

IN THE MATTER OF
VIOBIN CORPORATION

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

Docket C-3204. Complaint, Dec. 17, 1986—Decision, Dec. 17, 1986

This consent order prohibits, among other things, a Monticello, Ill. manufacturer and seller of wheat germ oil products, as well as its Richmond, Va. parent company, from misrepresenting that their wheat germ oil products can help consumers improve endurance, stamina, vigor, or any aspect of athletic fitness, or that octacosanol, the active ingredient in its products, is in any way related to body reaction time, oxygen debt, or athletic performance. Additionally, respondents are required to run corrective advertising for a specified period of time.

Appearances

For the Commission: *Brinley H. Williams and Cheryl B. Anderson.*

For the respondents: *Lawrence Sharp, McGuire, Woods & Battle,*
Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Viobin Corporation, a corporation, hereinafter referred to as 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 Viobin Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois. Viobin Corporation, a wholly-owned subsidiary of A.H. Robins Company, Incorporated, has its offices and principal place of business at 226 Livingston Street, Monticello, Illinois.

PAR. 2. Respondent is now and has been engaged in the manufacture, offering for sale, and sale of nutritional supplements, including Viobin Wheat Germ Oil, Prometabs and Prometol, and other products for personal or household use by members of the general public.

PAR. 3. Respondent has caused to be prepared and placed for publication and has caused the dissemination of advertising and promotional material, including, but not limited to, the advertising and labeling referred to herein, to promote the sale of Viobin Wheat Germ Oil, Prometabs and Prometol. As advertised, Viobin Wheat Germ Oil,

Prometabs and Prometol are "foods" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 4. Viobin Corporation operates in various States of the United States and in the District of Columbia. Respondent's manufacturing, offering for sale, sale, and distribution of nutritional supplements, including Viobin Wheat Germ Oil, Prometabs and Prometol, mentioned herein constitutes maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of its business, respondent has disseminated and caused the dissemination of advertisements for nutritional supplements, including Viobin Wheat Germ Oil, Prometabs and Prometol, by various means in or affecting commerce, including national magazines, product labels, and point of sale brochures, distributed by the mail and across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products.

PAR. 6. Typical statements in said advertisements, and promotional materials, disseminated as previously described, but not necessarily inclusive thereof, are found in advertisements and promotional materials attached hereto as Exhibits A through D. Specifically, the aforesaid advertisements contain the following statements:

- (a) Improve stamina and endurance with Viobin Wheat Germ Oil.
- (b) Free Booklet - summarizes strong evidence of the beneficial effect of Viobin Wheat Germ Oil with octacosanol on physical fitness.
- (c) More than 18 years of university research show positive evidence that Viobin Wheat Germ Oil can help athletes increase stamina and endurance plus help them overcome fatigue more quickly. These benefits are achieved separately and apart from the effects of physical training.
- (d) Studies indicate that octacosanol has a beneficial effect on oxygen intake, net oxygen debt and total body reaction time.
- (e) Prometol helps increase endurance, stamina and vigor.
- (f) Prometabs helps increase endurance, stamina and vigor.

PAR. 7. Through the use, *inter alia*, of the statements referred to in Paragraphs Six (a) through Six (f), and other representations contained in advertisements or promotional materials not specifically set forth herein, respondent has represented, and now represents, directly or by implication, that the use of Viobin Wheat Germ Oil, Prometabs and Prometol can help improve consumers' endurance, stamina, total body reaction time, ability to overcome fatigue, and overall athletic performance or overall physical fitness.

PAR. 8. The representations contained in Paragraph Seven are false, for the reason that the use of Viobin Wheat Germ Oil, Prometabs or Prometol will not improve consumers' endurance, stamina,

total body reaction time, ability to overcome fatigue and overall athletic performance or overall physical fitness.

PAR. 9. Through the use, *inter alia*, of the statements referred to in Paragraph Six (b) and Six (d), respondent has represented, and now represents, directly or by implication, that the octacosanol in Viobin Wheat Germ Oil, Prometabs and Prometol is effective in improving consumers' total body reaction time, oxygen uptake and net oxygen debt and thereby improves consumers' physical performance or physical fitness.

PAR. 10. The representations contained in Paragraph Nine are false, for the reason that the octacosanol in Viobin Wheat Germ Oil, Prometabs and Prometol does not improve consumers' total body reaction time, oxygen uptake, net oxygen debt or improve consumers' physical performance or physical fitness.

PAR. 11. In making the representations referred to in Paragraphs Seven and Nine, respondent has represented directly or by implication that at the time of making those representations it possessed and relied upon a reasonable basis for those representations.

PAR. 12. In truth and in fact at the time of making the representations referred to in Paragraphs Seven and Nine, respondent did not possess and rely upon a reasonable basis for those representations. Therefore, the representation referred to in Paragraph Eleven was and is false and misleading.

