IN THE MATTER OF

FREEMAN HOSPITAL, ET AL.

Docket 9273. Interlocutory Order, Nov. 30, 1995

ORDER DISMISSING COMPLAINT

On November 6, 1995, the respondents moved that this matter be withdrawn from adjudication. Complaint counsel did not oppose the motion. On November 8, 1995, the matter was withdrawn from adjudication pursuant to Section 3.26(c) of the Commission's Rules, 16 CFR 3.26(c), for the purpose of considering whether the public interest warrants further litigation.

The "Statement of Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction," issued June 21, 1995, provides that on a case-by-case basis, the Commission will evaluate whether to pursue administrative litigation after denial of a preliminary injunction. The statement indicates that the Commission will consider the following factors in deciding whether to continue administrative litigation:

(i) The factual findings and legal conclusions of the district court or any appellate court, (ii) any new evidence developed during the course of the preliminary injunction proceeding, (iii) whether the transaction raises important issues of fact, law, or merger policy that need resolution in administrative litigation, (iv) an overall assessment of the costs and benefits of further proceeding, and (v) any other matter that bears on whether it would be in the public interest to proceed with the merger challenged.

After consideration of these factors, the Commission concludes that further litigation is not in the public interest.

It is therefore ordered, That the complaint be, and it hereby is, dismissed.

IN THE MATTER OF

AMERICAN STORES COMPANY, 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 C-3238. Consent Order, Aug. 31, 1988--Modifying Order, Dec. 1, 1995

This order reopens a 1988 consent order that required American Stores to divest certain retail grocery stores in parts of California and Nevada and to obtain Commission approval before acquiring certain grocery stores. This order modifies the consent order by deleting the prior-approval requirements in paragraph VIII of the consent order pursuant to the Commission's Prior Approval Policy -- under which the Commission presumes that the public interest requires reopening and setting aside the prior-approval provisions in outstanding merger orders, making them consistent with the policy -- and by replacing that provision with a prior notification provision.

ORDER REOPENING AND MODIFYING ORDER

On November 20, 1995, American Stores Company ("ASC") filed its Petition To Reopen and Vacate or Modify Consent Order ("November Petition") in this matter. Respondent asks that the Commission reopen this 1988 consent order[1] pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement").[2] The Petition requests that the Commission reopen and vacate the order in Docket No. C-3238, or in the alternative, reopen and modify the order by deleting the prior approval provisions of paragraph VIII.

The November Petition is identical to the Petition to reopen previously filed by ASC on July 28, 1995 ("July Petition"). Since the July Petition was subject to a thirty-day public comment period, which expired on September 8, 1995, and no comments were received, the Commission waived the public comment period for the November Petition.

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[1] *American Stores Company, et al.*, 111 FTC 80 (1988) ("American Stores").

[2] 60 Fed. Reg. 39,745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH), ¶ 13,241, at 20,991 (June 21, 1995).

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

Narrow prior approval or prior notification provisions may be necessary to protect the public interest in some circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3.

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

Consistent with the Commission's Prior Approval Policy Statement, the presumption is that the prior approval requirement in paragraph VIII of this order should be reopened. There is nothing in the record to suggest that the respondent would engage in the same acquisition as alleged in the complaint. Accordingly, the

Commission has determined to modify the order in Docket No. C-3238 to set aside the prior approval requirement.

The Commission also stated in the Prior Approval Policy Statement that it would continue to fashion remedies as needed in the public interest, including ordering narrow prior notification requirements in certain limited circumstances. Accordingly, a prior notification provision may be used where there is a credible risk that a company would, but for an order, engage in an anticompetitive merger that would not be subject to the premerger notification and waiting period requirements of the HSR Act. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission has determined that the record in this case evidences a credible risk that the respondent could engage in future anticompetitive acquisitions that would not be reportable under the HSR Act. The complaint in Docket No. C-3238 charged that respondent's proposed acquisition of Lucky would, if consummated, violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially reducing competition in the retail sale and distribution of food and grocery store items in supermarkets in thirteen separate relevant geographic markets consisting of states, cities, areas and towns. Complaint, ¶¶ 8 and 9. Paragraph VIII of the order required respondent to obtain prior Commission approval before certain acquisitions of a retail grocery store or any interest in a retail grocery store in forty towns or areas in California and Nevada.

There has been no showing that the competitive conditions that gave rise to the Commission's complaint and order in Docket No. C-3238 no longer exist. Moreover, the size and localized nature of the relevant markets and the likely size and other characteristics of the market participants and relevant transactions as identified in the complaint and order indicate that future acquisitions that would currently be covered by the provisions of paragraph VIII of the order would probably not be subject to the premerger notification and waiting period requirements of the HSR Act.[3] Accordingly, pursuant to the Prior Approval Policy Statement, the Commission has determined to modify paragraph VIII of the order to substitute a prior

[3] *See* Order Reopening and Modifying Order, Supermarket Development Corporation, Docket No.C-3224 (Septemper 5, 1995) (Commission substituted a prior notification provision in an order based on similar complaint allegations).

notification requirement for the prior approval requirement. ASC does not object to the substitution of prior notification for prior approval. *See* Letter of Christopher J. MacAvoy to Donald C. Clark, November 20, 1995.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and

It is further ordered, That paragraph VIII of the order in Docket No. C-3238, issued on August 11, 1988, be, and hereby is, modified, as of the effective date of this order, to read as follows:

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, American shall cease and desist from acquiring, without prior notification to the Commission, directly or indirectly, through subsidiaries or otherwise, (i) five or more retail grocery stores, within any one year period from the date this order becomes final, including any facilities that have been operated as a retail grocery store(s) within six months of the date of the offer to purchase the facilities, or any interest in five or more retail grocery stores or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates five or more retail grocery stores, in Los Angeles and Orange Counties, California (excluding those cities and towns identified in subsection (iii) of this Part VIII), or (ii) two or more retail grocery stores, within any one year period from the date this order becomes final, including any facilities that have been operated as a retail grocery store(s) within six months of the date of the offer to purchase the facilities, or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates two or more retail grocery stores, in the Bay Area comprised of the following cities or towns:

Alameda, California
Albany, California
Belmont, California
Benicia, California
Berkeley, California
Burlingame, California
Campbell, California
Castro Valley, California
Cupertino, California
Newark, California
Oakland, California
Pacifica, California
Palo Alto, California
Pinole, California
Redwood City, California
Richmond, California
San Bruno, California
San Carlos, California

Daly City, California
El Cerrito, California
El Sobrante, California
Emeryville, California
Foster City, California
Fremont, California
Hayward, California
Hercules, California
Los Altos, California
Los Gatos, California
Menlo Park, California
Millbras, California
Milpitas, California
Mountain View, California
San Francisco, California
San Jose, California
San Leandro, California
San Lorenzo, California
San Mateo, California
San Pablo, California
Santa Clara, California
Saratoga, California
South San Francisco, California
Sunnyvale, California
Union City, California
Vallejo, California

or (iii) any retail grocery store, including any facility that has been operated as a retail grocery store within six months of the date of the offer to purchase the facility, or any interest in a retail grocery store or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates a retail grocery store, in the following cities or towns:

Bakersfield, California
Camarillo, California
Canyon Country, Newhall, Saugus or Valencia, California
Capitola, California
Catheral City, Coachella, Indio, Palm Desert, Palm Springs or Rancho Mirage, California
Concord, California
Danville, California
Encinitas, California
Escondido, California
Fallbrook, California
Fontana, California
Las Vegas, Nevada
Napa, California
Novato, California
Ontario, California
Riverside, California
Salinas, California
San Bernardino, California
San Diego County, California South of the Miramar Naval Air Station, San Juan Capistrano or San Clemente, California
San Marcos, California
San Rafael, Mill Valley, Fairfax, Greenbrae, Larkspur, San Anselmo, or Sausilito, Tiburon, California
San Ramon, California
Santa Barbara, Montecito or Goleta, California
Santa Maria, California
Santa Rosa, California

Oxnard, California	Simi Valley, California
Palmdale or Lancaster, California	Thousand Oaks, California
Petaluma, California	Upland, California
Pleasanton, California	Vacaville, California
Redlands, California	Vista, California
Rialto, California	Walnut Creek, California

The prior notification required by this paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of American and not of any other party to the transaction. American shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, American shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

Provided further that these prohibitions shall not relate to the construction of new facilities by American or the leasing by American of facilities not presently operated as a retail grocery store in those locations.

One year from the date this order becomes final and annually thereafter for nine (9) more years, American shall file with the Commission a verified written report of its compliance with this paragraph. Such reports shall include a listing of all acquisitions made by American without prior notification to the Commission in any area listed in this Part VIII.

IN THE MATTER OF

HOECHST AG

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-3629. Complaint, Dec. 5, 1995--Decision, Dec. 5, 1995

This consent order settles alleged violations of federal law prohibiting unfair or deceptive acts and practices and unfair methods of competition arising from the $7.1 billion merger of Hoechst AG and Marion Merrell Dow Inc. The consent order, among other things, requires Hoechst -- a pharmaceutical firm -- to provide Biovail Corporation International with a letter of access to the toxicology data necessary to secure additional FDA approvals for a hypertension and cardiac drug called Tiazac (diltiazem). It also requires Hoechst to return any confidential information obtained from Biovail; to refrain from using the information; to dismiss a patent infringement lawsuit filed by Marion Merrell Dow regarding Tiazac; to withdraw a citizen petition Marion Merrell Dow filed with the Food and Drug Administration relating to Tiazac; and to agree not to file any subsequent litigation against Biovail regarding diltiazem. In addition, the consent order requires Hoechst to divest the rights to either Trental or Beraprost (two drugs intended to treat intermittent claudication, a painful leg cramping condition); to divest the rights to Pentasa (or the generic formulation), which is one of two oral forms of mesalamine used to treat ulcerative colitis and Crohn's Disease; and to divest the rights to Rifadin (or the generic formulation), which is used to treat tuberculosis. The required divestitures have to he made to Commission-approved entities, within nine months of the date of the order.

Appearances

For the Commission: *Laura A. Wilkinson, Elizabeth A. Jex, David L. Inglefield* and *Pamela L. Taylor.*

For the respondent: *William C. Pelster, Skadden, Arps, Slate, Meagher & Flom* and *Bruce H. Kublik, Covington & Burling,* Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Hoechst AG ("Hoechst"), a German corporation subject to the jurisdiction of the Commission, has acquired all of the voting securities of Marion Merrell Dow Inc.

("MMD"), a Delaware corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, ("FTC Act"), 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 Hoechst is a corporation organized, existing, and doing business under and by virtue of the laws of Germany with its principal executive offices located in Frankfurt am Main, Germany. Respondent Hoechst operates in the United States through its wholly-owned subsidiaries, Hoechst Corporation and Hoechst-Roussel Pharmaceuticals, Inc., with their principal executive offices located at Route 202-206, Somerville, New Jersey. Respondent Hoechst is the majority owner of Copley Pharmaceuticals, Inc., a corporation, with its principal executive offices located in Canton, Massachusetts.

