaigns." PR, p. 42. Clinique states that its competitors are not subject to similar prohibitions and that they are "free to organize regional or national cooperative advertising and promotional campaigns that promote their brands without creating confusion or distraction over which dealer is running the ads or distributing the materials exhibiting the lowest prices." PR, p. 43.[4] This ability "to run a coordinated campaign," according to Clinique, confers a "distinct [competitive] advantage" on its competitors, and the "public interest would be better served by modifying the order to permit Clinique to introduce the same kinds of cooperative advertising and promotional programs that its competitors are permitted to employ." PR pp. 10-11, 43.

III. Standards For Reopening And Modification

Section 5(b) of the FTC Act, 15 U.S.C. 45 (b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" require such modification. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make

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[4] According to Clinique, its obligation under the order to afford its dealers an opportunity to modify each cooperative advertising and promotional program, among other things, (i) hinders its ability to implement such programs in a manner it believes best responds to rapidly changing market conditions, and (ii) prevents Clinique from taking advantage of seasonal marketing opportunities in a timely manner. PR, pp. 51-54.

continued application of it inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4.

The Commission may also modify an order pursuant to Section 5(b) when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. Therefore, Section 2.51 of the Commission's Rules of Practice invites respondents in petitions to reopen to show how the public interest warrants the requested modification. In the case of a request for modification based on this latter ground, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2. If the showing of need is made, the commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Id.* The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm.

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of Section 5 (b) plainly anticipates that the petitioner must make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified.[5] If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether the modification is required and, if so, the nature and extent of the modification. The

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[5] The Commission properly may decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979). *See also* Rule 2.51(b), which requires affidavits in support of petitions to reopen and modify.

Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in the finality of Commission orders.[6]

IV. Clinique Has Failed To Demonstrate Changed Conditions Of Law Or Fact That Require Reopening Of The Order

The provision that Clinique seeks to have set aside is part of the order's overall prohibition on resale price maintenance ("RPM"). Nothing in the complaint or order suggests that the provision was included because the prohibited conduct itself, absent RPM, was deemed *per se* unlawful. Of course, RPM agreements remain *per se* unlawful. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the Supreme Court recognized that non-price vertical restraints are not inherently anticompetitive and must be judged under the rule of reason. The Court replaced the *per se* test for non-price vertical customer restraints outside RPM with a rule of reason test, but the Court did not change the per se rule for non-price vertical restraints that are part of an RPM scheme.[7] Clinique has failed to show that the conduct in which it wishes to engage has become lawful if part of RPM. Because paragraph III(2) of the order prohibits conduct that is unlawful if engaged in as part of RPM, and because Sylvania did not change the law as to such conduct, Clinique has failed to show a change in the law.

Clinique has similarly not made the necessary showing that changed conditions of fact require the Commission to reopen and modify the order. Although Clinique alleges that the United States cosmetics, fragrances, soaps and related accessories market today

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[6] *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

[7] *See Beltone Electronics Corporation*, 100 FTC 68 (1982) (applying GTE Sylvania to non-price vertical restraints).

appears to be competitive, there is no evidence that this represents a change from conditions existing at the time the Commission issued the order.

V. Clinique Has Shown Public Interest Considerations That Warrant Reopening And Modifying The Order

Clinique has shown that the public interest warrants reopening and modifying the order to delete paragraph III(2). Paragraph III(2) prohibits conduct that by itself may not be unlawful, and this prohibition is no longer necessary to ensure Clinique's compliance with the law.[8] Moreover, Clinique has shown that it is being injured in competing with other firms that are free to and do engage in price-restrictive cooperative advertising and promotional programs. So long as Clinique continues to be prohibited by the core provisions of paragraph I of the order from engaging in RPM, the broader prohibition of paragraph III(2) now imposes costs that outweigh its continuing benefit. *See* generally *Lenox, Inc.*, Order Granting in Part and Denying in Part Request To Reopen and Set Aside Order, 111 FTC 612 (1989).

Clinique has shown that its ability to compete is adversely affected by the restriction in paragraph III(2) concerning price-restrictive cooperative advertising and promotional programs. PR, pp. 50-54. Clinique affirms by affidavit that many of its competitors currently use price-restrictive cooperative advertising and promotional programs with respect to cosmetic product lines that are directly competitive with the Clinique line. The order requirement that Clinique afford each of its dealers the opportunity to modify each advertising or promotional program to feature the dealer's individual pricing strategy imposes financial and other costs on

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[8] Paragraph III(2) of the order is in the nature of "fencing in" relief. Fencing in provisions in orders restrict otherwise lawful conduct, to prevent repetition of the violation or to mitigate the effects of prior unlawful conduct.

Clinique that its competitors do not incur. PR, pp. 40-43, 45-47, 50-54. In light of the use by Clinique's competitors of advertising and promotional programs that Clinique cannot unconditionally offer and use, Clinique has made a threshold showing that the order is causing competitive injury. Deleting paragraph III(2) from the order may allow Clinique to compete more effectively, to the benefit of consumers of Clinique's cosmetic products.

The reasons in favor of modifying the order by deleting paragraph III(2) outweigh the reasons not to modify the order. In 1990, the Commission reopened and modified the Magnavox order to delete similar provisions relating to restrictions on cooperative advertising allowances.[9] On April 8, 1992, the Commission reopened and modified the Pioneer order to delete, among other provisions, a prohibition relating to cooperative advertising restrictions.[10] In making these decisions, the Commission followed the reasoning in its 1987 decision to vacate the order in *The Advertising Checking Bureau, Inc.*, 93 FTC 4 (1979), which had prohibited the respondent from auditing cooperative advertising programs that required dealers to advertise at a specified price, or not to advertise at discount prices, as a condition for receiving advertising allowances or credits. In support of its determination to set aside *The Advertising Checking Bureau, Inc.* order, the Commission relied on the Supreme Court's decisions in *GTE Sylvania* and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), noting, among other things, that those decisions make it clear that the rule of reason should be applied in determining whether non-price vertical restraints unreasonably restrain

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[9] The Commission, among other things, deleted paragraph I(H) from the Magnavox order, which prohibited the respondent from "[t]hreatening to withhold or withholding earned cooperative advertising credits from dealers for the reason that they advertise its products at retail prices other than established or suggested retail prices." *The Magnavox Company*, 78 FTC 1183, 1189 (1971).

[10] Paragraph I(6) of the Pioneer order prohibited Pioneer from "[t]hreatening to withhold or withholding earned cooperative advertising credits or allowances from any dealer because said dealer advertises respondent's products at retail prices other than that which respondent deems appropriate or has approved." *U.S. Pioneer Electronics Corp.*, 86 FTC 1002, 1006 (1975).

competition and violate the antitrust laws. In a vertical setting, the *per se* rule applies only to agreements to fix resale prices that prevent the dealer from making independent pricing decisions. *See Monsanto*, 465 U.S. at 764. *The Advertising Checking Bureau, Inc.*, 109 FTC 146, 147 (1987).[11] The Commission also noted that "[t]he fact that a distributional restraint may have an incidental effect on resale prices is not by itself enough to condemn the practice as *per se* unlawful." *Id.*

With respect to price restrictive cooperative advertising programs specifically, the Commission held that such programs "would not by themselves constitute agreements to fix resale prices." *Id.* Moreover, the Commission recognized that price restrictive cooperative advertising programs are in fact "likely to be procompetitive...in most cases...by... channeling the retailer's advertising efforts in directions that the manufacturer believes consumers will find more compelling and beneficial.... This, in turn, may stimulate dealer promotion and investment and, thus, benefit interbrand competition." *Id. See also Withdrawal Of 1980 Policy Statement Regarding Price Restrictions In Cooperative Advertising Programs, reprinted in* 6 Trade Reg. Rep. (CCH) paragraph 39,057 (announced May 21, 1987). This change in Commission policy is consistent with recent court decisions.[12]

The approach followed by the Commission when it set aside the order in The Advertising Checking Bureau, Inc., adopted its new cooperative advertising policy, and modified the orders in Magnavox and Pioneer, is applicable to Clinique's request that the Commission delete paragraph III(2) of the order. This "fencing-in" provision prohibits price restrictions that Clinique might want to impose on its dealers in connection with its cooperative advertising

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[11] Of course, Sylvania did not change the *per se* rule against RPM, the conduct that the orders in Magnavox, Pioneer and Clinique were intended to prohibit.

[12] *See, In re Nissan Antitrust Litigation*, 577 F. 2d 910 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

and promotional programs. Such restrictions may not necessarily be part of an illegal RPM scheme and have been recognized as reasonable in many circumstances. Of course, any cooperative advertising program implemented by Clinique as part of an RPM scheme would be *per se* unlawful and would violate the order even if modified as Clinique requests.

Clinique believes that at least one remaining order provision might be construed to prohibit Clinique from engaging in otherwise lawful price-restrictive cooperative advertising programs.[13] Although Clinique does not expressly argue the point, it appears that Clinique is concerned that setting aside paragraph III(2) may not afford Clinique the relief it seeks unless the order makes clear that Clinique is permitted to engage in such conduct. PR, pp. 2-4. In light of the specific prohibition of paragraph III(2), the words "the resale price at which said dealer...proposes to...advertise any product," 96 FTC at 55, in paragraph I(8) of the order may refer to the dealer's own advertising, that is, advertising for which the dealer alone pays. These words, however, also may be construed to mean the prices at which the dealer proposes to advertise in Clinique's cooperative advertising program. The Commission, therefore, would not construe paragraph I(8) and the remaining cooperative advertising and promotional programs that included conditions as to the prices at which its dealers offered Clinique's products under the programs, so long as such programs are not part of a resale price maintenance scheme.

VI. Conclusion

The Commission has determined that Clinique has made a satisfactory showing that reopening the order and deleting paragraph

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[13] *See* paragraph I(8). 96 FTC at 55. Clinique does not ask the Commission to delete or modify this provision.

III(2) is in the public interest. Clinique has adequately demonstrated that the modification it seeks would enable Clinique to use what it considers the most efficient and cost effective cooperative advertising and promotional programs and put Clinique on an equal basis with its competitors. The modified order will continue to prohibit resale price maintenance.

Accordingly, *it is ordered*, that this matter be reopened and the Commission's order in Docket No. C-3027 be, and it hereby is, modified, as of the effective date of this order, by setting aside paragraph III(2).

IN THE MATTER OF

HAROLD A. HONICKMAN, ET AL.

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

Docket 9233. Consent Order, July 25, 1991--Modifying Order, March 2, 1993

This order reopens the proceeding and modifies the 1991 consent order (114 FTC 427) by allowing the respondents and the Brooklyn Beverage Acquisition Corp. to acquire non-carbonated soft drink assets without prior Commission approval. The Commission concluded that modifying the order was warranted to eliminate unintended coverage.