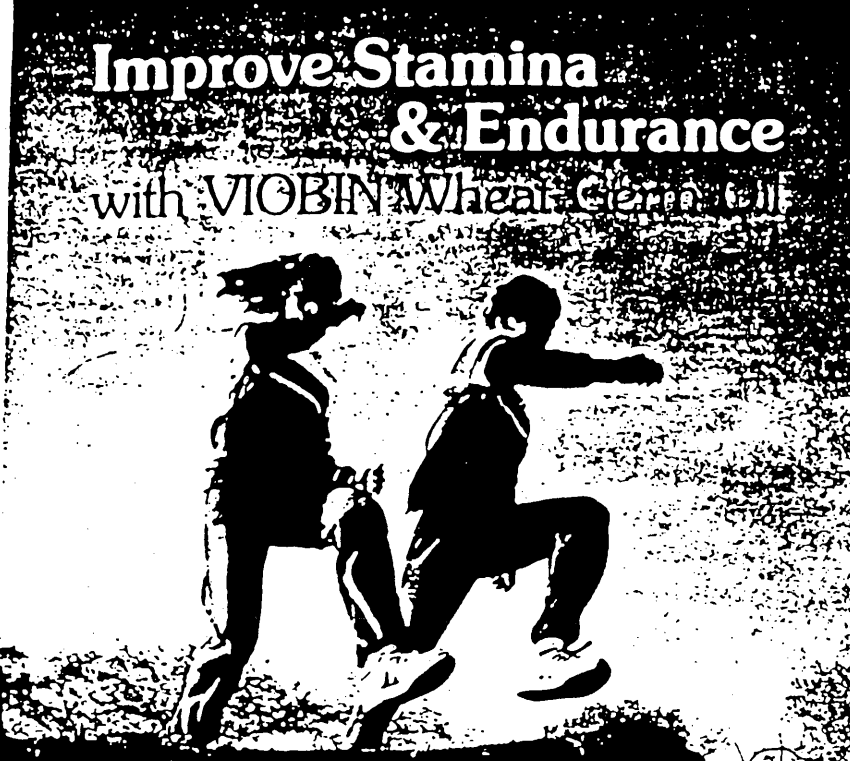
PAR. 13. The use by respondent of the aforesaid acts and practices, directly or by implication, and the placement in the hands of others of the means and instrumentalities by and through which others may have used the aforesaid statements, representations, acts, and practices, have had and now have the capacity and tendency to mislead consumers and to induce such persons to purchase Viobin Wheat Germ Oil, Prometabs and Prometol.

PAR. 14. 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 Sections 5 and 12 of the Federal Trade Commission Act.

Complaint

108 F.T.C.

EXHIBIT A



**Improve Stamina
& Endurance**
with **VIOBIN Wheat Germ Oil**

More than 18 years of university research show positive evidence that Viobin Wheat Germ Oil can help athletes increase stamina and endurance plus help them overcome fatigue more quickly. These benefits are achieved separately and apart from the effects of physical training.

Viobin Wheat Germ Oil is manufactured by an exclusive low-temperature process, preserving all the values that make wheat germ oil a valuable food supplement. One teaspoon of Viobin Wheat Germ Oil contains all the raw, unrefined wheat germ oil from 5 pounds of whole wheat... one of the world's richest natural sources of Vitamin E and octacosanol. Studies indicate that octacosanol has a beneficial effect on oxygen intake, net oxygen debt and total body reaction time.

Free Booklet — summarizes strong evidence of the beneficial effect of Viobin Wheat Germ Oil with octacosanol on physical fitness! Just send us your name and address, ask for "WGO Booklet," and we'll mail you free booklet right away.
No obligation.

VIOBIN
Viobin Corporation
Monticello, IL 61856
(217) 762-2561

Improve Stamina & Endurance with VIOBIN Wheat Germ Oil

More than 18 years of university research show positive evidence that Viobin Wheat Germ Oil can help athletes increase stamina and endurance plus help them overcome fatigue more quickly. These benefits are achieved separately and apart from the effects of physical training.



Viobin Wheat Germ Oil is manufactured by an exclusive low temperature process, preserving all the values that make wheat germ oil a valuable food supplement. One teaspoon of Viobin Wheat Germ Oil contains all the raw, unrefined wheat germ oil from 5 pounds of whole wheat — one of the world's richest natural sources of Vitamin E and octacosanol. Studies indicate that octacosanol has a beneficial effect on oxygen intake, net oxygen debt and total body reaction time.

Free Booklet — summarizes strong evidence of the beneficial effect of Viobin Wheat Germ Oil with octacosanol on physical fitness. Just send us your name and address, ask for "WGO Booklet," and we'll mail your free booklet right away. No obligation.