2. MMD is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its principal place of business located at 9300 Ward Parkway, Kansas City, Missouri.

II. JURISDICTION

3. Respondent Hoechst 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 FTC Act, as amended, 15 U.S.C. 44.

III. THE MERGER

4. Respondent Hoechst has acquired all of the voting securities of MMD for consideration valued at approximately $7.1 billion ("Merger"). The combined entity is doing business in the United States as Hoechst Marion Roussel, Inc.

IV. THE RELEVANT MARKETS

5. The relevant lines of commerce in which to analyze the effects of the Merger are the research, development, manufacture and sale of:

(1) Once-a-day diltiazem, which is used to treat hypertension (high blood pressure) and angina (severe chest pains);

(2) Oral dosage forms of mesalamine, which is used to treat the gastrointestinal diseases of ulcerative colitis and Crohn's Disease;

(3) Rifampin, which is used to treat tuberculosis (TB); and

(4) Drugs approved by the Food and Drug Administration ("FDA") for the treatment of intermittent claudication, a severe cramping in the legs caused by inadequate blood flow to the affected muscles due to arteriosclerosis.

6. For purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the Merger.

V. STRUCTURE OF THE MARKETS

7. The once-a-day diltiazem market is highly concentrated as measured by the Herfindahl-Hirschmann Index. MMD's Cardizem CD® has a dominant share of the once-a-day diltiazem market. Sales of once-a-day diltiazem products in the U.S. amounted to approximately $1 billion in 1994. Prior to the Merger, Hoechst and Biovail International Corporation ("Biovail") were jointly developing a new once-a-day diltiazem product, Tiazac®, that would have competed against MMD's Cardizem CD®.

8. Hoechst devised a plan to "fix-it-first" whereby it returned to Biovail its rights to Tiazac® prior to the Merger. The purported fix fails to remedy the anticompetitive effects of the Merger, because it leaves Biovail as a less effective competitor than it would have been absent the Merger.

9. The market for oral dosage forms of mesalamine is highly concentrated as measured by the Herfindahl-Hirschmann Index. MMD's Pentasa® has a significant share of the market for oral dosage forms of mesalamine. There is only one other oral dosage form of mesalamine approved by the FDA. Sales of mesalamine amounted to approximately $70 million in 1994. Prior to the Merger, Hoechst

begun research and development of a generic oral dosage form of mesalamine that would have competed against MMD's Pentasa®.

10. The rifampin market is highly concentrated as measured by the Herfindahl-Hirschmann Index. MMD's Rifadin® has a dominant share of the rifampin market. Sales of rifampin amounted to approximately $18 million in 1994. Prior to the Merger, Hoechst was one of only a few companies that had begun research and development of a generic rifampin product that would have competed against MMD's Rifadin®.

11. The market for drugs to treat intermittent claudication is highly concentrated as measured by the Herfindahl-Hirschmann Index. Hoechst's Trental® is the only drug approved by the FDA for the treatment of intermittent claudication, and Hoechst is developing improved formulations of Trental®. In 1994, Trental®'s sales were approximately $180 million. MMD is one of only a few companies engaged in advanced stages of research and development of drugs for use in the treatment of intermittent claudication that would have competed against Hoechst's Trental® franchise.

VI. BARRIERS TO ENTRY

12. Entry into the relevant markets is difficult and time consuming. FDA regulations create long lead times for the introduction of new drugs. Additionally, patents create large and often insurmountable barriers to entry.

VII. EFFECTS OF THE MERGER

13. The effects of the Merger may be substantially to lessen competition or tend to create a monopoly in the once-a-day diltiazem market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45. In 1993, Hoechst and MMD began the negotiations that ultimately resulted in the Merger. At the same time, Hoechst and Biovail were developing Tiazac®, a once-a-day diltiazem product. The pendency of the merger negotiations affected Hoechst's incentives with respect to the development of Tiazac®.

14. Just before finalizing the Merger, Hoechst returned its rights to Tiazac® to Biovail. The purported "fix-it-first" failed to remedy the anticompetitive effects of the Merger, because it leaves Tiazac®

as a less effective competitive product than it would have been absent the Merger.

15. The Merger eliminates actual and perceived potential competition between MMD's Cardizem® CD and Tiazac®. Effective competition between Tiazac® and Cardizem® CD will benefit consumers by leading to lower prices for once-a-day diltiazem.

16. The Merger provides the leading competitor in the once-a-day diltiazem market with access to competitively sensitive non-public information relating to Tiazac®, thereby: (1) reducing innovation in the market for once-a-day diltiazem; and (2) increasing prices in the market for once-a-day diltiazem.

17. The Merger also enhances the likelihood of collusion or interdependent coordination between or among the firms in the market for once-a-day diltiazem.

18. The effects of the Merger may be substantially to lessen competition or tend to create a monopoly in the market for oral dosage forms of mesalamine in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45. The Merger (1) eliminates actual potential competition in the market for oral dosage forms of mesalamine and (2) enhances the likelihood of collusion or interdependent coordination between or among the firms in the market for oral dosage forms of mesalamine.

19. The effects of the Merger may be substantially to lessen competition or tend to create a monopoly in the market for rifampin in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45. The Merger eliminates actual potential competition in the market for rifampin.

20. The effects of the Merger may be substantially to lessen competition or tend to create a monopoly in the market for drugs for the treatment of intermittent claudication in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45. The Merger eliminates actual potential competition in the market for drugs for the treatment of intermittent claudication.

VIII. VIOLATIONS CHARGED

21. The Merger described in paragraph four constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the merger of Hoechst AG ("Hoechst"), through its United States subsidiary, Hoechst Corporation, and Marion Merrell Dow Inc. ("MMD"), and Hoechst, hereinafter sometimes referred to as "respondent," having been furnished thereafter with a copy of a draft of the complaint that the Bureau of Competition presented 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 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Hoechst is a corporation organized, existing, and doing business under and by virtue of the laws of Germany, with its principal place of business located at 65926 Frankfurt am Main, Germany.

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

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. *"Respondent"* or *"Hoechst"* means Hoechst AG, its directors, officers, employees, agents and representatives, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by Hoechst AG; subsidiaries, divisions, groups and affiliates in which Hoechst AG owns more than 25 percent of the voting securities; and the respective directors, officers, employees, agents and representatives, and the respective successors and assigns of each.

B. *"MMD"* means Marion Merrell Dow Inc., its directors, officers, employees, agents and representatives, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by Marion Merrell Dow Inc.; and the respective directors, officers, employees, agents and representatives, and the respective successors and assigns of each.

C. *"Merger"* means the merger of Hoechst and MMD through the acquisition by Hoechst of the voting securities of MMD pursuant to a Stock Purchase Agreement and an Agreement and Plan of Merger both dated as of May 3, 1995.

D. *"Commission"* means the United States Federal Trade Commission.

E. *"FDA"* means the United States Food and Drug Administration.

F. *"NDA"* means new drug application.

G. *"ANDA"* means abbreviated new drug application.

H. *"Diltiazem"* means any formulation of the compound diltiazem hydrochloride used in the treatment of hypertension or angina.

I. *"Biovail"* means Biovail Corporation International, organized and existing under the laws of Canada and with its offices and principal place of business at 460 Comstock Road, Scarborough, Ontario, Canada, including its successors, licensees and assigns.

J. *"Biovail diltiazem products"* means the sustained release and\or extended release diltiazem products that Hoechst was developing with Biovail pursuant to the Rights Agreement that Hoechst and Biovail entered into on June 30, 1993.

K. *"Documents"* means all computer files and written, recorded, and graphic materials of every kind. The term "documents" includes electronic correspondence and drafts of documents, originals and all copies of documents, and copies of documents the originals of which are not in the possession, custody or control of the company.

L. *"Non-public information"* means any information or documents not in the public domain furnished by Biovail to Hoechst in connection with the Biovail diltiazem products. Non-public information shall not include information that subsequently becomes public or falls within the public domain through no violation of this order by respondent or nor shall it include information that subsequently becomes known to respondent from a third-party not in breach of a confidential disclosure agreement.

M. *"Beraprost"* means the prostaglandin analog(s) licensed by Toray Industries, Inc. to MMD used for the treatment of peripheral arterial disease, including, but not limited to, intermittent claudication.

N. *"Beraprost assets"* means all of MMD's U.S. assets and rights relating to the research and development, manufacture and sale of Beraprost, that are not part of MMD's physical facilities. "Beraprost assets" include, but are not limited to, all rights to brand or trade name, formulations, patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, distribution information, customer lists, information stored on management information systems (and specifications sufficient for the acquirer to use such information), software specific to MMD's Beraprost, inventory sufficient for the acquirer to complete all safety and efficacy studies, clinical trials or bioequivalency studies necessary to obtain FDA approvals, and all data, contractual rights, materials and information relating to

obtaining FDA approvals and other government or regulatory approvals for the United States.

O. *"Trental®"* means the compound pentoxifylline marketed by Hoechst for use in the treatment of vascular disease, including, but not limited to, intermittent claudication.

P. *"Trental® assets"* means all of Hoechst's U.S. assets and rights relating to the research and development, manufacture and sale of Trental®, including the unique physical assets used by Hoechst to manufacture Trental® and all of its brand names and trade names. "Trental® assets" include, but are not limited to, all rights to brand or trade name, formulations, patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, distribution information, customer lists, information stored on management information systems (and specifications sufficient for the acquirer to use such information), software specific to Hoechst's Trental®, and all data, contractual rights, materials and information relating to obtaining FDA approvals and other government or regulatory approvals for the United States.

Q. *"Mesalamine"* means the compound mesalamine used for the treatment of ulcerative colitis and Crohn's disease.

R. *"Mesalamine assets"* means either (1) all of Hoechst's U.S. assets and rights relating to the research and development, manufacture and sale of mesalamine by Hoechst that are not part of Hoechst's physical facilities and that were not acquired through the Merger; or (2) all of MMD's U.S. assets and rights relating to the research and development, manufacture and sale of mesalamine by MMD, including the unique physical assets used MMD to manufacture mesalamine and all of its brand names and trade names. "Mesalamine assets" include, but are not limited to, all rights to brand or trade names, all formulations, patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, distribution information, information stored on management information systems (and specifications sufficient for the acquirer to use such information), inventory sufficient for the acquirer to complete all ongoing safety and efficacy studies, clinical trials or bioequivalency studies necessary to obtain FDA approvals and all data, contractual

rights, materials and information relating to obtaining FDA approvals and other government or regulatory approvals for the United States.