ORDER REOPENING AND MODIFYING ORDER

On November 16, 1992, the Federal Trade Commission ("Commission") issued an Order to Show Cause why the proceeding in Docket No. 9233 should not be reopened to modify paragraph II of the order. By letter dated December 4, 1992, the respondents responded to the November 16, 1992, Order to Show Cause, stating, among other things, that they do not object to the proposed modification. The respondents reiterated their lack of objection to the proposed modification in a letter dated February 16, 1993.

Complaint counsel responded to the November 16 order by filing a Motion Requesting Federal Trade Commission to Issue Order Reopening and Modifying Order Issued July 25, 1991 on December 23, 1992. Complaint counsel recommends that the Commission reopen and modify paragraph II of the order. A letter dated December 11, 1992, from Brooks Beverage Management, Inc. ("Brooks"), attached to complaint counsel's motion, urges "the Commission to view beverage products such as Hawaiian Punch and Perrier the same as CSDs for purposes of industry competitive analysis." Brooks states, however, that it is "not in a position to recommend to the Commission what its position on the Honickman consent order should be."

As the Commission indicated in its Order to Show Cause, Mr. Honickman and the staff apparently reached an incorrect conclusion about order coverage during the negotiations leading to issuance of the order in FTC Docket No. 9233, and communicated that incorrect conclusion to the Commission. In particular, although the record does not show how the Commission itself interpreted the relevant language when it accepted the consent agreement, the record does show that both the Commission staff who considered the question and respondent believed that the order would not apply to non-CSD acquisitions. As the Commission stated in its Order to Show Cause, considerations of fairness and the public interest warrant modifying the order to eliminate the unintended coverage resulting from that miscommunication. Therefore, the Commission does not need to address the competitive significance of non-carbonated beverage products in determining to reopen and modify paragraph II of the order.

Accordingly, *it is ordered*, That this matter be and it hereby is reopened and that paragraph II of the order in this matter be modified, as of the date this order becomes final, to read as follows:

It is further ordered, That for a period of ten (10) years after the date this order becomes final, respondents shall not, without the prior approval of the Commission acquire directly or indirectly all or any part of the stock of, share capital of, equity interest in, assets of or rights related to any Bottling Operation in any county in the New York Metropolitan Area where at the time of such acquisition any Existing Honickman Bottling Operation distributes CSDs directly using company-owned or equity distributors to supermarkets; *provided, however*, that such prior approval shall not be required if respondents satisfy the conditions set forth in paragraph III of this order; and *provided further* that nothing contained in the foregoing provisions shall prohibit respondents from (i) acquiring stock or share capital for investment purposes only that does not exceed five (5) percent of the outstanding stock or share capital of any Bottling Operation, (ii) acquiring rights to equity territories ("equity distributor routes") for any territory in which Honickman

holds the right to bottle or distribute CSDs distributed through such equity distributor rights, (iii) acquiring production or distribution equipment, or (iv) acquiring business supplies or raw materials in the ordinary course of business.

Provided, further, however, that paragraph II of this order shall not apply to the acquisition of the right to distribute or sell solely any product that is not a CSD.

Commissioner Azcuenaga and Commissioner Starek recused.

IN THE MATTER OF

NATIONAL ASSOCIATION OF SOCIAL WORKERS

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

Docket C-3416. Complaint, March 3, 1993--Decision, March 3, 1993

This consent order prohibits, among other things, a Washington, D.C.-based, professional association from restraining competition among social workers by restricting or banning truthful, non-deceptive advertising or solicitation by its members, and from restricting social workers from paying a fee to any patient referral service.

Appearances

For the Commission: *Robert J. Schroeder.*

For the respondent: *Patricia P. Bailey, Squire, Sanders & Dempsey*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the National Association of Social Workers, a corporation, hereinafter sometimes referred to as respondent, has violated and is violating said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges in that respect as follows:

PARAGRAPH. 1. Respondent National Association of Social Workers is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 750 First Street, N.E., Suite 700, Washington, D.C.

PAR. 2. Respondent is a professional association with a total membership of about 114,000 social workers. Respondent has among its purposes, and it acts, to advance the interests of persona qualified, educated and trained, or who are being educated and trained to practice the social work profession in the United States, its territories, commonwealths and possessions. A substantial portion of respondents activities furthers the pecuniary interests of its members. By virtue of its purposes and its activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 3. Respondent's members are social workers, and include social workers, sometimes called clinical social workers, who provide therapeutic and counseling services for a fee, or whose employer provides such services for a fee. Such social workers apply social work theory and methods to the treatment and prevention of psychosocial dysfunction, disability, or impairment, including emotional and mental disorders. The services they offer are assessment, diagnosis, treatment, including psychotherapy, counseling, and consultation. Except to the extent competition has been restrained as alleged herein, many of its members, directly or through entities by which they are employed, have been and are now in competition among themselves and with other social workers.

PAR. 4. The acts and practices of respondent, including the acts and practices alleged herein, have been or are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. To create and maintain a social work practice, social workers compete, or may compete, with each other and others to attract new clients. Except to the extent competition among social workers is restrained as alleged herein, social workers compete, or may compete, among other ways, by communication with potential clients through advertising, including the use of testimonials; by personal communication with potential clients; and by use of professional referral services and other similar means. These means of communication with the consuming public and others enable social workers to inform consumers of their ability, experience, and competence; the quality, convenience, and amenity of offered

services; and price and other terms of sale. Such communication benefits consumers by increasing the truthful, useful, and desired information available to consumers, and by promoting competition among social workers.

PAR. 6. Respondent has acted as a combination of its members or has combined or agreed with at least some of its members to restrain competition in the sale and delivery of social work services by:

A. Prohibiting its members from soliciting the clients of other social workers and other professionals;

B. Prohibiting its members from paying referral services, marketing agencies or other similar organizations for referring clients, or from participating in or operating such organizations; and

C. Restraining its members from engaging in certain types of truthful advertising, including advertising that contains testimonials.

PAR. 7. Respondent has engaged in various acts and practices in furtherance of the combination or agreement described in paragraph six above. These acts and practices include, among other things, the following:

A. Adopting, in 1979, and subsequently maintaining and enforcing, respondent's Code of Ethics which restrains competition in the following ways, among others:

1. Prohibiting social workers from "solicit[ing] the clients of colleagues." This restriction, which is not limited to uninvited, personal solicitation of individuals who are vulnerable to undue influence, deters or may deter social workers from initiating contact with potential clients.

2. Prohibiting social workers from "accept[ing] or giv[ing] anything of value for receiving or making a referral." This restriction deters or may deter social workers from operating or participating in such institutions as patient referral services.

B. Adopting, in 1984, and subsequently maintaining in effect, respondent's NASW Standards for the Practice of Clinical Social Work, which restrain competition in the following ways, among others:

1. Deterring social workers from using testimonials in advertising. This restriction, which is not limited to preventing solicitation of testimonials from individuals who are vulnerable to undue influence, constrains, or may constrain, social workers from supporting truthful claims about their practices with statements from clients; or

2. Deterring social workers from advertising "hint(s) of enticement." This restriction constrains, or may constrain, social workers from offering truthful information concerning their services.

PAR. 8. The effects, tendency and capacity of the combination or agreement, and the acts and practices described above have been and are to restrain competition unreasonably and to injure clients and other consumers in the following ways, among others:

A. Restraining competition in the delivery of social work services;

B. Depriving clients and other consumers of the benefits of truthful information about the availability of social work services;

C. Depriving clients and other consumers of the benefits of competition among social workers in the provision of their services through competing referral services, agencies and clinics.

PAR. 9. The combination or agreement, and the acts and practices described above constitute unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The acts and practices of respondent, as herein alleged, or the effects thereof, are continuing and will continue in the absence of the relief herein requested.

Commissioner Starek dissenting.

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

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

1. Respondent National Association of Social Workers is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 750 First Street, N.E., Suite 700, Washington, D.C..

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

ORDER

I.

For the purposes of this order, "*NASW*" means the National Association of Social Workers, its directors, trustees, councils, committees, boards, divisions, officers, representatives, delegates, agents, employees, successors, or assigns.

II.

It is ordered, That NASW, directly, indirectly, or through any corporate or other device, in or in connection with NASW's activities as a professional association, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, shall cease and desist from:

A. Prohibiting, restricting, regulating, declaring unethical, interfering with, restraining or advising against the advertising, publishing, stating or disseminating by any person of the prices, terms, availability, characteristics or conditions of sale of social workers' services, offered for sale or made available by any social worker or by any organization or institution with which a social worker is affiliated, through any means, including but not limited to the adoption or maintenance of any principle, rule, guideline or policy that restricts any social worker from:

1. Engaging in any solicitation of actual or prospective clients or other consumers or from offering services to clients or other consumers receiving similar services from another professional; or

2. Presenting testimonials from clients or other consumers.

Provided that nothing contained in this order shall prohibit NASW from formulating, adopting, disseminating and enforcing reasonable ethical principles or guidelines governing the conduct of its members with respect to:

(1) Representations, including representations of objective claims for which the claimant does not have a reasonable basis, that NASW reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act; or
(2) Uninvited, in-person solicitation of business from persons who, because of their particular circumstances, are vulnerable to undue influence; or
(3) Solicitation of testimonial endorsements (including solicitation of consent to use the person's prior statement as a testimonial endorsement) from current psychotherapy patients, or from other persons who, because of their particular circumstances, are vulnerable to undue influence.

B. Prohibiting, restricting, regulating, declaring unethical, interfering with or restraining the giving or paying of any remuneration by any of its members or affiliates or any organization or institution with which any of its members or affiliates is associated to any patient referral service or other similar institution for the referral of clients or other consumers for professional service.

Provided that nothing contained in this section shall prohibit NASW from formulating, adopting, disseminating and enforcing reasonable ethical principles or guidelines requiring that its members disclose

to clients or other consumers that they will pay or give, or have paid or given, remuneration for the referral of such clients or other consumers for professional services.

III.

It is further ordered, That, for a period of five (5) years after the date this order becomes final, NASW shall:

Maintain for three (3) years following the taking of any action against a person alleged to have violated any ethical principle, rule, policy, guideline or standard relating to advertising, solicitation or referral fees, in one separate file segregated by the names of any person against whom such action was taken, and make available to Commission staff for inspection and copying, upon reasonable notice, all documents and correspondence that embody, discuss, mention, refer or relate to the action taken and all bases for or allegations relating to it.

IV.