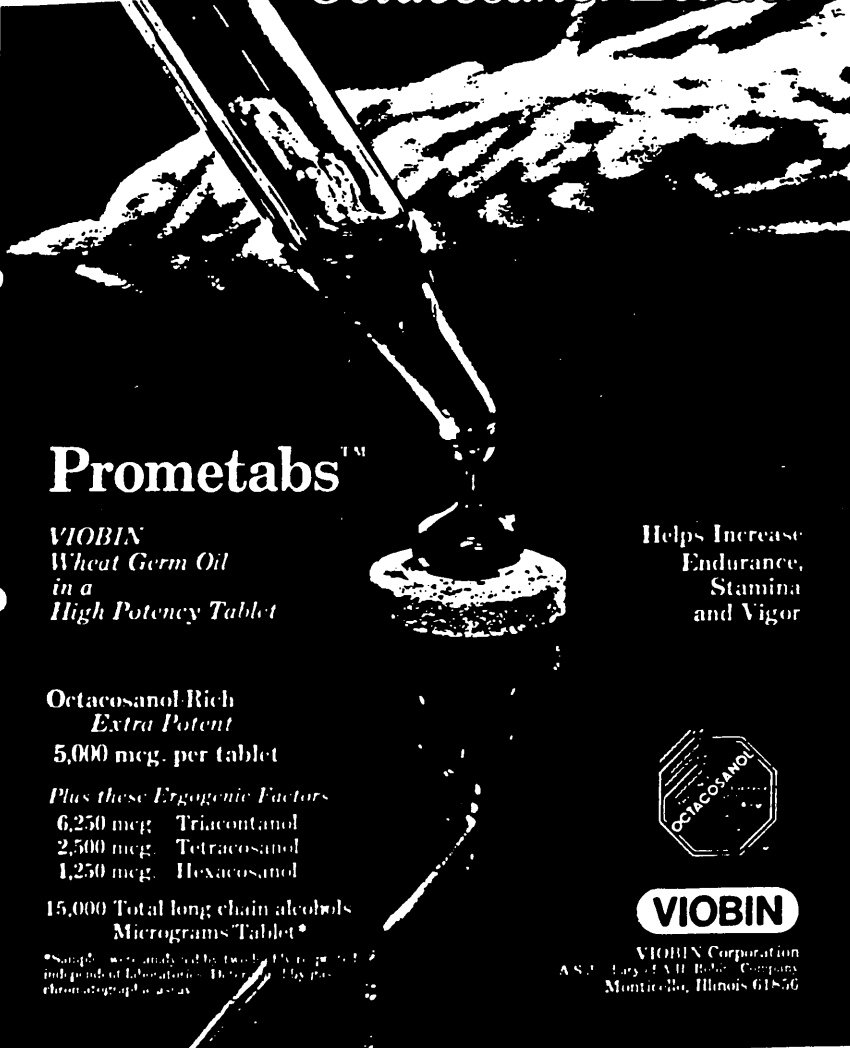
VIOBIN

VIOBIN Corporation
Monticello, Ill. 61856
(217) 762-2761

EXHIBIT C

Exhibit C

*From the
Octacosanol Leader*



Prometabs™

*VIOBIN
Wheat Germ Oil
in a
High Potency Tablet*

Helps Increase
Endurance,
Stamina
and Vigor


**Octacosanol Rich
Extra Potent
5,000 mcg. per tablet**

Plus these Ergogenic Factors

- 6,250 mcg. Triacosanol
- 2,500 mcg. Tetracosanol
- 1,250 mcg. Hexacosanol

**15,000 Total long chain alcohols
Micrograms Tablet***

*Samples were analyzed by two independent laboratories. Determined by gas chromatography assay.



VIOBIN

VIOBIN Corporation
A.S. J. Jay & H. Baker Company
Monticello, Illinois 61856

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EXHIBIT D

EXHIBIT D



PROMETOL[®]

The Gem

Helps Increase
Endurance,
Stamina and Vigor

Each 10 minim capsule provides:

- The octacosanol found in more than 5 teaspoonsful of VIOBIN Wheat Germ Oil or more than 24 pounds of whole wheat.
- 10% of the U.S. recommended daily allowance of vitamin E (natural, of course).
- A concentrate of other valuable nutrients found in VIOBIN Wheat Germ Oil.

2000 micrograms
per 10 minim capsule

Each Prometol 10 minim capsule contains 2000 micrograms of the amazing nutrient, octacosanol verified by multiple assays employing sophisticated techniques to elicit precise measurement.

Available at your local health food store.

VIOBIN Respected for years!



VIOBIN

VIOBIN Corporation
A Subsidiary of V.H. Baker Company
Monticello, Illinois 61866

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 and its parent corporation, A.H. Robins Company, Incorporated, having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

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

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

1. Respondent Viobin Corporation (Viobin) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois. Viobin has its offices and principal place of business at 226 Livingston Street, Monticello, Illinois.

A.H. Robins Company, Incorporated, (A.H. Robins) is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia. A.H. Robins has its offices and principal place of business at 1407 Cummings Drive, Richmond, Virginia.

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

ORDER

I.

It is ordered, That respondent Viobin Corporation, a corporation, its parent corporation, A.H. Robins Company, Incorporated, and all the other subsidiaries of A.H. Robins Company, Incorporated, their successors and assigns (hereinafter collectively "the companies"), and the companies' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, labeling, packaging, offering for sale, sale, or distribution of Viobin Wheat Germ Oil, Prometabs, Prometol, or any other product of substantially similar composition or possessing substantially similar properties, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that the product can help consumers improve endurance, stamina, vigor, reaction time, or any aspect of athletic fitness or performance.

B. Representing, directly or by implication, that octacosanol is related in any way to body reaction time, oxygen uptake, oxygen debt, or athletic fitness or performance.

II.

It is further ordered, (1) That respondent Viobin Corporation, its successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, labeling, packaging, offering for sale, sale, or distribution of any product for personal or household use in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, and (2) That A.H. Robins Company, Incorporated, its successors and assigns, and their officers, agents, representatives, and employees directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, labeling, packaging, offering for sale, sale, or distribution of any wheat germ oil product or any product advertised as containing octacosanol, triacontanol, tetracosanol, or hexacosanol, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting in any manner, directly or by implication, the purpose, content, sample, reliability, results or conclu-

sions of any scientific test, research or article, or any other scientific opinion or data.

III.

A. *It is further ordered*, That the companies and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, labeling, packaging, offering for sale, sale, or distribution of any product for personal or household use in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, concerning any benefit to be derived from using any such product with respect to athletic performance, capability or endurance unless, at the time of such representation, the companies possess and rely upon reliable and competent evidence that substantiates each such representation of the type and quantum appropriate for the representation.

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

IV.

It is further ordered, That respondent Viobin Corporation, its successors and assigns, and their officers, agents, representatives and employees:

A. Clearly and prominently disclose the following statement in each advertisement for Viobin Wheat Germ Oil, Prometabs and Prometol appearing in any magazine, any newspaper, or on any radio or television broadcast within one year of the date of service of this order:

Our earlier studies of the effects of wheat germ oil and octacosanol on endurance, stamina and vigor, while following techniques accepted at the time, do not meet the criteria of modern testing and therefore we no longer claim that the use of wheat germ oil or octacosanol will improve endurance, stamina or vigor, or any aspect of athletic fitness or performance.