S. *"Rifampin"* means the compound rifampin used for the treatment of tuberculosis.

T. *"Rifampin assets"* means either (1) all of Hoechst's U.S. assets and rights relating to the research and development, manufacture and sale of rifampin by Hoechst that are not part of Hoechst's physical facilities and that were not acquired through the Merger; or (2) MMD's U.S. assets and rights relating to the research and development, manufacture and sale of rifampin by MMD, including the unique physical assets used by MMD to manufacture rifampin and all of its brand names and trade names. "Rifampin assets" include, but are not limited to, all rights to brand or trade names, all formulations, patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, distribution information, information stored on management information systems (and specifications sufficient for the acquirer to use such information), inventory sufficient for the acquirer to complete all ongoing safety and efficacy studies, clinical trials or bioequivalency studies necessary to obtain FDA approvals and all data, contractual rights, materials and information relating to obtaining FDA approvals and other government or regulatory approvals for the United States.

U. *"Acquirer"* means the entity or entities to whom Hoechst shall divest the assets required to be divested pursuant to this order.

V. *"Contract manufacture"* means the manufacture of Trental®, mesalamine or rifampin, as applicable, by Hoechst for sale to an acquirer in a form acceptable for commercial sale in the United States, in each form of packaging used by respondent or MMD in the distribution and sale of such product, with information including, but not limited to, the name and identification codes of the acquirer inscribed on the packaging, and packaged in units specified by the acquirer, as permitted by the FDA.

W. *"Cost"* means respondent's or MMD's actual per unit cost of manufacturing the assets to be divested pursuant to this order.

X. *"Formulation"* means any and all information, including patent, trade secret information, technical assistance and advice, relating to the manufacture of the assets to be divested pursuant to this order that meet FDA approved specifications therefor.

II.

It is further ordered, That:

A. Within seven (7) days of the date this order becomes final:

1. Respondent shall grant to Biovail the right of reference to the pharmacology, toxicology and animal reproductive toxicology data contained in MMD's NDA No. 18-602 for diltiazem on file with the FDA. Respondent shall make the necessary filings with the FDA authorizing the FDA to refer to the appropriate section(s) of MMD's NDA No. 18-602 for such data (including, but not limited to, pharmacology and toxicology data) in support of Biovail's NDA No. 20-401 for the Biovail diltiazem products, including any supplemental NDAs or related NDAs. Provided however, the right of reference granted to Biovail pursuant to this paragraph does not constitute a general release of the data contained in MMD's NDA No. 18-602, except as it might appear in labelling.

2. Respondent shall withdraw the Citizen Petition(s) that MMD filed with the FDA relating to NDAs under Section 505(b)(2) of the Food, Drug and Cosmetics Act, 21 U.S.C. 355(b)(2), including the NDA for the Biovail diltiazem products. Respondent shall not file any further Citizen Petition with the FDA relating to the NDA under Section 505(b)(2) of the Food, Drug and Cosmetics Act, 21 U.S.C. 355(b)(2), that could have the effect of delaying the approval of the NDA for the Biovail diltiazem products.

3. Respondent shall file a stipulation of dismissal with prejudice to MMD of all litigation currently pending in the United States between or among MMD, Hoechst, and Biovail, including, but not limited to, *Marion Merrell Dow Inc., Carderm Capital L.P. and Elan plc v. Hoechst-Roussel Pharmaceuticals, Inc.*, No. 93-5074 (D.N.J), and shall not institute or cause any other person to institute any patent infringement action against Biovail relating to the Biovail diltiazem products.

4. Respondent shall return to Biovail all documents relating to the research, development, FDA approval, patenting, manufacture, marketing, or sale of the Biovail diltiazem products.

B. Respondent shall not use any non-public information relating to the Biovail diltiazem products and shall not provide, disclose or

otherwise make available to MMD any non-public information relating to the Biovail diltiazem products.

C. The purpose of this paragraph II is to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

III.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within nine (9) months of the date this order becomes final, either the Beraprost assets or Trental® assets.

B. Respondent shall divest the Beraprost assets or Trental® assets only to an acquirer that receives 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 Beraprost assets or Trental® assets is to ensure continued competition between Trental® and Beraprost, in the same manner in which Trental® and Beraprost would compete absent the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

C. The time period for divestiture pursuant to this paragraph III of this order shall be tolled if and when respondent:

1. Provides to the Commission objective evidence, including, but not limited to, results of clinical trials, indicating that, based on a compound's medical profile, and through no fault of respondent, the Beraprost assets are not viable or marketable; and

2. Petitions the Commission to modify this order, pursuant to Section 5(b) of the FTC Act and Section 2.51 of the Commission's Rules of Practice, based on the circumstances described in paragraph III.C.1 of this order.

This tolling of the time period for divestiture shall end when the Commission rules on respondent's petition to modify this order.

IV.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within nine (9) months of the date this order becomes final, the Mesalamine assets.

B. Respondent shall divest the Mesalamine assets only to an Acquirer that receives 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 Mesalamine assets is to ensure continued competition between Hoechst's mesalamine and MMD's mesalamine, in the same manner in which these compounds would compete absent the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

V.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within nine (9) months of the date this order becomes final, the Rifampin assets.

B. Respondent shall divest the Rifampin assets only to an acquirer that receives 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 Rifampin assets is to ensure continued competition between Hoechst's rifampin and MMD's rifampin, in the same manner in which these compounds would compete absent the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

VI.

It is further ordered, That:

A. Upon reasonable notice and request from the acquirer(s), to Hoechst, Hoechst shall provide information, technical assistance and advice to the acquirer(s) with respect to any assets divested pursuant to this order such that the acquirer(s) will be capable of continuing all applicable research, development and manufacturing. Such assistance shall include reasonable consultation with knowledgeable employees

of Hoechst and training at the acquirer's facility for a period of time sufficient to satisfy the acquirer's management that its personnel are adequately knowledgeable about the assets divested pursuant to this order. However, respondent shall not be required to continue providing such assistance for more than twelve (12) months after divestiture of such assets. Respondent may require reimbursement from the acquirer(s) for all of its own direct costs incurred in providing the services required by this subparagraph. Direct costs, as used in this subparagraph, means all actual costs incurred exclusive of overhead costs. If an acquirer hires any of respondent's officers, directors, agents, or employees whose work relates to a divested asset being acquired by the acquirer, respondent shall waive any confidentiality or non-competition employment rights relating to assets divested pursuant to this order that respondent has against such employee.

B. Pending divestiture of the assets to be divested pursuant to this order, respondent shall:

1. Take such actions as are necessary to prevent the destruction, removal, wasting, deterioration or impairment of the assets to be divested pursuant to this order, except for ordinary wear and tear; and

2. Maintain research and development of the assets required to be divested by this order, at the levels planned by either Hoechst or MMD for such assets as of June 1, 1995.

C. Hoechst shall maintain the physical assets, if any exist, necessary to manufacture Trental®, Beraprost, mesalamine and rifampin, until respondent's obligations pursuant to paragraphs III, IV, V, VI and VII of this order have been fulfilled. The maintenance of physical assets described in this subparagraph shall not exceed two (2) years following divestitures pursuant to paragraphs III, IV and V of this order.

D. Respondent shall obtain from each acquirer a certification of the acquirer's good faith intention to obtain in an expeditious manner all necessary FDA approvals to manufacture and sell in the United States the assets to be divested pursuant to this order and a commitment by the acquirer to use reasonable diligence to continue to research and develop the assets to be divested pursuant to this order for sale in the United States.

VII.

It is further ordered, That:

A. If respondent fulfills its obligations pursuant to this order by divesting assets relating to a product for which the FDA has issued either approval of a NDA or an ANDA (hereinafter Divested Product), respondent shall execute an agreement (hereinafter Divestiture Agreement) with the acquirer of such Divested Product.

B. Each Divestiture Agreement shall include the following and respondent shall commit to satisfy the following:

1. Respondent shall contract manufacture and deliver to the acquirer in a timely manner the requirements of the acquirer for the Divested Product at respondent's or MMD's cost for a period not to exceed five (5) years from the date the Divestiture Agreement is approved, or six (6) months after the date the acquirer obtains all necessary FDA approvals to manufacture the Divested Product for sale in the United States, whichever is earlier.

2. Respondent shall commence delivery of the Divested Product to the acquirer within two (2) months from the date the Commission approves the acquirer and the Divestiture Agreement.

3. After respondent commences delivery of the Divested Product to the acquirer pursuant to paragraph VII.B.2 of this order, all inventory of the Divested Product produced by respondent for the U.S. market at the facility that produced such Divested Product, regardless of the date of its production, may be sold by respondent only to the acquirer.

4. Respondent shall make representations and warranties to the acquirer that the Divested Product contract manufactured by respondent for the acquirer meets the FDA approved specifications therefor and is not adulterated or misbranded within the meaning of the Food, Drug and Cosmetic Act, 21 U.S.C. 321, *et seq.* Respondent shall agree to indemnify, defend and hold the acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Divested Product contract manufactured by respondent to meet FDA specifications. This obligation shall be contingent upon the acquirer giving respondent prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting respondent to assume the

sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel. This obligation shall not require respondent to be liable for any negligent act or omission of the acquirer or for any representations and warranties, express or implied, made by the acquirer that exceed the representations and warranties made by respondent to the acquirer.

5. During the term of contract manufacturing, upon reasonable request by the acquirer, respondent shall make available to the trustee appointed pursuant to paragraph VIII.A. of this order all records kept in the normal course of business that relate to the cost of manufacturing the Divested Product.

VIII.

It is further ordered, That:

A. Within forty-five (45) days of the date this order becomes final, the Commission shall appoint a trustee to ensure that respondent expeditiously performs its responsibilities required by this order. Respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authorities, and responsibilities under this paragraph:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Within ten (10) days after the appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the trustee all the rights and powers necessary to permit the trustee to assure respondent's compliance with the terms of this order, including the rights and powers necessary to divest assets, if the trustee is so directed by the Commission. As part of the trustee agreement, the trustee shall execute confidentiality agreements with respondent.

3. The trustee shall serve until either (a) the acquirer(s) has filed a complete application with the FDA for approval to manufacture and

sell a product(s) based on the Trental® assets or the Beraprost assets, the Rifampin assets and the Mesalamine assets, as applicable; (b) the trustee determines that the acquirer(s) has abandoned its efforts to obtain FDA approval to manufacture and sell a product(s) based upon the Trental® assets or the Beraprost assets, the Rifampin assets and the Mesalamine assets, as applicable; or (c) the trustee determines that the acquirer(s) has failed to exercise reasonable diligence in research and development toward obtaining FDA approval to manufacture and sell a product(s) based upon the Trental® assets or the Beraprost assets, the Rifampin assets and the Mesalamine assets, as applicable, which lack of diligence will have been certified to and accepted by the Commission, whichever comes first. The trustee's service shall continue for no more than two (2) years following divestiture of the Trental® assets or the Beraprost assets, the Rifampin assets and the Mesalamine assets, as applicable.

4. The trustee shall have full and complete access to the personnel, books, records, facilities and technical information related to the Trental® assets or the Beraprost assets, the Rifampin assets and the Mesalamine assets, or to any other relevant information, as the trustee may reasonably request, including, but not limited to, all records kept in the normal course of business that relate to the research and development of and the cost of manufacturing Trental® or Beraprost, mesalamine and rifampin. Respondent shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of his or her responsibilities pursuant to this order.

5. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission may set. The trustee shall have authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all expenses incurred. The Commission shall approve the account of the trustee, including fees for his or her services.

6. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses

incurred in connection with the preparations for, or defense of, any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

7. 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 VIII.A. of this order.

8. The Commission 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 requirements of this order.

9. The trustee shall report in writing to respondent and the Commission every one hundred and eighty (180) days concerning the trustee's obligations pursuant to this paragraph VIII.

B. Respondent shall comply with all reasonable directives of the trustee regarding respondent's obligations to comply with this order.

C. The trustee may require respondent to manufacture Beraprost for use by the acquirer in conducting clinical trials or other actions as required by the FDA if:

1. The acquirer has depleted its inventory of Beraprost acquired pursuant to the divestiture;

2. The acquirer has a need to conduct further trials or studies prior to submission of an application to the FDA to manufacture and sell a product based on the Beraprost assets; and

3. Despite good faith efforts to establish its own manufacturing capability for Beraprost, the acquirer has not succeeded in doing so as of the time Beraprost is needed for such clinical trials or other actions as required by the FDA.

The trustee shall determine reasonable compensation for respondent, based upon the costs of manufacture for such production.

IX.

It is further ordered, That:

A. If respondent has not divested, absolutely and in good faith and with the Commission's prior approval, (1) either the Trental®

assets or the Beraprost assets; (2) the Mesalamine assets; and (3) the Rifampin assets, within the time required by paragraphs III.A., IV.A., and V.A. of this order, the Commission may direct the trustee appointed pursuant to paragraph VIII of this order to accomplish any divestiture required pursuant to this order. Neither the decision of the Commission to direct the trustee nor the decision of the Commission not to direct the trustee to divest the assets required to be divested shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order. Respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authorities, and responsibilities under this paragraph.

B. If the trustee is directed under subparagraph A. of this paragraph to divest any assets, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall extend the authority and responsibilities of the trustee appointed under paragraph VIII of this order to include divesting any assets required to be divested by this order that have not been divested.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest any assets required to be divested pursuant to this order that have not been divested.

3. Within ten (10) days after the extension of the trustee's authority and responsibilities, respondent shall amend the existing trust agreement in a manner that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the extension of the trustee's authorities and responsibilities as described in paragraph IX.B.3 to accomplish the divestiture(s), which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve month period, the trustee has submitted a plan of divestiture(s) or believes that

divestiture(s) can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records, facilities and technical information related to the assets to be divested by the trustee, or to any other relevant information, as the trustee may reasonably request, including, but not limited to, all records kept in the normal course of business that relate to the research and development of, and the cost of manufacturing, Trental®, Beraprost, mesalamine and rifampin. Respondent shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price; to assure that respondent enters into Divestiture Agreement(s) that comply with the provisions of paragraph VII; to assure that respondent and the acquirer(s) comply with the remaining provisions of this order. The divestitures and the Divestiture Agreement(s) shall be made in the manner set forth in paragraphs III, IV, V, VI and VII of this order; provided, however, that if the trustee receives *bona fide* offers from more that one acquiring entity for any of the assets to be divested pursuant to this order, and if the Commission determines to approve more than one such acquiring entity for any of the assets to be divested pursuant to this order, the trustee shall divest to the acquiring entity selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission may set. The trustee shall have authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys 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 the respondent. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the assets to be divested.

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

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph VIII.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 divestitures required by this order.

11. The trustee shall report in writing to respondent and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture(s) required by this order.

12. If a divestiture application filed pursuant to paragraph III.A. is pending before the Commission, and respondent petitions the Commission to modify this order based on the conditions in paragraph III.C., then the Commission shall not approve the divestiture application until it rules on the petition to modify.

X.

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

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

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

XI.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty days (60) days thereafter until respondent has fully complied with the provisions of paragraphs II, III, IV, V, VI and VII of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II, III, IV, V, VI and VII of this order, including a description of all substantive contacts or negotiations for accomplishing the divestiture and the identity all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

XII.

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

IN THE MATTER OF

SANTA CLARA COUNTY MOTOR CAR DEALERS ASSOCIATION

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

Docket C-3630. Complaint, Dec. 13, 1995--Decision, Dec. 13, 1995

This consent order prohibits, among other things, a California association from carrying out, participating in, inducing or assisting any boycott or concerted refusal to deal with any newspaper, periodical, television or radio station, and requires the association to amend its by-laws to incorporate the stipulated prohibition, and to distribute the amended by-laws and the final Commission order to each of its members.

Appearances

For the Commission: *Ralph E. Stone* and *Pamela A. Gill.*

For the respondent: *Stephen V. Bomse, Heller, Ehram, White & McAuliffe,* San Francisco, CA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Santa Clara County Motor Car Dealers Association, an unincorporated association, hereinafter sometimes referred to as "the Association" or "respondent," has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Association is an unincorporated association organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business at 336 East Hamilton Avenue, Campbell, California.

PAR. 2. The Association is a trade association representing the interests of new automobile and truck dealers in Santa Clara County,

California. The Association's members are generally engaged in the advertising, offering for sale, and sale of new automobiles and trucks at retail. The Association has approximately 47 members, constituting approximately 50% of the new automobile and truck dealers in Santa Clara County. Except to the extent that competition has been restrained as alleged herein, Association members have been and are now in competition among themselves and with other new automobile and truck dealers.

PAR. 3. The Association engages in substantial activities that further its members' pecuniary interests. By virtue of its purposes and activities, the Association is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 4. The Association's acts and practices, including the acts and practices alleged herein, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 5. The Association has been and is acting in agreement, combination or conspiracy with its members, or in agreement, combination or conspiracy with some of its members, to restrain trade in the advertising, offering for sale, and sale of new automobiles and trucks in Santa Clara County, by canceling advertising in, and thereafter withholding advertising from, the San Jose Mercury News newspaper in retaliation for a San Jose Mercury News article that informed consumers how to analyze a manufacturer's factory invoice as part of the automobile-purchasing process.

PAR. 6. The purposes or effects of the agreement, combination or conspiracy and the Association's acts or practices as described above have been and are to restrain competition unreasonably and to injure consumers in one or more of the following ways, among others:

A. By foreclosing, reducing and restraining competition among new automobile and truck dealers in Santa Clara County;

B. By depriving consumers of truthful information concerning dealers' products and services; and

C. By depriving consumers of the benefits of competition among dealers in the advertising, offering for sale, and sale of new automobiles and trucks.

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

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Santa Clara County Motor Car Dealers Association is an unincorporated association organized existing , and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 336 East Hamilton Avenue, Campbell, California.

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

ORDER

I.

It is ordered, That, for the purposes of this order, "respondent" or "Association" shall mean the Santa Clara County Motor Car Dealers Association, its predecessors, successors and assigns, and its directors, committees, officers, delegates, representatives, agents, and employees.

II.

It is further ordered, That the Association, directly or indirectly, or through any person or any corporate or other device, in or in connection with its activities as a trade association, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from carrying out, participating in, inducing, suggesting, urging, encouraging, or assisting any boycott of, or concerted refusal to deal with, any newspaper, periodical, television station, or radio station, provide, however, that nothing in this order shall prohibit the Association or any of its members from establishing, participating in, or maintaining joint advertising programs, so long as such joint advertising programs are not a part of any boycott or concerted refusal to deal and do not otherwise violate this order.

III.

It is further ordered, That the Association shall:

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

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

C. For a period of five (5) years after the date this order becomes final, provide each new member with a copy of this order, the complaint, and the amended by-laws within thirty (30) days of the new member's admission to the Association; and

D. Within seventy-five (75) days after the date this order becomes final, and annually thereafter for a period of five (5) years on the anniversary of the date this order became final, file with the Secretary of the Commission a verified written report setting forth in detail the manner and form in which the Association has complied with and is complying with this order.

IV.

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

V.

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

A. Upon seven (7) days' notice to respondent, to have access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

B. Upon seven (7) days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

VI.

It is further ordered, That this order shall terminate on December 13, 2015.

IN THE MATTER OF

FEDERAL NEWS SERVICE GROUP, INC., ET AL.

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

Docket C-3631. Complaint, Dec. 18, 1995--Decision, Dec. 18, 1995

This consent order prohibits, among other things, a District of Columbia corporation that sells verbatim news transcripts, and its president, from agreeing, or soliciting an agreement, to allocate customers or divide markets with any provider of news transcripts; entering into, continuing, or renewing any agreement that prevents Reuters American from competing with the respondents in the production, marketing or sale of news transcripts; renewing its news transcript supply agreement with Reuters America for five years; agreeing, or soliciting agreements, with competitors to fix or maintain resale prices for news transcripts; and requiring or pressuring any competitor to maintain or adopt any resale price for news transcripts.

Appearances

For the Commission: *Michael E. Antalics, Barry Costilo* and *William Baer.*

For the respondents: *Katherine Boland, Bayh, Connaughton & Malone*, 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 Federal News Service Group, Inc., a corporation, and Cortes W. Randell, an individual (sometimes referred to as "respondents"), have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Federal News Service Group, Inc. ("FNS") is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business at 620 National Press Building, Washington, D.C.

PAR. 2. FNS is engaged in the production and sale of fast turnaround verbatim transcripts covering a variety of news events primarily involving the federal government ("news transcripts"). Examples of the news events transcribed and transmitted by FNS include White House and Departments of Defense and State speeches and press briefings, press conferences by federal agency officials, and Congressional hearings. Under the business name of Federal News Service, FNS sells and transmits these news transcripts over communication networks to customers located through the United States.

PAR. 3. Respondent Cortes W. Randell is an individual who is President of respondent FNS. At all times material to this case, he has formulated, directed, and controlled the acts and practices of respondent FNS. His principal office and place of business is 620 National Press Building, Washington, D.C.

PAR. 4. Reuters American Inc. ("Reuters") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 1700 Broadway, New York, New York.

PAR. 5. Reuters is engaged in the sale of news wires, news transcripts, and other services to the media and others. Reuters transmits these services over communication networks to customers located throughout the United States.

PAR. 6. Respondents' acts and practices, including the acts and practices alleged in this complaint, are in or affect commerce as defined in the Federal Trade Commission Act.

PAR. 7. Before May 1993, Reuters and FNS directly competed with each other for news transcript customers. They were the dominant sellers of news transcripts. Each company had its own source of supply of news transcripts. Reuters relied on News Transcripts Inc. ("NTI") to provide news transcripts exclusively to it. FNS produced its own news transcripts and relied on another company to supply news transcripts to it. FNS and Reuters competed on the basis of the price, speed, accuracy, and breadth of coverage of their respective news transcripts.