It is further ordered, That NASW shall:

A. Within sixty (60) days after the date this order becomes final, remove from NASW's Code of Ethics and Standards for the Practice of Clinical Social Work, and any officially promulgated or authorized guidelines or interpretations of NASW's official policies, any statement of policy that may be inconsistent with part II of this order, or amend any such statement to eliminate all such inconsistencies, including but not limited to Sections II.I.1 and III.K.1 of NASW's Code of Ethics, and Standards 8 and 9 of the Standards for the Practice of Clinical Social Work;

B. Within sixty (60) days after the date this order becomes final, publish in NASW News, or in any successor publication that serves as the official journal of NASW:

1. A copy of this order;

2. Notice of the removal or amendment of any Code of Ethics provisions, Standards, guidelines, interpretations, provisions or statement; and

3. A copy of any such Code of Ethics provision, Standard, guideline, interpretation, provision or statement as worded after any such amendment;

C. Within sixty (60) days after the date this order becomes final, distribute a copy of Appendix A, along with a copy of this order, to each of NASW's members, including those in all classes of membership, and to each affiliate;

D. Require as a condition of affiliation with NASW that any affiliate, constituent, or component organization agree by specific action taken by the affiliate, constituent, or component organization's governing body to adhere to the provisions of part II of this order; and

E. Cease and desist for a period of one (1) year from maintaining or continuing respondent's affiliation with any affiliate, constituent, or component organization, whether a division of NASW or a state or regional association affiliated with NASW, within one hundred and twenty (120) days after respondent learns or obtains information that would lead a reasonable person to conclude that said association has, following the effective date of this order, maintained or enforced any prohibition against:

1. Soliciting clients;

2. Offering services to persons receiving similar services from another professional; or

3. Making payments to patient referral services;

where maintenance or enforcement of such prohibition by respondent would be prohibited by part II of this order; unless, prior to the expiration of the 120 day period, said association informs respondent by a verified written statement of an officer that the association has eliminated and will not reimpose such prohibition, and respondent has no grounds to believe otherwise.

V.

It is further ordered, That NASW:

A. Shall, within sixty (60) days after the date this order becomes final and at such other times as the Commission may require by written notice to NASW, file with the Commission a written report setting forth in detail the manner and form in which NASW has complied and is complying with the order;

B. For a period of five (5) years after the date this order becomes final, maintain and make available to Commission staff for inspection and copying, upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by part II of this order, including but not limited to all documents generated by NASW or that come into the possession, custody, or control of NASW, regardless of the source, that discuss, refer, or relate to any advice or interpretation rendered with respect to advertising, solicitation, or giving or receiving any remuneration for referring clients for professional services, involving any of its members or affiliates.

VI.

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

Commissioner Starek dissenting.

APPENDIX A

NASW And FTC
Enter into Consent Agreement

As you may be aware, the NASW entered into a consent order agreement with the Federal Trade Commission on September 24, 1988. Under that agreement, the Commission has entered a cease and desist order that became final on [insert date]. A copy of that order is printed in this issue of the *NASW News*.

The agreement between the Commission and NASW does not constitute an admission by NASW that it has violated any law, and is for settlement purposes only.

The reason for this announcement is to acquaint all members with the order, especially including those who have become members in the last three years, and to call attention to changes that have been made in response to the agreement in NASW's Code of Ethics and in the Standards for the Practice of Clinical Social Work. The changes in the Code and Standards are also printed in this issue.

Under the terms of the order, NASW may not ban any of its members from engaging in truthful, non-deceptive advertising and marketing. Specifically, NASW may not prohibit its members from:

1. Engaging in any solicitation of actual or prospective clients or other consumers or from offering services to clients or other consumers receiving similar services from another professional;
2. Presenting testimonials from clients or other consumers.

The order also prohibits preventing the payment of any remuneration to any patient referral service or other similar institution for the referral of clients or other consumers for professional service.

However, the order does not prohibit NASW from formulating and enforcing reasonable principles or ethical guidelines to prevent deceptive advertising and solicitation practices. NASW is also not barred from issuing guidelines with respect to solicitation of business or testimonials from persons who because of their particular circumstances, are vulnerable to undue influence by a social worker.

The order also does not prohibit NASW from issuing reasonable principles or guidelines requiring that factual disclosures be made to clients or other consumers regarding fees paid by any social worker to any patient referral service or similar institution for referring the client or other consumer for professional services.

Finally, the order requires NASW to amend the Code of Ethics, the standards for the Practice of Clinical Social Work, and any guidelines or interpretations officially promulgated or authorized by NASW to delete any provisions that are in conflict with the order and to cease affiliation for one year with any affiliate, constituent, or component organization that engages in any conduct that is prohibited by the order and that does not notify NASW that it has ceased and will not repeat such conduct. In response to this requirement, NASW amended the Standards for Practice in April 1989, and the Code of Ethics in August 1990.

In entering into an agreement with NASW, the Federal Trade Commission has not endorsed principle, guideline, policy, or practice of the Association. For more specific information, you should refer to the Federal Trade Commission's order itself.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the decision of the Commission today to accord final approval to the consent order with the National Association of Social Workers ("NASW"). The lack of evidence indicating that the restrictions of NASW at issue are likely to restrict competition leads me to conclude that they are not "inherently suspect" as defined in Massachusetts Board of Registration in

Optometry ("Mass. Board").[1] Consequently, without a rule-of-reason inquiry, as required by Mass. Board, I cannot conclude that NASW's restrictions violate Section 5 of the Federal Trade Commission Act.

Association restrictions on professionals can reduce competition and thereby harm consumers. The challenged practices here are restrictions on certain certain types of advertising, solicitations, and payment of referral fees by those who choose to become members of NASW. Because social workers employed by social service agencies would not have reason to take part in these activities, the restrictions in effect apply only to "clinical" social workers in private practice who are members of NASW. These social workers primarily provide psychological counseling and therapy services, as opposed to what might be considered more traditional social worker services.

The restrictions at issue here were in place in NASW's ethics code and its "Standards of Practice" for a period of several years in the 1980s. We have no indication that they ever were enforced. We are not aware of any suspension, expulsion, reprimand, notice of violation in the association newsletter, or any threat of these or any other actions taken by NASW in response to violations of these restrictions. We do not know if the restrictions ever have affected a social worker's business practices in any way. We do not know if any members of the NASW were even aware of the existence of the allegedly anticompetitive restrictions.

Determining the extent to which a horizontal restraint is likely to have anticompetitive or procompetitive effects often requires considerable inquiry and analysis. However, in this case I need not reach that issue because the record does not indicate that the restrictions were likely to have any effect on the market. In order to determine whether a horizontal restraint is inherently suspect, Mass.

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[1] 110 FTC 549 (1988).

Board instructs us first to ask "is the practice the kind that appears likely, absent and efficiency justification, to 'restrict competition and decrease output'?"[2] The interpretation, enforcement, and market response to challenged restraints can, in many cases, clarify the likely effects of such restraints on competition.

Were the potential effects of the restrictions less ambiguous, I would not necessarily require much evidence of how these restrictions affected the market. Some efficiency benefits conceivably could result from NASW's restrictions. For example, NASW's restriction on the use of testimonials in members' advertising may protect certain patients vulnerable to undue influence from being coerced into providing testimonials for their therapist's advertising.[3] After all, patients of clinical social workers in many instances have serious emotional and mental disorders. Many of these patients may benefit from protection that is broader than that which is appropriate in other markets. Private professional associations such as NASW may be particularly well suited to provide such protection. The record does not indicate the extent to which such benefits are likely to result from the restrictions, as it also does not indicate the extent to which anticompetitive effects might result.

I am concerned that approving the consent order with NASW will suggest that the Commission may apply the Mass. Board analysis to summarily condemn competitively ambiguous horizontal restraints without any inquiry into how, or even if, the restrictions have affected the market. When restrictions as written are competitively ambiguous, as I believe they are here, the enforcement of such restrictions can shed much light on their likely effects.

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[2] 110 FTC 549, at 604.

[3] The order recognizes this and other possible sources of efficiency by including some safe harbors for NASW action. Because Commission inquiry into the restrictions' possible benefits was quite limited, I cannot confidently conclude that the safe harbors adequately protect potential benefits of the restrictions.

Judge Easterbrook has written that "there can be no restraint of trade without a restraint."[4] He explains that "enforcement mechanisms are the 'restraints' of trade. Without them there is only uncoordinated individual action, the essence of competition."[5] Evidence of how restrictions are interpreted and enforced may be sufficient to support a conclusion that the restrictions are inherently suspect.[6]

Other market evidence in some cases may indicate a likelihood of anticompetitive effects absent explicit market enforcement. For example, evidence may indicate that the fear of enforcement prevents professionals from certain restricted activities. Or professionals may choose not to violate restrictions because they fear retribution from their colleagues, such as being cut off from referrals or being ostracized after being noted as violators in a professional publication.

On the other hand, even when all agree that restrictions as written appear facially suspicious, they may, in fact, be competitively innocuous because they are not generally known by association members, are known but widely ignored, are easily circumvented, or are responded to by the membership in a way that illustrates that they are highly unlikely to have anticompetitive effects.

In this case, we are presented with almost no evidence on the interpretation, application, and market response to the challenged restraints. Nor do we have any evidence that the written restrictions at issue were enforced or affected the market in any way.

Furthermore, the restraints applied only to NASW members who provide psychological therapy and counseling in private practice.

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[4] *Schachar v. Am. Academy of Opthalmology, Inc.*, 870 F. 2d 397 (7th Cir. 1989).

[5] *Id.*, at 399.

[6] One commentator recently proposed as the first "analytical guideline" for antitrust enforcement in this area, "Professional rules are restraints only if and as enforced." John Lopatka, *Antitrust and Professional Rules: A Framework for Analysis*, 28 SAN DIEGO L. REV. 301, 310, 382 (1991). I would not go as far as he does when he argues that "unenforced restraints can be ignored." *Id.*, at 382.

In order to compete effectively at providing these services, it may not be necessary to be a member of NASW. We have no indication that NASW has leverage to impose anticompetitive restrictions on those social workers who choose to join the association. Moreover, even if NASW did have such leverage, it appears that inter-professional competition with other types of therapists may be sufficient to prevent anticompetitive results.

Obtaining evidence on these issues does not appear to impose an onerous burden of proof or to require an inordinate commitment of resources. Prudent enforcement requires that these issues be examined. The Commission's previous determinations that conduct is inherently suspect have been confined largely to cases in which market evidence much more strongly suggested the likelihood of anticompetitive effects than does the evidence in the present matter.

