

Complaint

102 F.T.C.

IN THE MATTER OF
ESTEE CORPORATION

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

Docket C-3126. Complaint, Nov. 16, 1983—Decision, Nov. 16, 1983

This consent order requires a Parsippany, N.J. manufacturer and marketer of health-related food products, among other things, to cease representing that any of its products have been accepted or recommended for use by diabetics or persons with hypoglycemia unless the identity of the endorser and the material qualifications or limitations placed on the endorsement are disclosed. If the company promotes a food as being appropriate for diabetics, it is required to disclose that the product is "not a reduced calorie food" in advertising and on package labels pursuant to FDA regulations. Representations that a food will or will not affect blood sugar levels, or that it has any health-related property for diabetics or hypoglycemics must be substantiated. Further, the firm is barred from misrepresenting the existence or truthfulness of endorsements; the identity of any sweetener; or that food containing fructose contains no sugar, is reduced in calories and is appropriate for weight control. The order additionally requires the company to provide the American Diabetes Association, Inc. or the Juvenile Diabetes Foundation with the sum of \$25,000 and to maintain files substantiating advertising claims for a period of three years.

Appearances

For the Commission: *Robert C. Cheek and Joel Winston.*

For the respondent: *Daniel L. Goldberg, Bingham, Dana & Gould,*
Boston, Mass.

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 Estee Corporation (hereinafter "Estee"), hereinafter at times referred to as respondent, has violated the provisions of the 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. Estee is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its office and principal place of business located at 169 Lackawanna Avenue, Parsippany, New Jersey.

PAR. 2. Estee has been and now is engaged in the business of marketing and advertising health-related foods, including but not limited to foods promoted as appropriate for diabetics.

PAR. 3. The above-named respondent, in connection with the manufacture and marketing of said foods, has disseminated, published and distributed, and now disseminates, publishes and distributes, advertisements and promotional material for the purpose of promoting the sale of Estee's "special foods." These foods are sweetened with fructose, sorbitol, or high fructose corn syrup. Each of these foods, as advertised, is a "food" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its said business, respondent has disseminated and caused the dissemination of certain advertisements concerning its special foods through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to the insertion of advertisements in magazines and newspapers with national circulations, the mailing of promotional booklets entitled "Estee . . . Special Foods For Special Diets" and "The Rationale For Special Dietary Foods Made With Fructose" for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of Estee's special foods.

PAR. 5. Respondent has, directly or by implication, through the advertisements referred to in Paragraph Four and others, made statements concerning the positions of the Food and Drug Administration and American Diabetes Association on the consumption by diabetics of the sweeteners used in Estee's special foods. Typical of the statements in said advertisements, but not necessarily all-inclusive thereof, are the following:

The nutritive sweeteners Sorbitol and Fructose have been accepted by the ADA and the FDA as being useful in the diets of diabetics on the advice of a physician.

* * * * *

Estee cookies are now sweetened with FRUCTOSE. The use of this all natural sweetener was recently reviewed by the American Diabetes Association. They concluded: "Thus, from short-term studies there appears to be *no need to restrict intake of Fructose* as compared with *complex carbohydrates* as it relates to changes in plasma glucose levels in diabetes." [Emphasis in original.]

PAR. 6. Through the use of the statements set forth in Paragraph Five and others, in the context in which they appeared, respondent has represented, directly or by implication, that the Food and Drug Administration and the American Diabetes Association each has concluded that the sweeteners in Estee's special foods are useful without significant qualifications in the diabetic's diet.

PAR. 7. In truth and in fact, the statements and representations set forth in Paragraphs Five and Six, in the context in which they appeared, were and are false, misleading and deceptive, in that:

(a) The Food and Drug Administration has made no conclusions about the usefulness of fructose, sorbitol, or high fructose corn syrup—the sweeteners in Estee's special foods—in the diabetic's diet.