PAR. 8. As early as May 1993, the respondents agreed with Reuters, among other things, that Reuters would not sell or attempt to sell news transcripts to FNS's customers; Reuters would sell FNS-produced news transcripts and Reuters would not produce and sell its own news transcripts or purchase and resell any other company's

news transcripts which compete with FNS's news transcripts; and the minimum price for news transcripts sold by Reuters would be at least $500 per month. These agreements were continued by subsequent agreements between FNS and Reuters. Reuters also acted in concert with FNS to induce NTI to enter into an agreement with FNS in June 1993 under which NTI agreed, among other things, to cease producing news transcripts and not to compete with FNS.

PAR. 9. The purpose and effect of these agreements was to eliminate competition in the production and sale of news transcripts. FNS became the sole producer of news transcripts, and by May 1994, many of FNS's customers had received price increases for news transcripts.

PAR. 10. In August 1993, FNS and Cortes W. Randell, in concert with Reuters, coerced a news transcript reseller to raise the price of its news transcript database. The reseller acquiesced in FNS's request to raise its prices to assure its continued supply of FNS-produced news transcripts. The reseller communicated its acquiescence to FNS and Reuters.

PAR. 11. By engaging in the acts or practices described in paragraphs six through ten or this complaint, respondents have unreasonably restrained competition in the news transcript business in the following ways, among other:

(a) Competition between FNS and Reuters for customers has been restrained;

(b) Price competition between FNS and Reuters has been restrained;

(c) Competition on the basis of product quality between FNS and Reuters has been eliminated; and

(d) Price competition between database resellers of news transcripts has been restrained.

PAR. 12. The acts or practices of respondents alleged herein were and are to the prejudice and injury of the public. The acts or practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. These acts or practices are continuing and will continue, or may recur, in the absence of the relief requested.

DECISION AND ORDER

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

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

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

1. Respondent Federal News Service Group, Inc. ("FNS") is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its offices and principal place of business located at 620 National Press Building, Washington, D.C. FNS operates under the business name Federal News Service.

Respondent Cortes W. Randell is an individual who is President of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

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

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. *"Respondents"* mean Federal News Service Group, Inc., its subsidiaries, divisions, and groups and affiliates controlled by Federal News Service Group, Inc., its successors and assigns, and its directors, officers, employees, agents, and representatives; Federal News Service, its subsidiaries, divisions, and groups and affiliates controlled by Federal News Service, its successors and assigns, and its directors, officers, employees, agents, and representatives; and Cortes W. Randell, an individual, his employees, agents, and representatives, and entities controlled by him.

B. *"Reuters"* means Reuters America Inc., its directors, officers, representatives, delegates, agents, employees, successors, assigns and its subsidiaries and their successors and assigns.

C. *"News transcripts"* mean fast turnaround verbatim transcripts of statements made by governmental officials or others covering a variety of news events or individual news events or parts thereof that are usually but not always produced within three (3) hours of the event and transmitted in any manner to resellers and customers in the United States. The definition of "news transcripts" does not include the "Daybook," a daily calendar of news events not containing news transcripts, which is sold by Reuters to FNS.

D. *"News transcript provider"* means any person or entity which produces news transcripts, by itself or through an arrangement by which a third party produces news transcripts exclusively for that person or entity, and markets and sells such news transcripts as a daily news service on a subscription basis.

II.

It is further ordered, That respondents, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, attempting to enter into, or continuing or attempting to continue, any combination, agreement

or understanding, either express or implied, with any news transcript provider to allocate or divide markets or customers with respect to news transcripts.

III.

It is further ordered, That respondents, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, or renewing any agreement between respondents and Reuters that prevents Reuters from in any way competing with respondents for the production, marketing or sale of news transcripts.

IV.

It is further ordered, That for five (5) years from either the date this order becomes final or July 31, 1995, whichever is later, respondents directly or indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do cease and desist from entering into, continuing, or renewing any agreements with Reuters providing for the supply of news transcripts or the purchase or sale of news transcript customer contracts or accounts.

Provided, that nothing in this order shall prohibit respondents from:

A. Selling a subscription for news transcripts to Reuters for Reuters Internal use; and

B. Contracting with Reuters for Reuters to supply respondents with Reuters' Daybook.

V.

It is further ordered, That respondents, directly or indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Entering into, attempting to enter into, maintaining, enforcing, or attempting to enforce, any agreements or understandings with any competitor in the production, distribution, or sale of news transcripts, or any purchaser or reseller of news transcripts which is directly or indirectly supplied by respondents, that fix, establish, control, or maintain resale prices or resale price levels for news transcripts; or

B. Requiring, coercing, or otherwise pressuring any competitor in the production, distribution or sale of news transcripts, or any purchaser or reseller of news transcripts which is directly or indirectly supplied by respondents, to maintain, adopt, or adhere to any resale price or resale price level for news transcripts.

VI.

It is further ordered, That respondents shall:

A. Within thirty (30) days after the date this order becomes final, distribute a copy of this order and complaint to each of their employees and news transcript resellers.

B. Within ninety (90) days after the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may, by written notice to the respondents require, file a verified written report with the commission setting forth in detail the manner and form in which the respondents have complied and are complying with this order.

C. 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 this order.

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

VII.

It is further ordered, That this order shall terminate as follows:

A. With respect to Federal News Service Group, Inc., this order shall terminate on December 18, 2015.

B. With respect to Cortes W. Randell, this order shall terminate on December 18, 2015 unless Cortes W. Randell totally ceases and does not resume his participation in the news transcript business in any capacity, in which case this order shall terminate five (5) years from the date he ceased participating in the business.

IN THE MATTER OF

REUTERS AMERICA INC.

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

Docket C-3632. Complaint, Dec. 18, 1995--Decision, Dec. 18, 1995

This consent order prohibits, among other things, a New York-based distributor of fast-turnaround verbatim news transcripts from agreeing to or attempting to agree to allocate customers or divide markets with any provider of news transcripts.

Appearances

For the Commission: *Michael E. Antalics, Barry Costilo* and *William Baer.*

For the respondent: *Salem Katsh, Weil, Gotshal & Manges*, New York, N.Y.

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 Reuters America Inc., a corporation (sometimes referred to as "respondent"), has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Reuters America Inc. ("Reuters") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 1700 Broadway, New York, New York.

PAR. 2. Reuters has been engaged in the sale of news transcripts and other services to the media and others. The "news transcripts" are fast turnaround verbatim transcripts covering a variety of news events primarily involving the federal government. Examples of the news events covered include White House and Departments of Defense and State speeches and press briefings, press conferences by

federal agency officials, and Congressional hearings. Reuters transmitted these services over communication networks to customers located throughout the United States.

PAR. 3. Federal News Service Group, Inc. ("FNS") is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business at 620 National Press Building, Washington, D.C.

PAR. 4. Under the business name of Federal News Service, FNS sells and transmits news transcripts over communication networks to customers located throughout the United States.

PAR. 5. Respondent's acts and practices, including the acts and practices alleged in this complaint, are in or affect commerce as defined in the Federal Trade Commission Act.

PAR. 6. From 1988, when Reuters entered the news transcript business, until May 1993, Reuters and FNS directly competed with each other for news transcript customers. They were the dominant sellers of news transcripts. Each company had its own source of supply of news transcripts. Reuters relied on News Transcripts Inc. ("NTI") to provide news transcripts exclusively to it. FNS produced its own news transcripts and relied on another company to supply news transcripts to it. FNS and Reuters competed on the basis of the price, speed, accuracy, and breadth of coverage of their respective news transcripts.

PAR. 7. Soon after Reuters entered the news transcript business, FNS solicited an agreement with Reuters that would eliminate the competition that existed between FNS and Reuters. Reuters rejected the solicitation.

PAR. 8. During the period between 1989 and 1993, Reuters learned of and had concerns related to a potential tax liability of its news transcript supplier. Reuters subsequently entered into the agreements described below.

PAR. 9. As early as May 1993, FNS and Reuters agreed, among other things, that Reuters would not sell or attempt to sell news transcripts to FNS's customers; Reuters would sell FNS produced news transcripts; Reuters would not produce and Sell its own news transcripts or purchase and resell any other company's news transcripts which compete with FNS's news transcripts for the term of their supply agreement plus at least five years; and the minimum price for news transcripts sold by Reuters would be at least $500 per

month. These agreements were continued by subsequent agreements between FNS and Reuters. Reuters also acted in concert with FNS to induce NTI to enter into an agreement with FNS in June 1993 under which NTI agreed, among other things, to cease producing news transcripts and not to compete with FNS.

PAR. 10. The effect of these agreements was to unreasonably restrain competition in the production and sale of news transcripts. FNS became the sole producer of news transcripts, and by May 1994, many of FNS's customers had received price increases for news transcripts.

PAR. 11. In August 1993, Reuters was under contract to supply a database reseller with news transcripts, and under that contract Reuters could receive as part of its royalty payment a percentage of the database reseller's price. Previously, Reuters had provided this database customer with news transcripts produced by NTI. In August 1993, however, FNS was producing news transcripts for Reuters and threatened to disallow Reuters' sale of transcripts to this database reseller unless the reseller agreed to raise its prices to its database customers. In order to insure that FNS would agree to allow Reuters to continue providing FNS transcripts to this database reseller, Reuters scheduled a meeting and otherwise assisted FNS in obtaining the reseller's agreement to raise the prices of its news transcript database. The reseller acquiesced in FNS's request to raise its prices and communicated its acquiescence to Reuters and FNS.

PAR. 12. By engaging in the acts or practices described in paragraphs nine through eleven of this complaint, Reuters unreasonably restrained competition in the news transcript business in the following ways, among others:

(a) Competition between FNS and Reuters for customers was restrained;

(b) Price competition between FNS and Reuters was restrained;

(c) Competition on the basis of product quality between FNS and Reuters was eliminated; and

(d) Price competition between database resellers of news transcripts was restrained.

PAR. 13. The acts or practices of Reuters alleged herein were and are to the prejudice and injury of the public. The acts or practices constitute unfair methods of competition in or affecting commerce in

violation of Section 5 of the Federal Trade Commission Act. These acts or practices are continuing and will continue, or may recur, in the absence of the relief requested.

DECISION AND ORDER

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

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

1. Respondent Reuters America Inc. ("Reuters") 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 1700 Broadway, New York, New York.

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

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. *"Respondent"* means Reuters America Inc., its subsidiaries, divisions, and groups and affiliates controlled by Reuters America In., its successors and assigns, and its directors, officers, employees, agents, and representatives.

B. *"FNS"* means Federal News Service Group, In., its directors, officers, representatives, delegates, agents, employees, successors, assigns and its subsidiaries and their successors and assigns; and Federal News Service, its directors, officers, representatives, delegates, agents, employees, successors, assigns and its subsidiaries and their successors and assigns.

C. *"News transcripts"* mean full-text fast turnaround verbatim transcripts of government-related events that are usually but not always produced within three (3) hours of the event and transmitted in any manner to resellers and customers in the United States. The definition of "news transcripts" refers to the type of full-text verbatim news transcript service formerly marketed by respondent under the name "the Federal News Reuter Transcript Service." News transcripts do not include news, information or data of the type generally included in respondent's other news services which may incorporate some quotations or partial excerpts from government-related events.