In Mass. Board, the record indicated that the Board had taken actions against numerous violators of the restrictions and these Board actions resulted in violators discontinuing advertising practices that were held to violate the Board's regulations.[7] Moreover, substantial evidence suggested that the restrictions were highly likely to lead to increased prices for optometry services.[8]

In Detroit Auto Dealers Association, evidence indicated that there was protracted enforcement of the restrictions which appeared to coerce widespread adherence.[9] Furthermore, the association acknowledged that its activity had anticompetitive results.[10]

In Superior Court Trial Lawyers' Association, the Commission concluded that the practice at issue was a *per se* antitrust violation.[11] But the Commission also concluded that the boycott resulted in

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[7] 110 FTC at 562-71 (Initial Decision Findings 73 and 117-59).

[8] *Id.*, at 561-63 (Initial Decision Findings 60-78).

[9] *Detroit Auto Dealers Association, Inc.*, 111 FTC 417, 425, 451-56 (1989) (Initial Decision Findings 51-52, 245-84), *aff'd in part, remanded in part*, 955 F. 2d 457 (6th Cir. 1992).

[10] 111 FTC at 426-27 (Initial Decision Findings 57-61).

[11] 107 FTC 510, 574.

anticompetitive effects amounting to $4 to 5 million per year.[12] The Supreme Court ultimately affirmed, holding the boycott to be illegal *per se* but emphasizing that the record included "overwhelming testimony" indicating that the group's actions brought the District's criminal justice system to the "brink of collapse" and thus resulted in higher prices.[13]

The Commission's recent consent order in American Psychological Association ("APA") was supported by evidence of enforcement of the restraints. Thus, we did not have to speculate about how the restrictions there have affected the market. APA's own enforcement record illustrated both its broad interpretation of the restrictions and actual effects of the restrictions on competitive behavior.

Without such evidence here, I cannot conclude that the challenged restrictions are inherently suspect. Consequently, in order to condemn these restrictions under Section 5, a traditional rule-of-reason analysis must be performed, including an evaluation of market power. Although the evidence in this regard is not complete, based on what has been presented to date, I consider it highly unlikely that these restrictions would be condemned at the completion of that analysis.

My conclusion that the challenged restraints are not inherently suspect does not require that I reach the issue of market power.[14] And I am not today advocating inclusion of a market power screen as a formal element of the Commission's truncated rule-of-reason analysis. But it seems to be self-evident that to ignore the issue of

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[12] *Id.*, at 577.

[13] *Federal Trade Commission v. Superior Court Trial Lawyers' Association*, 110 U.S. 768, 772, 782 (1990).

[14] Mass. Board does not require the use of a market power screen, but it is worth noting that the Massachusetts Board of Registration had the power to license, and thus it appeared likely to have substantial market power. And, in NCAA, the Supreme Court found that the association there did have substantial market power *NCAA v. Board of Regents of the Univ. Of Okla.*, 468 U.S. 85, 111 (1984) and that its restraint had demonstrable anticompetitive effects. *Id.*, at 104-07.

market power is to argue that the truncated rule of reason is applicable to the restrictions of all associations, regardless of the extent of an association's membership or its ability to affect members' behavior.

This is particularly troubling when the challenged restrictions are unenforced and their potential effects are ambiguous. Here, the indications of a lack of market power on the part of NASW could well undermine the potential for the restraints to have anticompetitive effects. It may well be that some limited analysis of market power is warranted in such cases in order to provide the Commission with some confidence that our enforcement program is consistent with our competition mission.[15]

I am concerned about extending the reach of Mass. Board to restrictions as competitively ambiguous as those of NASW here. I am further troubled that acceptance of the consent here might portend a lower standard of proof under Mass. Board by future Commission. The Mass. Board approach was an attempt by the Commission to enunciate a standard for evaluating horizontal restraints as gleaned from the Supreme Court's decision in *NCAA* and *Broadcast Music, Inc., v. CBS*,[16] the truncated rule-of-reason cases. A relatively low standard of proof in a truncated rule-of-reason analysis might appear to conserve enforcement resources. But if too much reason is truncated from the rule of reason, resources will be drawn to cases of questionable merit. The net effect is likely to be a draining of enforcement resources away from the types of cases in which Commission action can best benefit consumers. Acceptance of the consent order with NASW appears likely to encourage this unfortunate and unintended effect.

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[15] Clearly, evidence of market power is not necessary in all cases. For example, analysis of market power would not be necessary in a case involving an ethics code restriction that establishes minimum prices for association members.

[16] 441 U.S. 1 (1979).

Absent evidence that NASW's restrictions are likely to restrict competition, I do not have reason to believe that NASW has violated the Federal Trade Commission Act. Therefore, I must dissent from the Commission's action today.

IN THE MATTER OF

INSTITUT MERIEUX S.A.

Docket C-3301. Show Cause Order, March 9, 1993

SHOW CAUSE ORDER

On August 6, 1990, the Federal Trade Commission ("Commission") issued an order against Pasteur Merieux Serums et Vaccins S.A., formerly known as Institut Merieux S.A., ("respondent") in Docket No. C-3301. Paragraph II of the order, among other things, requires respondent to have leased on a long-term basis, at reasonable and customary terms, Connaught Bio Sciences, Inc.'s rabies vaccine business ("Connaught's rabies vaccine business"), by January 15, 1991, to a lessee that receives the prior approval of the Commission. Connaught's rabies vaccine business is located in Toronto, Ontario, Canada. Paragraph II also mandates that the lessee must make a lump-sum payment under reasonable and customary terms for the existing inventory of Connaught's rabies vaccine, and requires that the lease include a commitment from the lessee to supply rabies vaccine sufficient to satisfy the Canadian demand for rabies vaccine. Paragraph IV of the order provides for the appointment of a trustee to lease Connaught's rabies vaccine business in the event respondent has not accomplished the lease mandated by paragraph II of the order in a timely manner. Paragraph IX of the order, among other things, states that "in recognition of the sovereign rights of Canada . . . the appointment and term of a trustee, [and] the selection of any lessee . . . shall be subject to the approval of Investment Canada in accordance with Canadian law."[1] Paragraph XI of the order requires respondent to submit in writing to the Commission periodic verified written reports of its compliance with the terms of the order.

To date, respondent has been unable to locate a lessee for

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[1] "Investment Canada" is defined in the order to mean "the Agency of the Government of Canada established pursuant to the Investment Canada Act (S.C. 1985, C. 20) of Canada."

Connaught's rabies vaccine business. In its periodic compliance report dated August 12, 1992, and a supplement thereto dated September 1, 1992, respondent reports that it has diligently pursued the lease of the rabies vaccine business for two years, and has contacted all of the parties that would have an interest in the operation. Each potential lessee concluded that it was not interested in pursuing a lease.

Based upon the Commission's review of the information contained in respondent's verified periodic compliance reports, as well as other available information, the Commission believes that respondent's failure to accomplish the required lease is attributable to a combination of elements beyond respondent's control, and not to a lack of a good faith effort to comply with the relevant order provisions. Those elements include, among others, a number of unusual order requirements imposed on any potential lessee, and the fact that there does not appear to be any potential lessee that is interested in the rabies vaccine business or that is likely to receive the necessary governmental approvals. The record in this case establishes that accomplishment of the required lease is, for all practical purposes, a virtual impossibility, despite respondent's good faith efforts to comply with the order. Inasmuch as the Commission did not contemplate imposing an infeasible requirement on the respondent, the costs to respondent of further divestiture efforts are an inequitable and unbargained-for element of the consent order.[2]

The Commission also believes that a trustee appointed pursuant to paragraph IV of the order to accomplish the mandated lease would be unlikely to have any greater success than respondent in accomplishing the lease of Connaught's rabies vaccine business for the same reasons that respondent has been unsuccessful. In addition, requiring Merieux, or a trustee, to continue pursuing a potential lessee could adversely affect the viability of Connaught's rabies

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[2] We distinguish the costs imposed on a respondent by continued attempts to comply with an impossible order requirement from the kinds of costs ordinarily imposed by an order. For example, certain definable and predictable costs are always associated with a respondent's compliance obligations under a consent order. These costs are accepted by the respondent as part of the settlement of the case.

vaccine business, and thus, its ability to supply the Canadian rabies vaccine needs.

In view of the foregoing, the Commission has determined in its discretion that it is in the public interest to reopen the proceeding in Docket No. C-3301 and modify the order in this case by setting aside the following provisions: subparagraphs I(3), (4), (5); and paragraphs II; III; IV; V; VI; VII; VIII; IX; and XI(A).

In accordance with Section 3.72 of the Commission's Rules of Practice and Procedure, 16 CFR 3.72, respondent has thirty (30) days from the date of service of this order to file an answer to this Order to Show Cause or be deemed to have accepted the action proposed herein.

IN THE MATTER OF

ALAN V. PHAN

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

Docket C-3417. Complaint, March 12, 1993--Decision, March 12, 1993

This consent order prohibits, among other things, a California marketer of "Jazz cigarettes," a non-tobacco product, from representing that smoking such products poses no health risk, that smoking such products does not pose any of the health risks associated with smoking cigarettes, and that the smoke contains no tar. In addition, the respondent is prohibited from making any representations about the comparative or absolute health or safety attributes, benefits or risks of any cigarette or smoking product, unless it is substantiated by competent and reliable scientific evidence.

Appearances

For the Commission: *Jeffrey Klurfeld* and *Kerry O'Brien.*
For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Alan V. Phan, an individual trading and doing business as Harcourt Companies ("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 Alan V. Phan is the owner of Harcourt Companies, a California sole proprietorship. His principal office and place of business is located at 10915 Bloomfield Avenue, Los Alamitos, CA.

PAR. 2. Respondent has advertised, offered for sale, sold, and distributed smoking products, known as "Jazz Cigarettes" ("Jazz"),

to consumers. Jazz are non-tobacco products. Because Jazz do not contain tobacco, they are not "cigarettes," as that term is defined in the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1332.