B. Shall within six (6) months of the date of service of this order

place in each of the print publications in which any advertisement for Viobin Wheat Germ Oil appeared during calendar year 1985 at least one advertisement, not less than 5" × 7-½" in size, that clearly and prominently discloses the statement set forth in Paragraph IV. A.

V.

It is further ordered, That, for three years after the last date of dissemination of the representation, the companies and their officers, agents, representatives and employees, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying copies:

1. Of all materials that were relied upon in disseminating any representation covered by this order.
2. Of all test reports, studies, surveys, or demonstrations in their possession or control or of which they have knowledge that contradict any representation made that is covered by this order.

VI.

It is further ordered, That respondent Viobin Corporation notify the Commission at least thirty (30) days prior to any proposed change in respondent or its parent 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.

VII.

It is further ordered, That the companies shall forthwith distribute a copy of this order to each of their operating divisions and to all distributors of Viobin Wheat Germ Oil, Prometabs, Prometol or any other products of substantially similar composition.

VIII.

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

IX.

It is furthered ordered, That no provision of this order shall be interpreted as precluding respondent from making statements or disclosures on its labels or labeling where those statements or disclosures are required by regulations promulgated by the Food and Drug Administration (FDA) or with statutes the FDA enforces.

Proposed barter program with foreign countries for phosphate rock would avoid respondent's involvement in other than export trade and falls under the protection of the Webb-Pomerene Act. [Phosphate Rock Export Association, P86 9613]

Dear Mr. Fogt:

December 3, 1986

This letter responds to your request on behalf of the Phosphate Rock Export Association ("Phosrock") for an advisory opinion concerning a proposed barter program. That request poses a novel question of law, for which there is no clear Commission or court precedent, and thus under Section 1.1 of the Commission's Rules of Practice an advisory opinion is appropriate. Your first letter, dated April 8, 1986, proposed Phosrock involvement in a kind of activity not authorized by the Commission in its 1983 advisory opinion. [102 F.T.C. 1844] The Commission feels now, as it did then, that Phosrock's sale in the United States of the bartered-for products would not be solely export trade or in the course of export trade. As modified by your July 10, 1986 letter, however, Phosrock's proposed use of a broker to liquidate received products appears to avoid Phosrock's involvement in other than export trade and therefore falls under the protection of the Webb-Pomerene Act (the "Act"), 15 U.S.C. 65.

Based on the information provided, the Commission understands that Phosrock is an association formed pursuant to Section 5 of the Act. Membership is open to any person, firm or corporation mining phosphate rock in the United States. Phosrock makes no sales for United States domestic consumption, and does not have anything to do with determining the price of phosphate rock or any other product sold for United States domestic consumption.

Phosrock proposed in its July 10, 1986 letter to negotiate sales of phosphate rock on behalf of the Association to India and the Philippines. Phosrock anticipates that both India and the Philippines will not permit 100 percent cash payment, but will require Phosrock to accept as payment or partial payment some products of those countries. Phosrock proposes to accept shrimp. If the purchasing country requires Phosrock to accept Indian or Philippine products rather than cash in exchange, Phosrock will negotiate the exchange ratio of phosphate rock for shrimp. If a member requests that it receive its proportional share of the shrimp, Phosrock will arrange for it to receive bartered-for products in proportion to that member's contribution to the total amount of phosphate rock exported. Phosrock itself will neither consume nor resell the shrimp. If members elect not to receive their proportionate share of shrimp, Phosrock will turn the shrimp over to a shrimp broker for resale. Phosrock will distribute the cash proceeds of that sale to its members in proportion to their contribution to the amount of phosphate rock exported.

While Phosrock's current proposal contemplates Phosrock involvement in activities different from those the Commission approved in 1983, the Commission believes that, as long as Phosrock uses a broker to liquidate received products in this or any future barter programs it would be engaged solely in export trade as that term is defined in Section 1 of the Act, 15 U.S.C. 61, and its acts would constitute acts done in the course of export trade as that phrase is used in Section 2 of the Act, 15 U.S.C. 62.

The Commission has not examined the United States markets for phosphate rock and shrimp, to determine whether the proposed barter program will restrain trade in phosphate rock or shrimp in the United States, restrain the export trade of any of Phosrock's domestic competitors, artificially enhance or depress prices in the United States, substantially lessen competition, or otherwise restrain trade in the United States. Phosrock should take care to assure that its barter activities will not have any of the domestic effects prohibited by the Act.

This advisory opinion, like all those the Commission issues, approves only the conduct described in this letter, and that only so long as the barter program does not have any of the domestic effects prohibited by the statute. Phosrock would risk losing its Webb-Pomerene Association status, or an enforcement action, if it enlarged its participation in the proposed barter program beyond that described above. The Commission reserves the right to reconsider the legal and factual issues involved in this request, and to rescind or revoke its opinion in accordance with Section 1.3(b) of its Rules of Practice if implementation of the proposed barter program results in substantial anticompetitive effects, if Phosrock engages in activities not herein approved, or if the public interest otherwise requires.

By direction of the Commission.

Letter of Request

April 8, 1986

Dear Ms. Rock:

On behalf of the Phosphate Rock Export Association ("Phosrock" or the "Association") and its members, we are submitting this request for an advisory opinion from the Federal Trade Commission regarding a proposed barter program. The Federal Trade Commission previously approved Phosrock's request to barter phosphate rock for sulfur with the Governments of Mexico and Poland in an August 1, 1983 advisory opinion attached hereto as Exhibit A.* Phosrock's current request seeks an advisory opinion with respect to a contemplated

* Not reproduced herein. See 102 F.T.C. 1844.

barter program for various additional products with a variety of different countries. This proposed program is set forth in greater detail below along with a discussion of the pertinent background facts and our view of the program's legality under the antitrust laws.