D. *"News transcript provider"* means any person or entity which produces news transcripts, by itself or through an arrangement by which a third party produces news transcripts exclusively for that person or entity, and markets and sells such news transcripts as a daily service on a subscription basis.

II.

It is further order, That respondent, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, does forthwith cease and desist from entering into, attempting to enter into,

or continuing or attempting to continue, any combination, agreement or understanding, either express or implied, with any news transcript provider to allocate or divide markets or customers with respect to news transcripts.

III.

It is further ordered, That respondent, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, or renewing any agreement between respondent and FNS that prevents respondent from in any way competing with FNS for the production, marketing or sale of news transcripts.

IV.

It is further ordered, That, for five (5) years from either the date this order becomes final or July 31, 1995, whichever is later, respondent directly or indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do cease and desist from entering into, continuing, or renewing any agreements with FNS providing for the supply of news transcripts or the purchase or sale of news transcript customer contracts or accounts.

Provided that nothing in this order shall prohibit respondent from:

A. Purchasing a subscription for news transcripts from FNS for respondent's own use but not for resale; and

B. Contracting with FNS for supplying FNS with respondent's Daybook.

V.

It is further ordered, That respondent, directly or indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, attempting to enter into, maintaining, enforcing, or attempting to enforce, any agreements or understandings (1) with any competitor in the production,

distribution, or sale of news transcripts, that fix, establish, control, or maintain resale price levels for news transcripts, or (2) with any purchaser or reseller of news transcripts which is directly or indirectly supplied by respondent, that fix, establish, control, or maintain resale prices or resale price levels that such purchaser or reseller charges for news transcripts.

VI.

It is further ordered, That respondent shall:

A. Within thirty (30) days after the date this order becomes final, distribute a copy of this order and complaint to each of its officers and to each of its employees engaged in the production or sale of news transcripts.

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

C. 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 this order.

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

VII.

It is further ordered, That this order shall terminate on December 18, 2015.

IN THE MATTER OF

NEW BALANCE ATHLETIC SHOES, INC.

Docket 9268. Interlocutory Order, December 18, 1995

ORDER AMENDING COMPLAINT AND LIFTING STAY OF PROCEEDINGS

I. INTRODUCTION

By order dated July 10, 1995, the Commission directed the parties to this litigation to show cause why the complaint and notice order should not be amended or dismissed. This order was issued in conjunction with the Commission's announcement that it had rejected a consent agreement in Hyde Athletic Industries, Inc., FTC File No. 922-3236, and would conduct public proceedings to consider whether its current "made in USA" enforcement standard is appropriate in an era of global competition. The ongoing litigation was stayed pending the outcome of this show cause proceeding.

II. BACKGROUND

The complaint issued against New Balance on September 20, 1994 alleges violations of Section 5 of the FTC Act through statements made in advertising and labeling about the origin of New Balance's athletic shoes. Paragraph five alleges that New Balance:

> has represented, directly or by implication, that New Balance athletic shoes are made in the United States, *i.e.*, that all, or virtually all, of the component parts of the footwear are made in the United States, and that all, or virtually all, of the labor in assembling the footwear is performed in the United States.

Paragraph six alleges that this claim is false:

> In truth and in fact, a substantial amount of respondent's athletic shoes is assembled in foreign countries of foreign component parts, and in many instances respondent's athletic shoes assembled in the United States consist largely of foreign component parts. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

The Commission simultaneously accepted for public comment a complaint with an accompanying consent order raising similar allegations against Hyde Athletic Industries.

Over 150 public comments were filed in response to the Hyde consent agreement after it appeared in the Federal Register on September 23, 1994. Many of these comments took issue with the principle that an unqualified "made in USA" claim implies that all or virtually all of the parts of a product are made in the United States and all or virtually all of the labor used in producing a product is performed in the United States. The comments also raised other concerns, including questions about how such a standard would be calculated and implemented across various products and industries. Because these comments raised complex questions without readily apparent answers, the Commission publicly announced, on July 11, 1995, that it would invite various industry and trade associations, consumer groups and other government entities to participate in an exchange of views on these issues at a public workshop conference.

In light of the decision to review its enforcement standard, the Commission issued an Order to Stay Proceedings and Show Cause in the New Balance proceeding. The order directed the parties to brief the Commission on whether the public interest warrants amendment or dismissal of the complaint and notice order in this matter.[1] The Commission simultaneously rejected a proposed settlement incorporating the "all or virtually all" standard with Hyde Athletic Industries, and directed staff to renegotiate a modified consent order based on a revised complaint, consistent with the proposed amended complaint in New Balance.

III. THE PUBLIC INTEREST WARRANTS AMENDMENT OF THE COMPLAINT AND NOTICE ORDER

As explained in a Federal Register notice announcing the public workshop conference, the Commission will consider whether it should alter its legal standard regarding the use of unqualified "made

[1] New Balance asserts that "[i]t is not clear whether the Commission has the authority, *sua sponte*, to amend the complaint." Respondent's Brief in Response to Commission Order of July 11, 1995 at 28. The Commission has the authority to intervene *sua sponte* in an ongoing administrative adjudication to reconsider the public interest in proceeding, notwithstanding the absence of a specific Commission rule authorizing such action. *See, e.g., Hospital Board of Directors of Lee County*, 5 Trade Reg. Rep. (CCH) ¶ 23,860, at 23,619-20 (July 7, 1995); *Exxon Corp.*, 98 FTC 453, 461 (1981). Further, the Commission has the authority to act in a prosecutorial capacity in a pending adjudication to modify a complaint, *see, e.g., Cavanagh Communities Corp.*, 87 FTC 143, 144 (1976) (adding allegations), as well as to dismiss a complaint, *see, e.g., Frozen Food Forum, Inc.*, 84 FTC 1211, 1217 (1982).

in USA" claims for products comprised of domestic and foreign components and labor, and how domestic content should be measured under any future standard. *See* Request for Public Comment in Preparation for Public Workshop Regarding "Made in USA" Claims in Product Advertising and Labeling, 60 Fed. Reg. 53923, 53924 (October 18, 1995). Because the Commission is reviewing its enforcement standard, it concludes that public interest considerations and principles of fairness warrant dismissal of the charges against New Balance as they relate to advertising claims for athletic shoes manufactured in the United States of both foreign and domestic components. The remaining allegations of the complaint, however, remain unaffected by the upcoming policy review.[2] Moreover, the Commission has carefully considered respondent's arguments that the public interest does not warrant the additional expenditure of public or private resources on this litigation, and has concluded that resolution of these charges through administrative litigation is in the public interest.

Continuing to have reason to believe that New Balance has violated Section 5 of the FTC Act, the Commission has therefore determined not to dismiss the complaint, but to amend it. The attached amended complaint and notice order deletes those portions of the allegations in paragraphs five and six dealing with "made in the United States" claims as they relate to shoes of mixed domestic and foreign content. Paragraph five of the amended complaint alleges that New Balance, through its advertisements,[3] "has represented, directly or by implication, that all New Balance athletic shoes are made in the United States," and paragraph six alleges that this claim is false because "[i]n truth and in fact, a substantial amount of New Balance athletic shoes is wholly made in foreign countries." The Commission has also determined to amend Part I of the notice order to prohibit claims that "footwear made wholly abroad is made in the United States," as well as to prohibit misrepresentations about the quantity of footwear that New Balance exports.

Any requests for additional trial preparation or discovery shall be directed to the ALJ, who shall authorize such additional trial preparation and discovery as is appropriate.

[2] These allegations are: (1) that New Balance represented that all of its athletic shoes are made in the United States when a substantial amount is made entirely abroad; and (2) that New Balance represented that it annually exports to Japan hundreds of thousands of pairs of athletic shoes that are made in the United States when fewer than 10,000 pairs of New Balance shoes are made in the United States and exported to Japan each year.

[3] The amended complaint deletes all references to product labels.

Accordingly, *It is hereby ordered*, That the stay of these proceedings is hereby lifted, and the complaint and notice order are amended in accordance with the attached form of complaint.

Commissioner Starek dissenting.

COMPLAINT

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

PARAGRAPH 1. Respondent New Balance Athletic Shoe, Inc., is a Massachusetts corporation which manufactures and sells footwear. Its principal office or place of business is located at 38 Everett Street, Boston, Massachusetts.

PAR. 2. Respondent has manufactured, assembled, advertised, labeled, offered for sale, sold, and distributed athletic and other footwear to consumers.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including print and television advertising, and other promotional materials for footwear including, but not necessarily limited to, the attached Exhibits 1-5.

The "Mr. President" print advertisement (Exhibit 1) states:

"Here's one American-made vehicle that has no problem competing in Japan."
"Not only that, they're made right here in the USA."

The "Competition" print advertisement (Exhibit 2) states:

"If we can make great athletic shoes in America, why can't our competition?"
"New Balance is the only company that makes a full line of athletic shoes here in America."

The "Los Angeles" print advertisement (Exhibit 3) states:

"This American-made transportation system..."

"Mayor Bradley, perhaps you should consider New Balance athletic shoes. Not only are they made here in the USA...."

The "Junk" print advertisement (Exhibit 4) states:

"Who says buying American has to mean buying junk?"
"New Balance athletic shoes are one American-made product that's worth buying."
"The Japanese buy hundreds of thousands of pairs a year."

The "Mr. President" television advertisement (Exhibit 5) states:

"Here's one American made vehicle that has no problem competing in Japan."
"MADE IN USA"

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including, but not necessarily limited to, the advertisements attached as Exhibits 1-5, respondent has represented, directly or by implication, that all New Balance athletic shoes are made in the United States.

PAR. 6. In truth and in fact, a substantial amount of New Balance athletic shoes is wholly made in foreign countries. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph four, including, but not necessarily limited to, the advertisement attached as Exhibit 4, respondent has represented, directly or by implication, that it annually exports to Japan hundreds of thousands of pairs of athletic shoes that are made in the United States.

PAR. 8. In truth and in fact, respondent does not annually export to Japan hundreds of thousands of pairs of athletic shoes that are made in the United States. Fewer than 10,000 pairs of respondent's athletic shoes are made in the United States and exported to Japan each year. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

NOTICE

Notice is hereby given to the respondent hereinbefore named that the _____ day of _____, A.D., 19 , at a.m. o'clock is hereby fixed as the time and the Federal Trade Commission Offices, 6th Street & Pennsylvania Avenue, N.W., Washington, D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commision, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admissions, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest these allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

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

ORDER

I.

It is ordered, That respondent, New Balance Athletic Shoe, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any footwear in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly of by implication.

1. That footwear made wholly abroad is made in the United States.
2. The quantity of footwear it exports.

II.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

B. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call

into question such representation, or the basis relied upon for such representation, including complaints from consumers.

III.

It is further ordered, That the respondent shall distribute a copy of this order to each of its operating divisions and to each of its officer, agents, representatives, or employees engaged in the preparation or placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

IV.

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.

V.

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.

In witness whereof, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed at Washington, D.C. this _____ day of _____, _____.

By the Commission.