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 and promotional materials for Jazz, including but not necessarily limited to the attached Exhibits A-C. These advertisements and promotional materials contain the following statements (emphases in originals):

A. NO REASON TO QUIT SMOKING. A Revolutionary Product: Cigarettes Without Nicotine Means No Health Hazard. Now You Can Enjoy The Luxury of Smoking Without Worrying. (Exhibit A)

B. SHOW YOUR CONCERN BY SENDING THIS HEALTHY PRODUCT TO A FRIEND OR RELATIVE WHO ENJOYS SMOKING. (Exhibit A)

C. If cigarettes are such [sic] popular WITH the health hazard, what would you think if you could somehow have a cigarette WITHOUT the health hazard? If you could take the DANGER OUT of smoking? Do you think you have a WINNER? Well, our company did it. By taking the cancer-causing nicotine out of cigarettes, we have a harmless product that will revolutionize the cigarette market. (Exhibits B-1 and B-2)

D. The leaves used inside the cigarettes are called Anarastino Papasico, which is of the same family like tobacco leaves. However, it contains much less nicotine, thus, we are able to extract the nicotine out 100%. There is no tar either. The end result means a cigarette with NO nicotine, NO tar; therefore, we are NOT required to print Health Warning Label like regular cigarettes. (Exhibit C)

E. For those who are not used to the heavy taste of cigarettes like Pall Mall, Lucky Strike...they could get used to it by the third day of smoking. Just think that Jazz will not hurt you like other cigarettes will give you motivation to keep trying. (Exhibit C)

F. USING JAZZ TO QUIT SMOKING: Quite a few customers of ours turn this strong smell to their advantage: *they used JAZZ as a means to STOP smoking*. Whenever they have an urge to smoke, they light up 1 Jazz and it would stop the craving for at least a few hours. They smoke less and less, and some could quit permanently by the end of the 2nd week. (Exhibit C)

G. INTRODUCE TO A FRIEND: You would do your friends or relatives a great favor by let them try the JAZZ cigarettes. Even if they do not like the taste or the smell, they might be able to QUIT smoking all together. Save somebody's health is a great feeling... (Exhibit C)

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

A. Smoking Jazz poses no health risk for the user.

B. Smoking Jazz does not pose any of the health risks associated with smoking tobacco cigarettes.

C. Jazz smoke contains no "tar."

D. Jazz packages do not display the Surgeon General's health warnings because smoking Jazz does not pose the health and safety risks that have been associated with smoking tobacco cigarettes.

PAR. 6. In truth and in fact:

A. Smoking Jazz does pose a health risk for the user.

B. Smoking Jazz poses some of the same health risks that are associated with smoking tobacco cigarettes.

C. Jazz smoke does contain "tar." "Tar" refers to the total particulate matter that results from the incomplete burning of any organic material including the ingredients in Jazz.

D. Jazz packages do not display the Surgeon General's health warnings because the Federal Cigarette Labeling and Advertising Act requires that the Surgeon General's warnings be displayed only on packages of "cigarette," 15 U.S.C. 1333. Because Jazz do not contain any tobacco, they are not "cigarettes" within the meaning of the Act and, therefore, are not required to display the Surgeon General's warnings.

Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the promotional material attached as Exhibit C respondent has represented, directly

or by implication, that smoking Jazz is effective in aiding people to quit smoking tobacco products.

PAR. 8. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A-C, respondent has represented, directly or by implication, that at the time he made the representations set forth in paragraphs five and seven, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 9. In truth and in fact, at the time he made the representations set forth in paragraphs five and seven, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. The acts or practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A


NO REASON TO QUIT SMOKING
jazz
20 CIGARETTES SANS TABAC
ORDER
TODAY
MONEY BACK
GUARANTEE
ONLY $8.00 Carton
10 packs of 20 cigarettes each
More than 5 cartons only $7.00/carton
For faster processing call:
(213) 799-8870
CASH IN BIG...
Become a Jazz Distributor
To: Harcourt Companies
10815 Bloomfield Ave.
P.O. Box 915
Los Alamitos, CA 90720
Regular
Menthol
Money Order
Check
Visa
MasterCard
Signature
Name (please print)
Address
City
State
Zip
SHOW YOUR CONCERN BY SENDING THIS HEALTHY PRODU
TO A FRIEND OR RELATIVE WHO ENJOYS SMOKING

EXHIBIT B

THE HARCOURT EXPORTS COMPANY

MAKE MONEY THE SIMPLE WAY
SELL A BETTER MOUSETRAP

Dear Associate:

You have undoubtedly received many ad letters regarding MONEY MAKING schemes. All of them would paint a colorful image of you MAKING ALL KINDS OF MONEY WITHOUT LIFTING A FINGERS, WITHOUT INVESTING A DIME (except $15 for their plan), WITHOUT ANY RISK, so on and so on. If you've ever tried, you understand the empty feeling of disappointment.

It's time to get back to basics. It's time to go back to the thousand-year old principle of good business: BUILD AND SELL A BETTER MOUSETRAP.

Three Steps Are Required:

1. Find THE PRODUCT that people want and use repeatedly;
2. Make it BETTER than your competitors;
3. Work diligently to SELL it.

Apply these 3 steps to ANY PRODUCT, you will be successful. It will truly be YOU who plays in the Bermuda beach, driving a Rolls, smiling next to a Hollywood celebrity. It's that SIMPLE.

After 5 years of working on these principal steps, I finally found it. I have perfected the first 2 steps and I am asking you to join me in Step 3.

Step 1 - THE PRODUCT : CIGARETTES

Even with the warning "Smoking is Dangerous to Your Health", and all other fuss about Smoking In Public Places, the number of smokers has increased every year. Among the Fortune-500, the tobacco companies have always enjoyed the highest profit. When people risk personal death to enjoy their cigarettes, you could be sure that there is no other product that is MORE POPULAR. The enjoyment of SMOKING is unsurpassed.

Step 2 - MAKE IT BETTER

If cigarettes are such popular WITH the health hazard, what would you think if you could somehow have a cigarette WITHOUT the health hazard? If you could take the DANGER OUT of smoking? Do you think you have a winner? Well, our company did it. By taking the cancer-causing nicotine out of cigarettes, we have a harmless product that will revolutionize the cigarette market.

STEP 3 - SELL IT

First of all, let me emphasize the 2 extra advantages in marketing this cigarette:

1. At present, there is no cigarette in the marketplace comparable to ours. It would take the competitors at least 3 years to catch up with our know-how. By then, you and I should already have our own condo in Bermuda.

2. The government requires no warning label on our cigarette and exempts it from the cigarette stamp tax (a savings of over $18 in some states). The result is a much cheaper price for the consumer. A double WHAMMY: health product at a lower cost.

Now, I need YOU to sell these cigarettes for me. And share with me the profit. It's that SIMPLE.

Of course, I have other alternatives. I could set up a public company, raise millions of money, hire the best advertising executives, employ thousands of workers in hundreds of facilities across the country. But I've been through that route before. I made some money, but along with money, I also got a bad heart, some kind of ulcer, and countless headaches.

This time, I am taking a different route. I will depend on INDEPENDENT ENTREPRENEURS like YOU to market these cigarettes for me. The money I'll make will be a little less, but I'd rather let YOU have part of it, than giving them to those lawyers, accountants, bankers and tax collectors.

THE MARKETING PLAN IS SIMPLE:

It's just a numbers game. Out of 10 individual smokers you contact, you will get at least 5 buyers. What's more, they will be repeat buyers, as smoking is still a habit-forming activity. Out of 10 stores you contact, at least 3 will agree to sell it for you. And re-order through you.

The more people or stores you contact, the more money you are going to make. It's that SIMPLE.

All you need to start is a very MINIMUM inventory. I do NOT want you to order big load. You stock up as you go. Because cigarette is light and small, you do not need anything bigger than a closet for your inventory. I advise you working out of your home to save any unnecessary expense.

As we agree, the more you sell, the more PROFIT you are going to get. In addition, your cost will go down as your SALE is up. To qualify as a distributor, you must order a MINIMUM of 30 cartons. And our pricing is SIMPLE, as follows:

30 to 59 cartons:	25% off
60 to 119 cartons :	35 % off
Over 120 cartons:	50 % off

At present, our RETAIL PRICE is $12 per carton. I figure if you could contact 100 smokers and 10 stores in your area, you could sell 120 cartons a week easily. You will make $720. a week or $37,440. a year. Not bad for about 5-hour work and initial investment of $270.

Of course, you could start smaller or bigger. You control your own destiny. It's that SIMPLE.

That's all I could tell you. We all believe in ACTION, not WORDS. What I offer you is very SIMPLE and TANGIBLE. Not some pie in the sky. The product is THERE, the market is THERE, the profit is THERE. If you decide to roll up your sleeves and go to WORK, fill up the order form and enclose a check, money order, or credit card number. It's that SIMPLE.

Yours truly,

Dr Alan V Pasqualle

EXHIBIT C

SOME INFO BEFORE YOU SMOKE...

WHAT ARE THESE CIGARETTES MADE OF ???

The leaves used inside the cigarettes are called Anarastino Papasico, which is of the same family like tobacco leaves. However, it contains much less nicotine, thus, we are able to extract the nicotine out 100%. There is no tar either. The end result means a cigarette with NO nicotine, NO tar; therefore, we are NOT required to print Health Warning Label like regular cigarettes.

THE SMELL IS TOO STRONG FOR ME...

For those who are not used to the heavy taste of cigarettes like Pall Mall, Lucky Strike...they could get used to it by the third day of smoking. Just think that Jazz will not hurt you like other cigarettes will give you motivation to keep trying.

USING JAZZ TO QUIT SMOKING

Quite a few customers of ours turn this strong smell to their advantage: they used JAZZ as a means to STOP smoking. Whenever they have an urge to smoke, they light up 1 Jazz and it would stop the craving for at least a few hours. They smoke less and less, and some could quit permanently by the end of the 2nd week.

INTRODUCE TO A FRIEND

You would do your friends or relatives a great favor by let them try the JAZZ cigarettes. Even if they do not like the taste or the smell, they might be able to QUIT smoking all together. Save somebody's health is a great feeling...

NEW JAZZ LIGHT

We are working on a formula to make JAZZ real light for those who prefer Salem or Virginia Slim. Unfortunately, we project the completion of the manufacturing only by May 1992. We shall send you a FREE sample as soon as it is available.

THANKS FOR YOUR HELP AND SUPPORT IN THIS EXPERIMENT. YOUR HEALTH AND THE HEALTH OF OUR CITIZENS GIVE US THE BEST MOTIVATION IN OUR DAILY RESEARCH.

DR ALAN PASQUALLE

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

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

1. Respondent Alan V. Phan is the owner of Harcourt Companies, a California sole proprietorship. His principal office and place of business is located at 10915 Bloomfield Avenue, Los Alamitos, CA.

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 Alan V. Phan, an individual trading and doing business as Harcourt Companies, and his successors and assigns, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Jazz or any product containing substantially similar ingredients, 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, that:

A. Smoking such product poses no health risk for the user.

B. Smoking such product does not pose any of the health risks associated with smoking tobacco cigarettes.

C. Such product's smoke contains no "tar."

II.

It is further ordered, That respondent Alan V. Phan, an individual trading and doing business as Harcourt Companies, and his successors and assigns, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any smoking product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any misrepresentation, in any manner, directly or by implication, regarding the display of health warnings required by the Federal Cigarette Labeling and Advertising Act.

III.

It is further ordered, That respondent Alan V. Phan, an individual trading and doing business as Harcourt Companies, and his successors and assigns, in connection with the manufacturing,

labeling, advertising, promotion, offering for sale, sale, or distribution of any cigarette, as defined in 15 U.S.C. 1332, or any other smoking product, 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, the comparative or absolute health or safety attributes, benefits, or risks associated with smoking such product, unless such representation is true and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. For 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 has 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.