Phosrock was formed in 1970 pursuant to Section 5 of the Webb-Pomerene Act.¹ Its Articles of Incorporation, By-Laws, form of Membership Agreement and current Annual Report are on file at the Federal Trade Commission.² The Association engages in all aspects of export sales activity in phosphate rock as a non-exclusive export channel for its members sales. Its responsibilities include market research and analysis, technical assistance, solicitation, negotiation and conclusion of export sales contracts, traffic coordination, invoicing, order processing and collection and distribution of the proceeds of sale. Phosrock is headquartered in Tampa, Florida, and has an office in Paris, France.

Phosrock is engaged solely in "export trade." The Association makes no sales for United States domestic use or consumption; it has nothing to do with determining the price of phosphate rock sold for consumption or use in the United States. Not only does Phosrock not control the amount of phosphate rock available either for sale in the United States or for export, it does not control the amount of rock its members will export. Under the Association's Membership Agreement, each member, acting individually, determines the amount of disposable phosphate rock it will make available for sale each year through the Association. A member's share of Association sales is determined as a function of its relative participation in past Association sales and as the proportion its nominated tonnage bears to the disposable phosphate rock nominated for sale by all members through the Association. Each member, in addition, retains the unfettered right to sell phosphate rock on terms and conditions which it determines individually, to any domestic person for whatever purpose, including exportation.³ Phosrock has no involvement in export sales by a member company to any affiliated company abroad.⁴

The phosphate rock exported by Phosrock is a mined raw material used in various phosphorous derivative industries, particularly in the manufacture of complex phosphatic fertilizers.⁵ Apart from the phosphate rock miners operating in the United States, virtually all other phosphate rock miners in the world are government-owned or con-

¹ 15 U.S.C. 65.

² The members of Phosrock are: Agrico Chemical Company, AMAX Chemical Corporation, Freeport Phosphate Rock Company, Gardinier, Inc., International Minerals & Chemical Corporation, Mobil Mining and Minerals Company, Occidental Chemical Company and W.R. Grace & Co. Membership in Phosrock is open to any person, firm or corporation engaged in the United States mining of phosphate rock.

³ In addition, subject to availability and mutual agreement on terms and conditions, Phosrock will sell and has sold phosphate rock to domestic persons for exportation.

⁴ The term "affiliated company" is defined in Phosrock's Membership Agreement to be a corporation in which a member has a 20% ownership interest.

⁵ See generally *Fertilizer Technology and Use* (2d Ed. 1972).

trolled. For example, the Office Cherifien des Phosphates (OCP) of Morocco holds the largest known deposits of minable phosphate rock in the world and derives a substantial portion from the export sale of phosphate rock. Other countries in which phosphate rock miners are government-controlled include Algeria, Egypt, Senegal, Tunisia, Jordan, Syria, China, Viet Nam, Ocean Islands, U.S.S.R., Brazil and Mexico.

Phosrock's efforts to promote American international trade in competition with foreign governmental units have been severely undercut by the worldwide recession in the fertilizer industry. Despite accelerating costs, real phosphate rock prices in the export market have declined to levels at or below producers costs. The industry is currently operating at substantially below capacity; employment has declined from 10,000 in 1981 to 5,500 in 1985.⁶ Because of these conditions, the Association has closed offices which it previously operated in Tokyo, Japan and Sao Paulo, Brazil.

In such a depressed market, Phosrock's problems have been compounded by the inability of many of its customers—usually foreign governments—to pay hard currency for phosphate rock. This has been true in the East Bloc countries like Poland as well as in developing countries such as Mexico and Brazil which are experiencing significant financial difficulties. The continuing sharp drop in oil prices is exacerbating this problem, particularly for countries like Mexico.

In order to combat these market conditions, Phosrock sought and obtained an advisory opinion from the Federal Trade Commission, dated August 1, 1983, which permits Phosrock annually to exchange phosphate rock for up to 400,000 M/T of sulfur with the Governments of Mexico and Poland.

Since 1983, the opportunities for countertrade have continued not only with Poland and Mexico but also have arisen in dealings with other potential customers. Brazil provides a useful illustration. When Phosrock was formed, Brazil was one of the larger markets for Florida phosphate rock, importing nearly a million metric tons per year (M/T/Y) from the Association and its members. Thereafter, the Brazilian Government determined to develop its indigenous phosphate resources and to aid that development by reducing and then virtually eliminating phosphate rock imports. After this government decision, imports fell from 1.6 million M/T in 1977 to 185,000 M/T in 1982 and to approximately 9,000 M/T in 1984. Despite the restrictions imposed on the Brazilian market to imported phosphate rock, the Brazilian government has made it known that purchase of Brazilian goods, like shrimp, by potential phosphate rock suppliers may aid in securing necessary import licenses to permit the sale of limited amounts of

⁶ See U.S. Department of the Interior, Phosphate Rock in 1985 attached hereto as Exhibit B. [Not reproduced herein.]

phosphate rock into Brazil. Indeed, granting of import licenses for Brazil from countries such as Senegal, Mexico and Israel have reportedly been influenced by such a balance of trade considerations.

Given these market conditions, Phosrock desires to be able to engage in a broad range of barter activities with customers in and/or with the governments of countries such as Brazil, India, Indonesia, the Philippines (sic) and Romania, as well as Mexico and Poland, in which Phosrock would exchange phosphate rock for shrimp, other types of fish, fruit, or other similar products not regularly sold in the ordinary course of business by Phosrock or its members. Accordingly, we are requesting the Federal Trade Commission to render an advisory opinion with regard to Phosrock's participation in such a barter program so that the Association need not seek advisory opinions each time it contemplates a slightly different form of barter transaction.