(b) The American Diabetes Association has made no conclusions about the usefulness of Estee's high fructose corn syrup in the diabetic's diet, and its conclusions (as stated in Olefsky and Crapo, "Fructose, Xylitol, and Sorbitol," *Diabetes Care*, Vol. 3, No. 2 (March-April, 1980)) about the usefulness of fructose and sorbitol contain significant qualifications.

Therefore, neither the Food and Drug Administration nor the American Diabetes Association has concluded that the sweeteners in Estee's special foods are useful without significant qualifications in the diabetic's diet. For the foregoing reasons, the advertisements referred to in Paragraphs Four and Five were and are misleading in material respects and constituted, and now constitute, false advertisements.

PAR. 8. Respondent has, directly or by implication, through the advertisements referred to in Paragraph Four and others, made statements concerning the dietary qualities of Estee's special foods. Typical of the statements in said advertisements, but not necessarily all-inclusive thereof, are the following:

We know what it's like to live on a diet in a world filled with cookies, candies, and mouthwatering desserts. That's why we've created the world's largest assortment of diet treats. . . . We know you're always looking for ways to satisfy your desire for sweets while still staying within your diet.

* * * * *

In an advertisement with the heading "LIFE CAN BE SWEET WITHOUT A LOT OF SUGAR" and with an image of Estee's "DIETETIC" coconut cookies prominently pictured:

Fructose is nature's sweetest sugar, commonly found in many fruits and berries. It's up to 50% sweeter than regular sugar, and it's even recommended for use by diabetics and hypoglycemics We'd like you to try our products made without sugar. . . .

PAR. 9. Through the use of the statements set forth in Paragraph Eight and others, in the context in which they appeared, respondent has represented, directly or by implication, that:

(a) Estee's foods are significantly reduced in calories compared with comparable foods.

(b) Estee's foods are useful or appropriate for weight control.

PAR. 10. In truth and in fact:

(a) Many of Estee's foods are not significantly reduced in calories compared with comparable foods.

(b) Many of Estee's foods are not useful or appropriate for weight control.

Therefore, the advertisements referred to in Paragraphs Four and Eight were and are misleading in material respects and constituted, and now constitute, false advertisements, and the statements and representations set forth in Paragraphs Eight and Nine, in the context in which they appeared, were and are false, misleading and deceptive.

PAR. 11. Respondent has, directly or by implication, through the advertisements referred to in Paragraph Four and others, made statements concerning the identity and properties of the sweeteners used in Estee's special foods, and the usefulness or appropriateness of Estee's special foods for diabetics. Typical of the statements in said advertisements, but not necessarily all-inclusive thereof, are the following:

Estee Cookies are sweetened with FRUCTOSE, the natural sweetener that delivers the clean, sweet sugar taste that diabetics and hypoglycemics have always been denied.

* * * * *

At Estee, our business is making life a little sweeter for people who can't afford a lot of ordinary table sugar (sucrose) in their diets. *Instead, we use sorbitol and fructose*, the slowly absorbed sweeteners that avoid the "highs and lows" of ordinary table sugar. [Emphasis in original.]

* * * * *

Here is a special cookie designed for people with diabetes, hypoglycemia and hypertension, who must restrict their intake of ordinary sugar and salt.

* * * * *

It's [fructose] up to 50% sweeter than regular sugar, and it's even recommended for use by diabetics and hypoglycemics.

* * * * *

We'd like you to try our products made without sugar. . . .

* * * * *

Meet the newest member of the Estee family of fine products—LOW CALORIE AND NO SUGAR FOODS.

PAR. 12. Through the use of the statements set forth in Paragraph Eleven and others, in the context in which they appeared, respondent has represented, directly or by implication, that:

(a) The sweetener in all of Estee's "fructose"-sweetened special foods is fructose.

(b) Estee's special foods, including its "fructose"-sweetened special foods, do not contain any sugar.

PAR. 13. In truth and in fact:

(a) The sweetener in certain of Estee's "fructose"-sweetened foods is not fructose, but rather is high fructose corn syrup.

(b) Estee's "fructose"-sweetened foods contain fructose, which is a sugar, or high fructose corn syrup, which is comprised of sugars.