Donald S. Clark
Secretary

EXHIBIT 1

Mr. President: Here's one American-made vehicle that has no problem competing in Japan.

Perhaps while jogging in Tokyo's Palace Gardens, Mr. President, you noticed that an awful lot of Japanese people (over 1,000,000 at last count) wear New Balance athletic shoes.

New Balance shoes come in a full range of widths, Mr. President. This means they deliver a perfect fit—no matter how wide or narrow your feet happen to be.

What's more, they're made right here in the USA.

I know you'll approve, Mr. President, that when you [illegible] people really truly need something [illegible] imports. People buy it.

new balance NB

EXHIBIT 2

Exhibit 2

If we can make great athletic shoes in America, why can't our competition?

new balance

EXHIBIT 3

Mayor Bradley:
This American-made
transportation system
could reduce smog,
eliminate traffic, and save
you $122,000,000.

new balance NB

EXHIBIT 4

EXHIBIT 4

New Balance athletic shoes are one American-made product that's worth buying.

The Japanese buy hundreds of thousands of pairs a year. The German consumer newsletter *Marktintern* ranks New Balance as the top

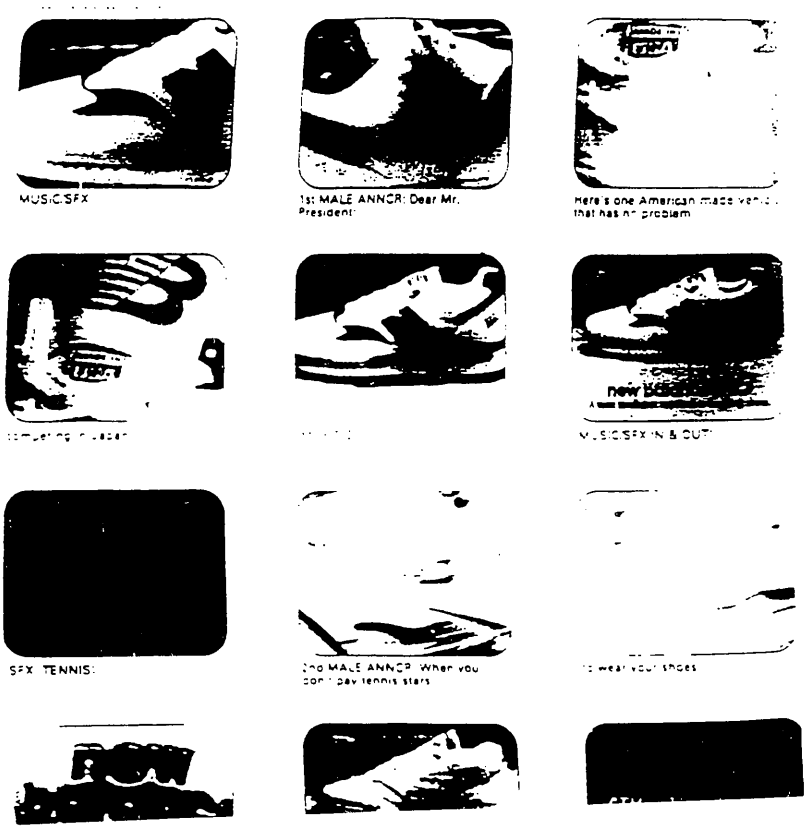
Who says buying American has to mean buying junk?

American brand. And the Made In America Foundation included New Balance in its recent collection of the best American products.

The fact is Americans have been wearing New Balance shoes since 1906. Not just because it shows how they feel about their country, but because it shows how they feel about their feet.

new balance NB

EXHIBIT 5



CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

On September 20, 1994, when the Commission first issued its complaint against New Balance Athletic Shoes, Inc., I dissented. It is traditional (with rare exceptions) for a commissioner who dissents from the issuance of an administrative complaint to withhold an explanation of her views until a later stage of the proceeding. I reserved my views in accordance with that practice.

My views nevertheless were stated in my dissent in a case that settled at the same time. Hyde Athletic Industries, Inc., Matter No. 922-3236 (Sept. 20, 1994) (Commissioner Azcuenaga, dissenting). In Hyde, I questioned the standard for "Made in USA" claims that the Commission incorporated into the complaint, which was the same standard incorporated into the complaint in this case. I also was concerned that the Commission was enforcing a standard for "Made in USA" claims at the same time that it apparently was reconsidering that standard. I was "troubled by the majority's implicit uncertainty about the standard [for Made in USA claims] it has chosen to impose," *id.*, as reflected in the majority's request for public comment concerning the standard. Although I was willing to reexamine the enforcement standard, I was "unwilling to embark on that process while continuing to bring cases to enforce the existing standard." *Id.*

Today, the Commission issues a revised complaint and notice order to remove from this litigation the issue of what enforcement standard should be applied to "Made in USA" claims for products of mixed domestic and foreign origin. The Commission has undertaken formally to review its enforcement standard for such claims, and it will hold a public workshop to obtain information in connection with its review.[1] These actions are consistent with my earlier and continuing views that the Commission should not attempt to enforce a legal standard about which it has reservations and that the Commission should reexamine the standard for "Made in USA" claims. The deletion from this complaint of the allegations based on that standard having been made, I suport the amended complaint.

[1] Because the Commission is reviewing its enforcement standard, it has concluded that "public interest considerations and principles of fairness" warrant dismissal of the portions of the complaint and notice order based on that standard.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today, the Commission accepts for public comment a consent agreement settling charges that Hyde Athletic Shoes, Inc. made the false representation that its footwear is "Made in USA." I have reason to believe that this representation is false because some Hyde footwear is assembled in foreign countries of foreign components and because some Hyde footwear consists largely of foreign components even though it is assembled in the United States. Nevertheless, I am unwilling to vote to accept the consent agreement for public comment.

First, the complaint and order interpret the established standard for the claims at issue in a manner that apparently would prohibit certain "Made in USA" representations as false that consumers likely would view as true. Specifically, the complaint and order treat a "Made in USA" representation as containing the implied claim that:

> all, or virtually all, of the component parts of the footwear are made in the United States, and that all, or virtually all, of the labor in assembling the footwear is performed in the United States.

Under the interpretation of the majority, this implied claim apparently would be false, for example, if 2% of a product's value is attributable to component parts, 25% of which are foreign, and 98% of its value is attributable to labor, all of which is American. Because I believe that consumers are likely to view such products as American, I am reluctant to support an interpretation of the standard that could prohibit advertisers of such products from using a "Made in USA" claim.

Also, I am troubled by the majority's implicit uncertainty about the standard it has chosen to impose, as reflected in the Analysis to Aid Public Comment. The proposed complaint alleges that Hyde has made a false "Made in USA" representation in its advertising. Yet, by soliciting information on how consumers perceive a "Made in USA" representation in its Analysis to Aid Public Comment, the Commission apparently asks what implied claim consumers take from a "Made in USA" representation. If the Commission has not yet determined what claim Hyde made, surely it is inappropriate to issue a complaint alleging as false a claim that is yet to be definitively identified. The better, indeed, the proper approach is for the Commission to determine before issuing a complaint that it has

reason to believe that a particular claim was made and that this claim is false.

A case can be made that the Commission should reexamine its standard regarding "Made in USA" representations. I would not object to such a reexamination, but I am unwilling to embark on that process while continuing to bring cases to enforce the existing standard.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I oppose narrowing the complaint and notice order in this matter. As I have stated elsewhere, case-by-case litigation is the appropriate means to evaluate "Made in USA" claims.[1] With the amendment of this compliant, the Commission ratifies the change of course on which it embarked when it rejected the consent order in Hyde and issued its order to show cause in this proceeding.

The record was fully developed and the parties were ready for trial to begin when the Commission stayed the proceedings and issued its order to show cause why the complaint should not be dismissed or amended. The briefs subsequently filed by the parties indicate that significant evidence of consumer perceptions of "Made in USA" claims would have been tested in trial, and the Commission would have had the benefit of a full examination of the evidence in assessing whether New Balance's claims were deceptive. Instead, the Commission has opted to address claims about products containing both foreign and domestic components in a resource-intensive, unnecessarily broad review more typical of a rulemaking.

To remove all issues related to mixed foreign and domestic content, the Commission drops the central allegation of the complaint -- involving the application of unqualified "Made in USA" claims to products assembled in the United States from foreign and domestic components -- and revises the notice order to prohibit New Balance from misrepresenting that "footwear made wholly abroad is made in the United States." Without violating the order, New Balance could advertise as "Made in USA: imported athletic shoes that are assembled in a foreign country from foreign components parts, so long as the shoes also contained any small part of U.S. origin. Such

[1] *See* Request for Public Comment in Preparation for Public Workshop Regarding "Made in USA" Claims in Product Advertising and Labeling, 60 Fed. Reg. 53923, 53930 (October 18, 1995) (Dissenting Statement of Commissioner Roscoe B. Starek, III); Hyde Athletic Industries, Inc., File No. 922-3236 (Dissenting Statement of Commissioner Roscoe B. Starek, III).

an eviscerated order would have little value and would not justify the resources involved in continuing this litigation.

It also seems likely to be an inefficient use of scarce resources to address in a public workshop whether the Commission's enforcement standard for "Made in USA" claims is appropriate in an era of global competition. If information provided to consumers is deceptive, a market based on consumer choices cannot function properly, whether the market is global or national.

Guidance on the level of substantiation that the Commission will require for unqualified "Made in USA" claims -- including methods of calculating domestic content -- and on how much flexibility the Commission will use in enforcement may prove useful and could reduce the costs of complying with the standard. Further review of these issues, however, by no means justifies drastically narrowing the scope of this adjudication. The Commission frequently undertakes reviews to reduce uncertainties about its enforcement policies, and issues enforcement policy statements or guides, without dropping enforcement efforts againts clear violations of law in the interim.

IN THE MATTER OF

GENERAL MOTORS CORPORATION

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

Docket C-2966. Consent Order, May 18, 1979--Modifying Order, Dec. 21, 1995

This order reopens a 1979 consent order that settled allegations that General Motors ("GM") engaged in unfair and deceptive practices by selling cars with engines and other equipment manufactured by a different GM division without informing purchasers. This order modifies the consent order by allowing GM to display division brand nameplates on engines that are not manufactured by that GM division. In addition, the Commission deleted the provision from the modified order that have expired, concluding that elimination of the expired provisions is warranted. The Commission determined that changed conditions of fact justified reopening the proceeding and modifying the order.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On July 7, 1995, General Motors Corporation ("GM") filed a petition pursuant to Section 5(b)(2) of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45(b)(2), and Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, to reopen the proceeding and modify the cease and desist order entered against it on May 18, 1979, in Docket No. C-2966 (93 FTC 860).[1]

The cease and desist order settled allegations that GM, a worldwide manufacturer of passenger vehicles: (1) represented that certain standard and optional equipment was manufactured by the particular division that assembled the passenger vehicle when that equipment was, in fact, manufactured by another division; (2) misrepresented the availability of various standard and optional equipment; and (3) substituted equipment other than that represented as being available, and delivered passenger vehicles that contained standard or optional equipment different from that ordered by retail purchasers.