Under the proposed program, the Association would negotiate the exchange ratio for the products involved. No barter transaction will be considered if the quantity of the product to be obtained by the Association (the bartered product) in exchange for the Association's phosphate rock exceeds five percent of the available supply of the bartered product in any relevant U.S. market. In addition, if the bartered product is a product of the kind which a member of the Association or its affiliates sells in the ordinary course of its business, that member would not participate in the Association's decision whether to engage in the proposed barter transaction and would not participate in the Association's decision how to dispose of the bartered product. Unless a member requests that it receive its share of the bartered product directly, the Association in most instances plans to sell the bartered products to foreign or domestic purchasers upon the best terms it can negotiate.⁷ The Association then plans to distribute the money obtained from the sale of the bartered products to Association members on the basis of each member's proportionate contribution of the exported phosphate rock. For the reasons set forth below, we view the program as a permissible activity of a Webb-Pomerene association which, in any event, does not raise concerns under U.S. antitrust law.

This proposed barter program is substantially similar to the barter transaction which the FTC approved in its August 1, 1983 advisory opinion letter. The only difference between the two barter proposals is that in our earlier proposal, the bartered product to be received—sulfur—was one that could be consumed internally by Phosrock's members. Where that was not feasible, it was contemplated that Phosrock's members would individually resell the sulfur in the for-

⁷ In some instances however, Phosrock may be able to barter for products such as sulfur and residual oil, which can be consumed internally by Phosrock's members. Accordingly, in these instances those bartered products will not be resold, but distributed to Phosrock's members for their own use according to each member's proportionate contribution of the exported phosphate rock.

eign or domestic marketplace. The Commission agreed that such a barter transaction would constitute an "act in the course of export trade" and "would not artificially (sic) enhance or depress phosphate rock prices or otherwise restrain trade in U.S. markets for phosphate rock or sulfur." Under Phosrock's current barter proposal, most of the products for which Phosrock anticipates being able to trade—various types of fruit and fish and other similar products—will not be useable by Phosrock or its members. Accordingly, unless a member makes a request to the contrary, Phosrock plans to sell such products in the United States or elsewhere under the most favorable terms available and to allocate the money received from such sale to its members. This slightly different manner of disposing of the bartered products, however, does not remove the barter transaction from the course of export trade nor create any anticompetitive effects that would make it subject to antitrust challenge.

As a matter of definition, the exchange of goods for goods universally is recognized to be as much an act of trade as is the exchange of goods for currency. Accordingly, the Association's receipt and conversion of the bartered product must be considered to be an "act done in the course of export trade" in the same way that the Association's distribution of monies to members (sometimes after the conversion of such monies to U.S. dollars) is an act in the course of export trade. Such conduct is one of a variety of ways of implementing an export sale; in some circumstances, as here, where the members of the Association have no experience with, or expertise in, using or trading the bartered product, it is the most efficient and possibly the only feasible way of implementing the barter transaction.

In light of the Webb-Pomerene Act's primary purpose of promoting export trade by permitting American companies to combine in export associations without fear of antitrust exposure, and the Congressional expectation that the Act would apply to export trade via barter,⁸ it would be unwarranted to attribute to Congress the intent to bring certain types of barter transactions within the umbrella of Webb-Pomerene immunity and to exclude others without clear evidence that such exclusion from protection of these other types of barter transactions rested on concerns with respect to the *effect* on domestic competition produced by such transactions rather than the *form* adopted to accomplish the barter transaction in question.

It is quite true that Congress sought to foreclose the potential for the abuse of the grant of Webb-Pomerene immunity if export associations were to turn around and sell in domestic channels the *same* commodities that they had been permitted to band together to export. In order to safeguard the domestic market, Congress added the follow-

⁸ At time of the Act's passage, barter was as it is today, an important trading method that was and is necessary to employ if U.S. associations are to become better matches for their powerful international trading rivals.

ing qualification to the definition of "export trade" in Section 1 of the Webb-Pomerene Act:

but the words "export trade" shall not be deemed to include the production, manufacture or selling for consumption or for resale within the United States or any Territory thereof, *of such goods, wares or merchandise*, or any act in the course of such production, manufacture or selling for consumption or for resale. (Italics added)⁹

The phrase "such goods, wares or merchandise" refers to those products being "exported, or in the course of being exported from the United States."

While the proviso directly addresses the congressional concern that members of export association be prevented from colluding to restrain domestic trade in the class of products they are selling overseas, it does not preclude a Webb-Pomerene association from receiving and disposing of other products in exchange for exported products.¹⁰ The limitation to the definition of export trade in Section 1 of the Webb-Pomerene Act thus offers no support for an artificial interpretation of the Act which would make the most common forms of barter transactions ineligible for Webb-Pomerene immunity. Barter is export trade and conversion of a bartered product to currency is a necessary act in the course of such export trade.

Moreover, even though the proposed barter program constitutes an act "in the course of export trade," the program is not automatically immunized from antitrust scrutiny. Rather, under section 2 of the Act, Phosrock's proposed barter program still would be subject to antitrust attack if it: restrained trade within the United States; restrained the export trade of any domestic competitor of the Association; served artificially or intentionally to enhance or depress prices with the United States of commodities of the class exported by the Association; or substantially lessened competition within the United States.¹¹ However, analysis of the proposed barter program together with the Commission's prior approval of Phosrock's annual barter of 400,000 M/T of sulfur with Poland and Mexico suggest that no such antitrust concerns will be raised here.