IV.

It is further ordered, That respondent Alan V. Phan, an individual trading and doing business as Harcourt Companies, and his successors and assigns, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product 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, that using such product is effective in aiding people to quit smoking tobacco products, unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

V.

It is further ordered, That respondent shall:

A. Within thirty (30) days from the date of service of this order,

distribute a copy of the complaint and order to each past or present distributor of Jazz.

B. Distribute a copy of the complaint and order to each new distributor of Jazz within thirty (30) days of the date that individual or entity becomes a distributor;

C. Distribute a copy of the complaint and order to each future purchaser of Jazz, or any other transferee, who acquires, with or without valuable consideration, more than thirty (30) cartons of Jazz.

D. For ten (10) years from the date of service of this order, distribute a copy of the complaint and order to each managerial employee of respondent, and to each salesperson of respondent's products, whether they are independent sales agents or employees of respondent.

E. Within ten (10) days from the date of the service of this order, distribute a copy of the complaint and order to any individual or entity who is involved in the preparation and placement of advertisements or promotional materials, or communicates with customers or prospective customers regarding the efficacy or safety of any product covered by this order.

VI.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondent, or his 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 test, reports, studies, surveys, demonstrations or other evidence in his possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaint from consumers.

VII.

It is further ordered, That response shall, for a period of ten (10) years after the date of service of this order upon him, promptly notify the Commission, in writing, of his discontinuance of his present business or employment and of his affiliation with a new business or employment. For each such new affiliation, the notice shall include the name and address of the new business or employment, a statement of the nature of the new business or employment, and a description of respondent's duties and responsibilities in connection with the new business or employment.

VIII.

It is further ordered, That respondent shall, within sixty (60) days from the date of service of this order upon him, 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 he has complied with this order.

IN THE MATTER OF

ALLIANT TECHSYSTEMS INC.

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 9254. Complaint, Dec. 7, 1992--Decision, March 16, 1993

This consent order requires, among other things, a Minnesota-based defense systems contractor that provides ammunition, for a 10-year period, to obtain Commission approval before: acquiring the assets or stock of any company engaged in systems contracting for certain tank or lightweight ammunition; or selling or transferring Alliant's stock or assets to a company engaged in systems contracting for certain types of ammunition. In addition, the order requires the respondent to terminate its proposed acquisition of certain Olin Corporation assets.

Appearances

For the Commission: *Laura A. Wilkinson.*

For the respondent: *Ira S. Sacks, Fried, Frank, Harris, Shriver & Jacobson*, New York, N.Y.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that the Respondent, Alliant Techsystems-Inc. ("Alliant"), a corporation subject to the jurisdiction of the Commission, has entered into an agreement to acquire certain stock and assets of Olin Corporation and the proposed acquisition, if consummated, would violate the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that said acquisition agreement constitutes a violation of Section 5 of the FTC Act, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section

5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

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

(a) "*Alliant*" means Alliant Techsystems Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Delaware with its principal offices at 5901 Lincoln Drive, Edina, Minnesota, as well as its officers, employees, agents, parents, divisions, subsidiaries, successors, assigns, and the officers, employees, or agents of Alliant's divisions, subsidiaries, successors and assigns; and

(b) "*Olin*" means Olin Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of Virginia with its principal offices at 120 Long Ridge Road, Stamford, Connecticut, as well as its officers, employees, agents, divisions, subsidiaries, successors, assigns, and the officers, employees or agents of Olin's divisions, subsidiaries, successors and assigns.

II. THE RESPONDENT

2. Alliant is a corporation organized and existing under the laws of Delaware, with its principal place of business at 5901 Lincoln Drive, Edina, Minnesota.

3. In fiscal year 1992, Alliant's sales of 120mm tank ammunition and 30mm lightweight ammunition were approximately $240 million in the United States.

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

III. THE PROPOSED ACQUISITION

5. On or about August 4, 1992, Alliant and Olin signed a definitive transaction agreement under which Olin would exchange its Ordinance Division and Physics International subsidiary for approximately 2.82 million shares of newly issued Alliant common stock plus Alliant's assumption of $65 million of Olin debt. The transaction is valued at approximately $127 million. Alliant is a systems contractor for various rounds of 120mm tank ammunition and 30mm lightweight ammunition. Olin is a systems contractor for various rounds of 120mm tank ammunition and 30mm lightweight ammunition. The effect of the proposed acquisition, if consummated, may be substantially to lessen competition or tend to create a monopoly in systems contracting for: (a) 120mm kinetic energy ("KE") training ammunition, *i.e.*, M865; (b) 120mm KE tactical ammunition, *i.e.*, M829A1; (c) 120mm advanced KE tactical ammunition, *i.e.*, M829A2; (d) 120mm chemical energy ("CE") training ammunition, *i.e.*, M831E2; (e) 120mm CE tactical ammunition, *i.e.*, M830; (f) 120mm advanced CE tactical ammunition, *i.e.*, M830A1; (g) all types of 120mm tank ammunition; and (h) 30mm lightweight training ammunition, *i.e.*, M788, in the United States.

IV. TRADE AND COMMERCE

6. The relevant lines of commerce in which to analyze the proposed acquisition are systems contracting for: (a) 120mm kinetic energy ("KE") training ammunition, *i.e.*, M865; (b) 120mm KE tactical ammunition, *i.e.*, M829A1; (c) 120mm advanced KE tactical ammunition, *i.e.*, M829A2; (d) 120mm chemical energy ("CE") training ammunition, *i.e.*, M831E2; (e) 120mm CE tactical ammunition, *i.e.*, M830; (f) 120mm advanced CE tactical ammunition, *i.e.*, M830A; (g) all types of 120mm tank ammunition; and (h) 30mm lightweight training ammunition, *i.e.*, M788.

7. The relevant geographic market for each line of commerce specified in paragraph 6 above is the United States.

V. MARKET STRUCTURE

8. The relevant markets are highly concentrated. Alliant and Olin are the only two systems contractors supplying or capable of supplying (a) 120mm kinetic energy ("KE") training ammunition, *i.e.*, M865; (b) 120mm KE tactical ammunition, *i.e.*, M829A1; (c) 120mm advanced KE tactical ammunition, *i.e.*, M829A2; (d) 120mm chemical energy ("CE") training ammunition, *i.e.*, M831E2; (e) 120mm CE tactical ammunition, *i.e.*, M830; (f) 120mm advanced CE tactical ammunition, *i.e.*, M830A1; (g) all types of 120mm tank ammunition; and (h) 30mm lightweight training ammunition, *i.e.*, M788, in the United States.

VI. ENTRY CONDITIONS

9. Entry into the relevant markets is difficult or unlikely.

VII. COMPETITION

10. Alliant and Olin are actual or potential competitors in the relevant markets and this acquisition would create a monopoly in the relevant markets.

VIII. EFFECTS

11. The effect of the proposed acquisition, if consummated, may be substantially to lessen competition or tend to create a monopoly in the relevant lines of commerce in the United States in violation of Section 7 of Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

IX. VIOLATIONS CHARGED

12. The proposed acquisition by Alliant of Olin violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and would, if consummated, violate Section 7 of the Clayton Act, 15

U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent, Alliant Techsystems Inc., with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

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

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

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

1. Respondent Alliant is a corporation organized and existing under the laws of Delaware, with its principal place of business at 5901 Lincoln Drive, Edina, 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.

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

"*Alliant*" means Alliant Techsystems Inc., as well as the directors, officers, employees, representatives, agents, parents, divisions, subsidiaries, successors, and assigns, as well as the directors, officers, employees and agents of its parents, divisions and subsidiaries, successors, and assigns.

"*Olin*" means Olin Corporation, as well as its directors, officers, employees, representatives, agents, parents, divisions, subsidiaries, successors, and assigns, as well as the directors, officers, employees and agents of its parents, divisions and subsidiaries, successors, and assigns.

"*Systems contractor for 30mm lightweight ammunition or 120mm tank ammunition*" means any company that supplies or has supplied completed rounds of 30mm lightweight ammunition or completed rounds of 120mm tank ammunition to any customer in the United States, including but not limited to the United States Army, or that is developing completed rounds of 30mm lightweight ammunition or completed rounds of 120mm tank ammunition for any customer in the United States, including but not limited to the United States Army.

II.

It is ordered, That, for a period commencing on the date this order becomes final and continuing for ten (10) years, Alliant shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise, acquire: (1) any interest in the whole or any part of the stock, share capital, or equity of any systems contractor for 30mm lightweight ammunition or 120mm tank ammunition; or (2) any assets of a systems contractor for 30mm lightweight ammunition or 120mm tank ammunition.

Provided, however, that this paragraph II shall not apply to the acquisition of products or services in the ordinary course of business.

III.

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for ten (10) years, Alliant shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise, sell or otherwise transfer to any systems contractor for 30mm lightweight ammunition or 120mm tank ammunition: (1) any interest in or any part of the stock, share capital, or equity of Alliant, or (2) any assets used for or previously used for (and still suitable for use for) systems contracting of 30mm lightweight ammunition or 120mm tank ammunition. *Provided, however*, that this paragraph III shall not apply to the sale of products or services in the ordinary course of business.

IV.

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for ten (10) years, Alliant shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation that may affect compliance obligations arising out of the order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of any subsidiary engaged as systems contractor for 30mm lightweight ammunition or 120mm tank ammunition, or any other change that may affect compliance obligations arising out of the order.

V.

It is further ordered, That, unless Alliant has already done so, it will, not later than fourteen (14) days after this order becomes final:

(1) terminate any agreement that provides for or contemplates the acquisition of, or exchange of stock for, Olin's Ordinance Division and/or its Physics International subsidiary, including but not limited to the transaction agreement signed on or about August 4, 1992; (2) return or destroy all documents containing or recording confidential information provided to Alliant by Olin in connection with acquisition negotiations or agreements; and (3) recover from Olin or have Olin destroy all documents containing or recording confidential information provided to Olin by Alliant in connection with acquisition negotiations or agreements. Nothing herein contained shall relieve Alliant from any obligation of confidentiality imposed by agreement among Alliant and Olin.

VI.

It is further ordered, That Alliant shall, within sixty (60) days after the date this order becomes final, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order. Within one year after the order becomes final, and annually for the next nine years, Alliant 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, or has complied with the order.

IN THE MATTER OF

S.C. JOHNSON & SON, INC.

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-3418. Complaint, March 16, 1993--Decision, March 16, 1993

This consent order requires, among other things, a Wisconsin-based manufacturer of home care products to divest its assets used in the production, manufacture and sale of continuous action and aerosol air freshener products and furniture care products, in order to acquire certain assets of the Drackett Company, a subsidiary of Bristol-Myers Squibb Company. In addition, for a 10-year period, Johnson must obtain Commission approval before acquiring any interest in any air freshener or furniture care product manufacturer or distributor.