[1] This order will sunset on May 18, 1999, provided that neither the Department of Justice nor the Commission files a complaint in federal court to enforce the order pursuant to Section 5(l) of the FTC Act prior to that date. *See* Final Rule Regarding the Duration of Existing Competition and Consumer Protection Orders, 60 Fed. Reg. 58514 (Nov. 28, 1995).

Various parts of the order imposing obligations with respect to certain model year passenger vehicles, *i.e.,* Parts V, VI, VII, X.B, X.C, and XI.B, have expired. The remaining provisions of the order remain in full force and effect. Part I of the order defines certain terms used in the order. Part II prohibits GM from misrepresenting the manufacturing source of any engine option and the availability of an option or item of standard equipment. Part III prohibits GM from displaying the name of any GM car division on any engine unless that engine is manufactured by that particular division. Part IV requires GM to notify dealers if passenger vehicles are being equipped with engines other than those specified in sales literature for that passenger vehicle. Part VIII requires GM to make available replacement parts and repair and maintenance information for passenger vehicles equipped with substituted engines to its dealers. Part IX of the order limits application of the order to the United States and its territories. Part X.A prohibits GM from utilizing a wholesale ordering system that prevents dealers from designating specific optional equipment requested by purchasers.

The petition to reopen the proceeding to modify Part III of the order and to add a definition to Part I was placed on the public record for thirty days on August 4, 1995, for the purpose of receiving public comment. *See* 60 Fed. Reg. 39,958 (1995). No comments were received. GM agreed to an extension of time for Commission action until December 20, 1995, to enable it to develop clarifying information to respond to questions raised by the Commission.

STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

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 altered, modified, or set aside if the respondent makes "a satisfactory showing that changed conditions of law or fact" so require.[2] A satisfactory showing sufficient to require reopening is made when a

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

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

The 1980 amendment to Section 5(b) did not change the standard for order reopening and modification, but "codifie[d] existing Commission procedure by requiring the Commission to reopen an order if the specified showing is made," S. Rep. 96-500, 96th Cong., 2d Sess. 9-10 (1979), and added the requirement that the Commission act on petitions to reopen within 120 days of filing.

request to reopen identifies significant changes in circumstances and show that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. Louisiana Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986) at 4.[3] Reopening may not be required if the changes were reasonably foreseeable at the time of consent negotiations. *Phillips Petroleum Co.*, Docket No. C-1088, 78 FTC 1573, 1575 (1971).

The language of Section 5(b) plainly anticipates that the burden is on the requester to make "a satisfactory showing" of changed conditions to obtain reopening of the order. *See Gautreaux v. Pierce,* 535 F. Supp. 423, 426 (N.D. Ill. 1982) (requester must show "exceptional circumstances, new, changed or unforeseen at the time the decree was entered"). The legislative history also makes clear that the requester has the burden of showing, by means other than conclusory statements, why an order should be modified.[4]

If the Commission determines that the requester has made the necessary showing, the Commission must reopen the order to determine whether the modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the requester fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. The requester's burden is not a light one in view of the public interest in repose and finality of Commission orders.[5]

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[3] *See* S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant change or changes causing unfair disadvantage); Pay Less Drugstores, Inc., Docket No. C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers that the order sought to remedy) (unpublished); *See also United States v. Swift & Co.,* 286 U.S. 106, 119 (1932) ("clear showing" of changes that eliminate reasons for order or such that order causes unanticipated hardship).

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

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

[5] *See Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394 (1981) (strong public interest considerations support repose and finality); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 296 (1974) ("sound basis for . . . [not reopening] except in the most extraordinary circumstances"); *RSR Corp. v. FTC,* 656 F. 2d 718, 721-22 (D.C. Cir. 1981) (applying Bowman Transportation standard to FTC order).

CHANGED CONDITIONS OF FACT WARRANT REOPENING ORDER

In 1979, when the Commission issued its order, the Cadillac, Buick, Oldsmobile, Pontiac, and Chevrolet Divisions ("the nameplate divisions") of GM were organized as semi-autonomous motor car companies under GM's North American Car and Truck Operations with individual design, marketing, and manufacturing responsibilities, including engine production. In 1984, GM consolidated its engine manufacturing operations so that the nameplate divisions that existed in 1979 no longer manufactured engines. GM Petition at 6. In 1990, GM further consolidated all of its engine manufacturing operations into a single unit, except that its Saturn division continues to manufacture its own engines. GM Petition at 2. Because GM's nameplate divisions no longer manufacture engines, GM generally is prevented from branding an engine with a division nameplate since Part III of the 1979 order permits a division nameplate to appear on an engine only if the engine was manufactured by that division.[6]

GM maintains that Part III of the order is inequitable and harmful to competition following its reorganization. GM has submitted a market research report prepared by an independent market research organization that suggests that a substantial number of consumers would place a higher value on GM passenger cars if their engines were branded with their division nameplate. Five of GM's competitors, like GM, have separated their engine production organizations from their marketing organizations.[7] Unlike GM, however, these competitors are able to brand their engines with their division nameplates rather than their manufacturing source to take advantage of any commercial value associated with the division nameplates. Because Part III of the order has become inequitable and harmful to competition, we conclude that GM has made a sufficient showing to warrant reopening the 1979 order and consideration of its requested modification.

[6] Because the Saturn division manufacturers its own engines, it is permitted under Part III to put the Saturn nameplate on its engines.

[7] These companies and their marketing organizations are Ford (Ford and Lincoln-Mercury), Chrysler (Chrysler-Plymouth, Dodge, and Jeep-Eagle), Toyota (Toyota and Lexus), Nissan (Nissan and Infiniti), and Honda (Honda and Acura).

THE REQUESTED MODIFICATION

GM requests that the Commission revise Part III of the order and add a definition of "nameplate" (a term that did not appear in the original order) to Part I of the order. The modification GM request would permit it to display division nameplates only on those engines that are materially different from engines in new cars displaying all other division nameplates.[8] The modification would not permit GM to display different division nameplates on identical engines.

In addition, the requested modification would not affect other protections afforded by the order. Part II.A of the order will continue to prohibit GM from displaying a division nameplate on an engine in a manner that misrepresents the manufacturing source of an engine. Part IV of the order also will continue to require GM to notify dealers of any production plans that would result in replacing one engine with a different engine in makes of cars sold by the dealers.

Finally, several provision of the order have already expired. Although GM did not request that the Commission delete these expired provisions, we conclude that elimination of these expired provisions is warranted. Accordingly, the expired provisions will be deleted from the modified order.

It is therefore ordered, That the proceeding is hereby reopened and the order modified to read:

ORDER

I.

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

A. The term *"GM"* shall mean General Motors Corporation, and all of its divisions, its successors, assigns, officers, representatives, agents, and employees, acting directly or through any subsidiary or other device.

B. The term *"franchised GM passenger car dealer"* shall mean any person, partnership, or corporation which is a party to a franchise

[8] Because it is possible that consumers would place a higher value on a GM automobile with a division nameplate on the engine because they assume that its engine is materially different from the engines sold by the other GM nameplate divisions, the modification would permit GM to display a division nameplate on an engine only if it is materially different from engines with other nameplates.

agreement with GM to purchase new GM passenger cars for resale to purchasers.

C. The term *"manufacturing source"* shall mean the GM division or entity by which the item referred to was produced.

D. The term *"line"* shall mean each make and model of passenger car manufactured by General Motors Corporation and distributed or sold under the Chevrolet, Pontiac, Buick, Oldsmobile or Cadillac name.

E. The term *"engine option"* shall mean any engine designated by a GM ordering code number (including the standard engine) offered by GM as factory-installed equipment. For purposes of this order, each engine option shall be assigned a single, unique ordering code designation for a given model year which does not vary across division lines.

F. The term *"material difference"* shall mean any difference which results in a significant difference in engine performance, including but not limited to any difference in Environmental Protection Agency ("EPA") fuel economy ratings, mileage intervals in excess of 1,000 miles for recommended engine maintenance, horsepower and displacement, or which results in a difference or regular maintenance replacement parts.

G. The term *"substituted engine"* shall mean an engine option installed in any GM line in any area of the country as a replacement for an engine option offered for that line in the same model year, but which is unavailable in such line or area, if the replacement engine option:

(1) Is produced by a division other than that which produced the engine option to be replaced; or

(2) Has any "material difference" from the engine option to be replaced.

H. The term *"option"* shall mean an item of equipment to be installed in a new GM passenger car for which GM provides purchasers a choice of alternatives.

I. The term *"purchaser"* shall mean a potential buyer, potential lessee, buyer and lessee of any new GM passenger car, but shall not include a franchised GM passenger car dealer.

J. The term *"nameplate"* shall mean the name of the franchise identity through which new passenger cars are sold by GM, such as

"Cadillac," "Buick," "Oldsmobile," "Pontiac," "Chevrolet," or "Saturn."

II.

It is hereby ordered, That GM is prohibited from misrepresenting as of the time the representation is made by GM:

A. The manufacturing source of any engine option; and

B. That an option or item of standard equipment offered for a new GM passenger car is available if in fact it is not.

III.

It is further ordered, That GM is prohibited from displaying a passenger car's nameplate on any engine or visible attachment to the engine unless such engine is materially different from engines in new GM cars sold under all other nameplates.

IV.

It is further ordered, That if:

A. GM furnishes or has furnished, during or in preparation for any model year, any information to any franchised GM passenger car dealers regarding any engine offered for any GM line for any model year, and

B. The engine described in the information provided to such dealers is to be or has been replaced by a substitute engine for that model year,

GM shall notify such dealers in writing, with respect to the affected lines handled by them, forthwith after the decision to substitute has been made. Such written notification shall include the lines in which the substituted engine is offered, its manufacturing source, ordering code number, designation used in the vehicle identification number to identify the type of engine option, and any material differences between the substituted engine and the engine to be replaced.

V.

(Expired)

VI.

(Expired)

VII.

(Expired)

VIII.

It is further ordered, That GM shall make available, subject to *force majeure*, labor disruptions, and other causes outside GM's control, replacement parts and repair and maintenance information to franchised GM passenger car dealers adequate to allow such dealers to provide GM warranty service to purchasers of new GM passenger cars equipped with any substituted engine to the same extent as it does in the case of new GM passenger cars equipped with non-substituted engines.

IX.

It is further ordered, That this order shall be limited in its application to sales of new GM passenger cars in the United States and its territories.

X.

It is further ordered, That:

A. GM is prohibited from utilizing a wholesale ordering system whereby its franchised GM passenger car dealers may not designate the specific options, other than standard equipment, requested by the purchaser. GM shall notify its dealers in writing that purchasers should be given the opportunity to designate the specific options ordered. Provided, that GM shall indicate when an option is required to be paired with another specific option.

B. (Expired)
C. (Expired)

XI.

It is further ordered, That:

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

B. (Expired)