Whether Phosrock is engaged in exports for cash or barter, the Association has no role whatsoever in determining the price of phosphate rock within the United States. Thus, there is no feature of the barter program that might serve "artificially or intentionally to en-

⁹ 15 U.S.C. 61. Congress provided in the same vein that if any conduct, whether an act of export trade or not, substantially restrained domestic trade or lessened competition in the United States, it would be subject to antitrust attack. See 15 U.S.C. 62.

¹⁰ Thus, it deserves emphasis that Phosrock's proposal does not contemplate either the introduction or the reintroduction of the export product—phosphate rock—into domestic commerce. Under the plan, the product that reaches U.S. shores would be that proffered by a foreign customer in exchange for phosphate rock.

¹¹ 15 U.S.C. 62. Indeed, it is precisely because of this ability to challenge any such anticompetitive activity of a Webb-Pomerene Association that the Commission should not adopt an unduly restrictive interpretation of those activities that constitute "export trade" or acts "in the course of export trade."

hance or depress prices within the United States" of Phosrock's export product. With respect to the possible restraint of the export trade of a competitor of the Association, we can contemplate no ill effect on an American rival of Phosrock from the Association's engaging in the proposed barter program. Just as is the case when Phosrock trades its export product for currency, a nonmember American company selling in the same foreign market is free to compete with the Association on whatever terms it chooses to offer. In addition, membership in the Association is open to all American producers of phosphate rock.

Finally, no aspects of Phosrock's proposed barter program will restrain trade within the United States or substantially lessen competition within the United States. On the contrary, the proposed barter program is structured so that the products to be bartered for in most instances will be products that the Association and its members do not produce, or sell in the ordinary course of their business.¹² While on occasion, Phosrock may barter for other products like sulfur and residual oil which its members can consume internally,¹³ the quantity of product received will be such that its acquisition and consumption by Phosrock's members could not restrain trade. Indeed, the Association will never engage in a barter transaction in which it intends to consume or resell the bartered product in U.S. commerce, if the quantity of the bartered product to be received by the Association comprises 5% or more of the available supply of that bartered product for any domestic U.S. market. Moreover, in most instances, the quantity of the bartered product which Phosrock receives will comprise a fractional percentage at best of the available product supply. In a word, the program will be operated so as to ensure that the Association does not possess "market power" in any bartered product for which it may trade.

Thus, even if Phosrock's proposed barter program is viewed as employing a joint buying or selling arrangement, it is well-established that such cooperative buying or selling arrangements in and of themselves are not *per se* illegal. They raise antitrust concerns only when the group has substantial economic power in the market for the commodity to be purchased or sold¹⁴ or when the arrangement is accom-

¹² In the event that the Association barter phosphate rock for a product which is sold in the regular course of business by a member or its affiliate, the member will not participate in deciding whether the Association shall participate in the barter transactions and shall not participate in the Association's decision regarding the disposal of the bartered product.

¹³ See note 7 *supra*.

¹⁴ Thus, the courts have frequently held that the operations of buying and selling groups (e.g., of theatre owners jointly purchasing films; of small grocers purchasing food-stuffs in bulk; of greeting card buyers using a buying corporation; of competing coal producers using a joint selling agent; and of copyright holders using a joint licensing agent) do not violate the antitrust laws. See *Central Retailer-Owner Groceries, Inc. v. FTC*, 319 F.2d 410 (7th Cir. 1963) (small grocers); *Arkansas Brokerage Co. v. Dunn & Powell, Inc.*, 173 F. 899 (8th Cir. 1909) (mercantile jobbers); *G&P Amusement Co. v. Regent Theatre Co.*, 107 F.Supp. 453 (N.D. Ohio 1952), *aff'd*, 216 F.2d 749 (6th Cir. 1954) (theatres); *Mid-West Theatres Co. v. Cooperative Theatres, Inc.* 43 F.Supp. 216 (E.D. Mich. 1941) (theatres); *Associated Greeting Card Distrib.*, 50 F.T.C. 631 (1954) (greeting cards); *Appalachian Coals Inc. v. U.S.*, 288 U.S. 344 (1933) (coal producers); *Broadcast Music Inc. v. CBS*, 441 U.S. 1, 14-15 (1979) (copyright owners).

panied by anticompetitive restrictions on the members' ability to resell the commodity purchased.¹⁵ As set out herein, neither of those conditions would be present under Phosrock's proposal. Thus, the program will not substantially lessen competition within the United States.¹⁶

In passing the Webb-Pomerene Act, Congress sought to provide American companies with the flexibility for combatting foreign buying and selling cartels in order to expand U.S. export trade. Phosrock's proposed barter program promotes this objective without endangering U.S. commerce in any respect. Neither domestic commerce in phosphate rock or the bartered product will be substantially affected.¹⁷

We would be happy to meet with you to discuss this matter in greater detail or to provide you with any further written information you may require. We look forward to hearing from you and, we would hope, your response could be available as expeditiously as possible.

Thank you for your consideration in this matter.

Very truly yours,

Howard W. Fogt, Jr.
Counsel to the Phosphate Rock
Export Association

Second Letter of Request

July 10, 1986

Dear Ed:

In light of our discussions, Phosrock has decided to revise its April 8, 1986 request for an advisory opinion regarding a broad range of proposed barter and countertrade activities. This letter limits our request, as set forth below, to certain specific activities regarding the Association's efforts to sell phosphate rock to India and The Philippines. Accordingly, we hereby withdraw all aspects of our April 8, 1986 request which sought advice regarding matters other than those described below.