Appearances

For the Commission: *Steven A. Newborn* and *Jane R. Seymour.*

For the respondent: *Tefft W. Smith, Kirkland & Ellis,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondent, S.C. Johnson & Son, Inc. ("Johnson"), a corporation, proposes to acquire all of the voting securities of The Drackett Company ("Drackett"), a wholly-owned subsidiary of Bristol-Myers Squibb Company ("BMS"), from BMS, and certain assets of BMS relating to Drackett's international business, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect

thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Johnson is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business at 1525 Howe Street, Racine, Wisconsin.

2. Johnson is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. THE ACQUIRED COMPANY

3. BMS is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 345 Park Avenue, New York, New York.

4. BMS is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

5. Drackett is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 201 East Fourth Street, Cincinnati, Ohio.

6. Drackett is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

7. On or about October 26, 1992, Johnson agreed to acquire all of the voting securities of Drackett, a wholly-owned subsidiary of BMS, and certain assets of BMS relating to Drackett's international business, for a price of approximately $1.15 billion.

IV. THE RELEVANT MARKETS

8. The relevant lines of commerce in which to analyze Johnson's acquisition of Drackett from BMS are:

a. The continuous action air freshener products business and the instant action air freshener products business, which means the business of formulating, manufacturing, marketing and selling products designed to combat and eliminate offensive odors in the home, that are applied by aerosol spray or in liquid, solid, wick and other forms and that are distributed to consumers primarily in grocery, drug, and mass merchandise stores; and

b. The furniture care products business, which means the business of formulating, manufacturing, marketing and selling household polishes and dusting aids designed to clean, shine, and protect furniture and other household surfaces, that are applied by aerosol spray or in cream, paste, liquid and other forms and that are distributed to consumers primarily in grocery, drug, and mass merchandise stores.

9. The relevant section of the country for each relevant line of commerce specified in paragraph 8 above is the United States.

10. The relevant markets set forth above are highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

11. Entry into the relevant markets is difficult or unlikely.

12. Johnson and BMS are actual competitors in the relevant markets.

V. EFFECTS OF THE ACQUISITION

13. The effects of the acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

14. All of the above increase the likelihood that firms in the relevant markets will increase prices and restrict output both in the near future and in the long term and that Johnson will unilaterally exercise market power in the relevant markets.

VI. VIOLATIONS CHARGED

15. The acquisition agreement described in paragraph seven constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

16. The acquisition described in paragraph seven, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission 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 that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in

the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure 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 S.C. Johnson & Son, Inc. ("Johnson") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business located at 1525 Howe Street, Racine, Wisconsin.

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. "*Johnson*" means S.C. Johnson & Son, Inc., its predecessors, successors and assigns, divisions, subsidiaries, affiliates, companies, groups, partnerships and joint ventures that S.C. Johnson & Son, Inc. controls, directly or indirectly, and their directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. "*BMS*" means Bristol-Myers Squibb Company, its predecessors, successors and assigns, divisions, subsidiaries, affiliates, companies, groups, partnerships and joint ventures that Bristol-Myers Squibb Company controls, directly or indirectly, and their directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. "*Drackett*" means The Drackett Company, its predecessors, successors and assigns, divisions, subsidiaries, affiliates, companies, groups, partnerships and joint ventures that The Drackett Company controls, directly or indirectly, and their directors, officers, employees, agents and representatives, and their respective successors and assigns.

D. "*Acquisition*" means the acquisition by Johnson from BMS of all the voting securities of Drackett, a wholly-owned subsidiary of BMS, and certain assets of BMS relating to Drackett's international business.

E. "*Air freshener products*" means products designed to combat and eliminate offensive odors in the home that applied by aerosol spray, or in liquid, solid, wick or other forms and that are distributed to consumers primarily through grocery, drug, and mass merchandise stores.

F. "*Furniture care products*" means household polishes and dusting aids designed to clean, shine, and protect furniture and other household surfaces, which are applied by aerosol spray or in cream, paste, liquid and other forms and that are distributed to consumers primarily through grocery, drug, and mass merchandise stores.

G. "*Renuzit Assets*" means all of Drackett's rights, title and interest in and to:

(1) Air freshener products, including, but not limited to, the brands and trademarks "Renuzit", "Renuzit Adjustable", "Renuzit Roommate", "Renuzit Freshell", "Renuzit Fragrance Jar", "Renuzit Aerosol", and "Renuzit Fresh 'n Dry";

(2) Furniture care products, including, but not limited to, the brands and trademarks "Endust" and "Behold", but excluding the brand and trademark "Mr. Muscle" outside the United States; and

(3) All of Drackett's assets and businesses associated with the development, production, distribution, and sale for resale of air freshener products and furniture care products and as further delineated in the subparagraphs of Schedule A, attached hereto and made a part hereof.

II.

It is ordered, That:

A. Johnson shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Renuzit Assets; *provided, however,* Johnson is not required to divest any of the Renuzit Assets identified in Schedule A, Part 2, if such assets are not needed by the acquirer or acquirers ("acquirer(s)") in connection with the development, production, distribution, and sale for resale of air freshener products or furniture care products.

B. Johnson shall divest the Renuzit Assets only to an acquirer or acquirers ("acquirer(s)") 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 divestiture of the Renuzit Assets is to ensure the continuation of the assets as an ongoing, viable enterprise engaged in the same businesses in which the Renuzit Assets presently are employed, and to remedy the lessening of competition resulting from the proposed Acquisition as alleged in the Commission's complaint.

C. At the time of divestiture, Johnson shall make available to the acquirer(s) such Johnson personnel, assistance and training as the acquirer(s) might reasonably need to transfer Drackett technology and know-how included in the Renuzit Assets, and shall continue providing such personnel, assistance and training at Johnson's cost for a period of time (not to exceed six (6) months) sufficient to satisfy the acquirer(s)' management that its personnel are appropriately trained in the technology and know-how. At the time of divestiture, Johnson shall also divest any additional, incidental assets of Drackett and make any further arrangements for

administrative services within the first six (6) months after divestiture that may be reasonably necessary to assure the viability and competitiveness of the Renuzit Assets.

D. Johnson shall ensure that substantially the same services that BMS agreed to provide Johnson pursuant to the Acquisition Agreement dated October 26, 1992, between Johnson and BMS covering Johnson's acquisition of Drackett ("Acquisition Agreement"), shall be provided to the acquirer(s), upon the acquirer's request and on the same terms as such services are provided to Johnson, during the period that BMS has agreed to provide Johnson such services pursuant to the Acquisition Agreement.

E. Johnson will provide and ensure that BMS also provides reasonable cooperation and assistance to the acquirer(s) in obtaining approvals for the transfer of all registrations, leases, licenses, certifications, permits, or similar documents relating to the Renuzit Assets.

F. Johnson shall comply with all terms of the Agreement to Hold Separate, attached hereto and made a part hereof. The Agreement to Hold Separate shall continue in effect until such time as Johnson has divested the Renuzit Assets or until such other time as the Agreement to Hold Separate provides.

G. Johnson shall take such actions as are necessary to maintain the viability and marketability of the Renuzit Assets and to prevent the destruction, removal, wasting, deterioration or impairment of any of the Renuzit Assets except in the ordinary course of business and except for ordinary wear and tear that does not affect the viability and marketability of the Renuzit Assets.

III.

It is further ordered, That:

A. If Johnson has not divested, absolutely and in good faith and with the Commission's prior approval, the Renuzit Assets within twelve (12) months of the date this order becomes final, Johnson shall consent to the appointment by the Commission of a trustee to

divest the Renuzit Assets. In the event the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, Johnson shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Johnson to comply with this order.

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

1. The Commission shall select the trustee, subject to the consent of Johnson, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall, subject to the prior approval of the Commission, have the exclusive power and authority to divest the Renuzit Assets, and in addition, after a period of six (6) months, to divest the trademark "Vanish" along with the Renuzit Assets, together with any additional, incidental assets of Johnson, including those relating to the "Vanish" trademark, and make any further arrangements for administrative services that may be reasonably necessary to assure the viability and competitiveness of the Renuzit Assets and the "Vanish" trademark.

3. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph B.8. to accomplish the divestiture. 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 or by the court (in the case of a court-appointed trustee). *Provided,*

however, the Commission may only extend the divestiture period two (2) times.

4. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Renuzit Assets, or any other relevant information, as the trustee may reasonably request. Johnson shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. Johnson shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Johnson 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 Johnson's absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in paragraph II.B. of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each acquirer for the divestiture. The divestiture shall be made in the manner set out in paragraph II; *provided, however*, if the trustee receives bona fide offers from more than one acquirer, and if the Commission determines to approve more than one such acquirer, the trustee shall divest to the acquirer(s) selected by Johnson from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of Johnson, 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 Johnson, 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 Johnson 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 Renuzit Assets.

7. Johnson shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trusteeship, 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, claims, or expenses result from misfeasance, negligence, willful or wanton acts, or bad faith by the trustee.

8. Within thirty (30) 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, Johnson shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

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

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

11. The trustee shall have no obligation or authority to operate or maintain either the Renuzit Assets or those assets associated with the "Vanish" trademark.

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

IV.

It is further ordered, That Johnson shall maintain the viability and marketability of the "Vanish" trademark together with any

additional, incidental assets of Johnson relating to the "Vanish" trademark, and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair their marketability or viability, pending divestiture without the prior approval of the Commission.

V.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until Johnson has fully complied with the provisions of paragraphs II and III of this order, Johnson 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, or has complied with those provisions. Johnson shall include in its compliance reports, among other things that are required from time to time, a full description of all substantive contacts or negotiations for the divestiture, including the identity of all parties contacted. Johnson also shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

VI.

It is further ordered, That, for a ten (10) year period commencing on the date this order becomes final, Johnson shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries, partnerships or otherwise,

(1) Any equity or other interest in, or the whole or any part of the stock or share capital of, any person or business that is engaged in the development, production, distribution, and sale for resale of air freshener products or furniture care products in the United States; *provided, however*, that individual employees of Johnson and each pension, benefit or welfare plan or trust controlled by Johnson may

acquire, for investment purposes only, an interest of not more than two (2) percent of the stock or share capital of such person or business;

(2) Any equity or other interest in, or the whole or any part of the stock or share capital of, any person or business that owns or licenses a brand or trademark used in connection with the sale of air freshener products or furniture care products in the United States; *provided, however*, that individual employees of Johnson and each pension, benefit or welfare plan or trust controlled by Johnson may acquire, for investment purposes only, an interest of not more than two (2) percent of the stock or share capital of such person or business; or

(3) Any assets used or previously used (and still suitable for use) in the manufacture or production of air freshener products or furniture care products; *provided, however*, that Johnson may, in the ordinary course of business, make purchases of used equipment suitable for manufacturing air freshener products and/or furniture care products totaling not more than $1 million per year.

One (1) year from the date this order becomes final and annually thereafter for nine (9) years on the anniversary date of this order, Johnson shall file with the Secretary of the Federal Trade Commission a verified written report of its compliance with this paragraph.

VII.

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 Johnson, Johnson 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 Johnson relating to any matters contained in this consent order; and

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

VIII.

It is further ordered, That Johnson shall notify the Commission at least thirty (30) days prior to any change that may affect compliance obligations arising out of the order, including but not limited to, any change in Johnson such as dissolution, assignment, or sale resulting in the emergence of a successor, the creation or dissolution of subsidiaries, or any other change.

SCHEDULE A

Johnson shall divest all of the Renuzit Assets pursuant to the terms of this order. The associated assets identified in paragraph I.G.(3) of this order shall include all assets, properties, business and goodwill, tangible and intangible, utilized by Drackett in the development, production, distribution and sale of air freshener products and furniture care products, including, without limitation, the following:

PART 1

(1) All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, marketing information, product development information, research materials, technical information, management information systems, software, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes and quality control data;

(2) Intellectual property rights, patents and patent applications and the formulas, copyrights, trademarks and trade names, service marks;

(3) All rights, title and interest in and to the contracts entered in the ordinary course of business with customers (together with the associated bid and performance bonds), suppliers sales representatives, brokers and distributors, agents, inventors, product testing and laboratory research institutions, providers of electronic data exchange services, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

(4) All rights under warranties and guarantees, express or implied;

(5) All books, records, files, financial statements and supporting documents;
(6) All items of prepaid expense.

PART 2

(1) The Franklin, Kentucky plant, all machinery, fixtures, equipment, vehicles, furniture, tools and all other tangible personal property;
(2) Inventory;
(3) Accounts and notes receivable;
(4) All Environmental Protection Agency and all other federal and state regulatory agency registrations and applications, and all documents related thereto; and
(5) All rights, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits.

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Hold Separate") is by and among S.C. Johnson & Son, Inc. ("Johnson," as defined in paragraph I of the proposed order contained in the Agreement Containing Consent Order), a corporation organized, existing, and doing business under and by virtue of the laws of Wisconsin, with its office and principal place of business at 1525 Howe Street, Racine, Wisconsin; 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 October 26, 1992, Johnson entered into an agreement with Bristol-Myers Squibb Company ("BMS") to acquire all the voting securities of The Drackett Company ("Drackett"), a wholly-owned subsidiary of BMS, and certain assets of BMS relating to Drackett's international business (hereinafter "Acquisition"); and

Whereas, BMS, with its principal office and place of business located at 345 Park Avenue, New York, New York, produces and

markets, among other things, air freshener products and furniture care products, as defined in paragraph I of the proposed order; and

Whereas, Drackett, with its principal office and place of business located at 201 East Fourth Street, Cincinnati, Ohio, produces and markets household products; and

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

Whereas, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement"), the Commission must 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 the Renuzit Assets, as defined in paragraph I of the proposed order, during the period prior to the final acceptance and issuance of the order by the Commission (after the 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 the Renuzit Assets defined in paragraph I of the proposed order and the Commission's right to have the Renuzit Assets continue as a viable competitor; and

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

1. Preserve the Renuzit Assets pending the divestiture as a viable, independent, ongoing enterprise, and
2. Remedy any anticompetitive effects of the Acquisition; and

Whereas, Johnson's entering into this Hold Separate shall in no way be construed as an admission by Johnson that the Acquisition is illegal; and

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

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 that, at the time it accepts the Agreement for public comment it will grant early termination of the Hart-Scott-Rodino waiting period, and unless the Commission determines to reject the proposed order, it will not seek further relief from Johnson with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Hold Separate and the Consent Agreement to which it is annexed and made a part thereof, and in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Renuzit Assets pursuant to the order, as follows:

1. Johnson agrees to execute and be bound by the Consent Agreement.

2. Johnson agrees that from the date this Hold Separate is accepted until the earlier of the dates listed below in subparagraphs 2.a and 2.b, it will comply with the provisions of paragraph 3 of this Hold Separate:

a. Three (3) 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; or

b. The day after the divestiture required by the Consent Agreement has been completed.

3. Johnson agrees to hold the Renuzit Assets separate and apart on the following terms and conditions:

a. The Renuzit Assets, as defined in paragraph I of the proposed order, shall be held separate and apart and shall be operated independently of Johnson (as employed here and hereinafter, the

term "Johnson" shall exclude the Renuzit Assets and exclude all personnel directly connected with the Renuzit Assets) except to the extent that Johnson must exercise direction and control over the Renuzit Assets to assure compliance with this Hold Separate or the order, and except as otherwise provided in this Hold Separate; *provided, however*, that all assets at the Urbana, Ohio plant used to manufacture Renuzit air freshener products shall be transferred to the Franklin, Kentucky plant, and the Urbana, Ohio plant shall not be considered part of the Renuzit Assets.

b. Prior to, or simultaneously with, its acquisition of Drackett, Johnson shall separately incorporate the Renuzit Assets ("Renuzit Company") and adopt new Articles of Incorporation and By-laws that are not inconsistent with any provisions of this Hold Separate or the order.

c. Johnson shall elect a five-person board of directors for the Renuzit Company ("New Board"). The New Board shall consist of the existing Renuzit General Manager and the existing Renuzit Financial Manager (provided they agree, or comparable, knowledgeable persons among the managers of the Renuzit Assets independent of Johnson); two Johnson employees whose responsibilities with Johnson do not involve direct management of Johnson's North American Consumer Products Business; and a chairman who will be independent of Johnson and competent to assure the continued viability and competitiveness of the Renuzit Assets. Except for the two Johnson directors serving on the New Board, Johnson shall not permit any director, officer, employee, or agent of Johnson also to be a director, officer, or employee of the Renuzit Company.

d. Johnson shall not exercise direction or control over, or influence directly or indirectly, the Renuzit Company, the independent chairman, or the New Board, or any of its operations or businesses; *provided however*, that Johnson may exercise only such direction and control over the Renuzit Company as is necessary to assure compliance with this Hold Separate or the order.

e. Johnson shall maintain the viability and marketability of the Renuzit Assets and shall not cause or permit the destruction, removal, wasting, deterioration, or impairment of any assets or

businesses it may have to divest except in the ordinary course of business and except for wear and tear. Johnson shall not sell, transfer, or encumber the Renuzit Assets except in the ordinary course of business.

f. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or defending or prosecuting litigation, or negotiating agreements to divest assets, Johnson shall not receive or have access to, or the use of, any material confidential information not in the public domain about the Renuzit Company or the activities of the New Board, nor shall the Renuzit Company receive or have access to, or use of, any material confidential information not in the public domain about Johnson's air freshener products and furniture care product businesses, or the activities of Johnson in managing its air freshener products and furniture care products businesses. Johnson may receive on a regular basis from the Renuzit Company aggregate financial information necessary and essential to allow Johnson to prepare United States consolidated financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in the paragraph. ("Material confidential information" as used herein, means competitively sensitive or proprietary information not independently known to Johnson from sources other than the New Board including, but not limited to, customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.)

g. Except as is permitted by this Hold Separate, the two directors of the Renuzit Company appointed by Johnson and who are also directors, officers, agents, or employees of Johnson ("Johnson New Board members"), shall not receive any Renuzit Company material confidential information and shall not disclose any such information obtained through their involvement with the Renuzit Company to Johnson or use it to obtain any advantage for Johnson. The two Johnson New Board members shall participate in matters that come before the New Board only for the limited

purposes of considering any capital investment of over $250,000, approving any proposed budget and operating plans, authorizing dividends and repayment of loans consistent with the provisions of subparagraph 3.1 hereof, and carrying out Johnson's responsibilities under the Hold Separate and the order. Except as permitted by the Hold Separate, the two directors shall not participate in any matter, or attempt to influence the votes of other directors of the New Board with respect to matters that would involve a conflict of interest between Johnson and the Renuzit Company. Meetings of the New Board during the term of the Hold Separate shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of the Hold Separate.

h. The Renuzit Company shall be staffed with sufficient employees to maintain the viability and competitiveness of the Renuzit Aseets, which employees shall be selected from Drackett's existing employee base and may also be hired from sources other than Johnson. Each director, officer and management employee of the Renuzit Company shall execute a confidentiality agreement prohibiting the disclosure of any Renuzit Company confidential information.

i. All material transactions, out of the ordinary course of business and not precluded by subparagraphs 3.a - 3.1 hereof, shall be subject to a majority vote of the New Board.

j. Johnson shall not change the composition of the New Board unless the independent chairman consents. The independent chairman shall have the power to remove members of the New Board for cause. Johnson shall not change the composition of the management of the Renuzit Company except that the New Board shall have the power to remove management employees for cause.

k. If the independent chairman ceases to act or fails to act diligently, a substitute chairman shall be appointed in the same manner as provided in paragraph 3.c of this Hold Separate. Any

replacement for independent chairman shall be appointed with the consent of the Commission.

l. Johnson shall make available for use by the Renuzit Company each year until divestiture an amount not less than $32 million ($32,000,000), unless a smaller amount is requested or required by the Renuzit Company, in its sole discretion, for advertising and consumer and trade promotion of the Renuzit Business products, and shall pay all direct product costs and indirect overheads for the Renuzit Company, to the extent that the Renuzit Company, in its sole discretion, deems such payment to be necessary. Johnson shall also provide all working capital deemed necessary for the Renuzit Company by a vote of a majority of the New Board.

4. Should the Federal Trade Commission seek in any proceeding to compel Johnson to divest itself of the Renuzit Assets or any additional assets, as provided in the proposed order, Johnson shall not raise any objection based on the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Johnson also waives all rights to contest the validity of this Hold Separate.

5. To the extent that this Hold Separate requires Johnson to take, or prohibits Johnson from taking, certain actions which otherwise may be required or prohibited by contract, Johnson shall abide by the terms of the Hold Separate or order and shall not assert as a defense such contract requirements in a civil penalty action or any other action brought by the Commission to enforce the terms of this Hold Separate or order.

6. For the purpose of determining or securing compliance with this Hold Separate, subject to any legally recognized privilege, and upon written request with reasonable notice to Johnson made to its principal office in the United States, Johnson shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Johnson 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 Johnson relating to compliance with this Hold Separate; and

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

7. This Hold Separate shall not be binding until approved by the Commission.