¹⁵ Under our program, each member will determine individually whether it wishes to participate in any proposed barter transaction and whether it would like to receive its share of the bartered product directly or receive dollars after the Association sells the bartered product in the foreign or domestic marketplace.

¹⁶ We recognize of course that while the proposed barter program will be structured so that the Association does not obtain "market power" in any of the bartered products it receives, the Commission will always reserve its right to take appropriate enforcement action if the program's rules are not followed or otherwise result, for whatever reason, in a substantial lessening of competition in domestic commerce.

¹⁷ Because the proposed barter program would not violate Section 1 of the Sherman Act, it would not run afoul of the Wilson-Tariff Act, 15 U.S.C. 8, either. As Judge Becker held in *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F.Supp. 1100, 1163-64 (E.D. Pa. 1981), "the Wilson-Tariff Act sought to make clear that import trade was subject to the scrutiny of the antitrust laws" and, as such, is coterminous with Section 1 of the Sherman Act. See also *Outboard Marine Corp. v. Petzel*, 461 F.Supp. 384, 407 (D. Del. 1978).

As you know, in order to promote export trade in phosphate rock most efficiently, Phosrock must overcome the inability of Phosrock's actual and potential customers in the developing world to pay cash for phosphate rock and their insistence (sic) on barter and countertrade as, at least, a partial solution to this problem.¹ This issue is particularly important in India and The Philippines, both longtime consumers of large amounts of phosphate rock. More importantly, in both countries, new, significant fertilizer plants are being built. These plants are among the very few new opportunities to enlarge phosphate rock export sale that have come along in recent years. With respect to both the Paradip project in India and the Philphos project in The Philippines, the Association faces intense competition from foreign government owned or controlled phosphate rock suppliers from Morocco, Jordan, Oceania and Israel. Some are competing by offering to take an equity position in the new facility. All are prepared to engage in barter and countertrade, if necessary, to get the business. Nevertheless, there is an opportunity for Phosrock to sell 400/500,000 M/T of phosphate rock per year and realize approximately \$15,000,000 in much needed revenues.

In both situations, the Association has been told that barter and countertrade will be important considerations in selecting phosphate rock suppliers. In India, fertilizer inputs (sic) are purchased by the government-owned Minerals and Metals Trading Corporation of India Ltd. ("MMTC"). While preferring to do business on a cash basis, MMTC has recently informally advised that Indian government policy will require that twenty percent of the cost of fertilizer inputs be paid for through barter or countertrade of Indian products. It is understood that this minimum level of barter and countertrade activity may be raised in the near future by the Indian government to fifty percent. Similar incentives to barter phosphate rock exist in The Philippines. In light of the prospects for export trade in phosphate rock to be undertaken on the basis of barter and countertrade, the Association has identified shrimp from India and The Philippines for sale in the United States or elsewhere as an important opportunity for Phosrock to secure a share of this new phosphate rock export business.

There can be no legitimate question that Phosrock's barter or countertrade of phosphate rock for shrimp, under these circumstances, would restrain any domestic trade. The United States is the world's largest consumer of shrimp. American apparent consumption of shrimp increased from 423 million pounds in 1980 to 604 million

¹ See, Agrawai, "Countertrade and Bilateral Trade Agreements in Fertilizers" and Tanco, "Countertrade in the Fertilizer Industry," IX *Agro-Chemicals News In Brief* 10 ff (1986), attached hereto as Exhibit A. [Not reproduced herein.]

pounds in 1984.² The industry is highly unconcentrated. Much of the shrimp consumed in the United States is imported from many countries around the world. U.S. shrimp imports increased from 219 million pounds in 1980 to 342 million pounds in 1984.³ The value of 1984 imports was \$1.2 billion. The industry is "extremely competitive" with prices in this "highly competitive market . . . adjusting daily to changes in supply and demand."⁴

The barter and countertrade of phosphate rock for shrimp presents (sic) a very practical and natural way for Phosrock to respond to the opportunities presented in India and The Philippines. Such activity would clearly enhance U.S. international trade without any possible legitimate question of restraints on domestic trade in phosphates or shrimp. Indeed, even if Phosrock were to trade shrimp for all of the 500,000 M/T potential of this new phosphate rock business, it would account for only .08% of U.S. value of shrimp imports. No serious antitrust risk can be posed by such activity. Accordingly, the Association requests the Federal Trade Commission, through its advisory opinion, to authorize Phosrock to barter and countertrade phosphate rock for shrimp up to an annual limit of \$15,000,000.

As in past barter transactions, the Association would negotiate the exchange of phosphate rock for shrimp. Each member of the Association would determine individually whether it wished to participate in the transaction. Unless in the unlikely event a member requests that it receive shrimp as its share of the consideration for the phosphate rock sold, the Association immediately plans to convert to cash the shrimp received in such transactions through the use of a seafood broker who will have full authority to sell the shrimp at market on terms which it alone will negotiate. Immediately thereafter, the Association will distribute the money obtained from the sale to its members on the basis of each member's proportionate contribution of the exported phosphate rock. We believe these activities to be substantially similar to the barter activities approved in the Commission's August, 1983 advisory opinion and to constitute "export trade" or "act[s] done in the course of export trade."

Because this matter has been pending since April 8, 1986 and because of its great importance for the Association, we would appreciate your most expeditious consideration of this request.

Sincerely yours,

Howard W. Fogt, Jr.
Counsel for the Phosphate Rock
Export Association

² United States International Trade Commission, "Conditions of Competition Affecting the U.S. Gulf and South Atlantic Shrimp Industry," Report No. 332-201, p.143 (1985).

³ *Id.* at 153. See Table 61 attached as Exhibit B. [Not reproduced herein.]

⁴ *Id.* at iii and 188.

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