Therefore, the advertisements referred to in Paragraphs Four and Eleven were and are misleading in material respects and constituted, and now constitute, false advertisements, and the statements and representations set forth in Paragraphs Eleven and Twelve, in the context in which they appeared, were and are false, misleading and deceptive.

PAR. 14. Through the use of the statements set forth in Paragraph Eleven and others, in the context in which they appeared, respondent has represented, directly or by implication, that Estee's fructose- and sorbitol-sweetened special foods are useful or appropriate for the diabetic's diet.

PAR. 15. At the time of the disseminations of the statements and representations contained in Paragraphs Eleven and Fourteen, respondent did not possess and rely upon a reasonable basis for making such unqualified statements and representations, in that:

(a) Estee's fructose- and sorbitol-sweetened special foods should not be eaten in more than limited amounts by any diabetic.

(b) Many diabetics are on weight loss or weight control diets, and many of Estee's fructose- and sorbitol-sweetened special foods are not reduced in calories and therefore are not useful or appropriate for purposes of weight loss or weight control.

(c) Estee's fructose- and sorbitol-sweetened special foods are not appropriate for diabetics who are untreated or who are out-of-control.

Therefore, the making of said statements and representations as alleged constituted, and now constitutes, unfair and deceptive acts or practices in or affecting commerce.

PAR. 16. Through the use of the statements set forth in Paragraph Eleven and others, in the context in which they appeared, respondent has represented, directly or by implication, that:

(a) the sweetener in Estee's cookies and other high fructose corn syrup-sweetened special foods has the same characteristics as fructose, including its effects on diabetics' blood sugar levels.

(b) Estee's cookies and other high fructose corn syrup-sweetened special foods are useful or appropriate for the diabetic's diet and will not cause undesirable elevations of diabetics' blood sugar levels.

PAR. 17. At the time of the disseminations of the statements and

representations contained in Paragraphs Eleven and Sixteen respondent did not possess and rely upon a reasonable basis for making such statements and representations. Therefore, the making of said statements and representations as alleged constituted, and now constitutes, unfair and deceptive acts or practices in or affecting commerce.

PAR. 18. In the course and conduct of its aforesaid business and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the food industry.

PAR. 19. The use by respondent of the aforesaid unfair and deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true.

PAR. 20. The aforesaid acts and practices of respondent, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted, and now constitute, unfair methods of competition in or affecting commerce, and unfair and deceptive acts or practices in or affecting commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

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

The 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, 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 Estee Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 169 Lackawanna Avenue, in the City of Parsippany, State of New Jersey.

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

For the purposes of this order, the term *food* shall mean and include any article used for food or drink for humans, chewing gum, and any article used for a component of any such article.

Any provision of this order shall not cover labels or labeling if such provision is inconsistent with regulations of the Food and Drug Administration or with the statutes it enforces.

The provisions of this order shall not apply to any label or labeling printed by respondent before the date of service of this order and shipped by respondent to distributors or retailers prior to January 1, 1984 or the date of service of this order, whichever is later.

I

It is ordered, That respondent Estee Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any food 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 any food is accepted or recommended by an individual or organization other than the advertiser for use by a diabetic or hypoglycemic, unless in immediate conjunction with such representation the following is disclosed with equal prominence:

1. the identity of the individual or organization, and

2. all material qualifications or material limitations, if any, placed on the acceptance or recommendation by the individual or organization.

B. Failing to clearly and prominently disclose in a non-label advertisement: "This food is not a reduced calorie food," when:

1. respondent makes a representation, directly or by implication, in the advertisement that any food is an appropriate part of a diabetic's diet, and

2. a disclosure is required on the label that the food is not a reduced calorie food pursuant to regulations promulgated by the Food and Drug Administration.

Provided, That, where more than one food is promoted by a single advertisement, and a label disclosure is required pursuant to regulations promulgated by the Food and Drug Administration for one or more of the advertised foods, this section shall be satisfied if the following statement is clearly and prominently disclosed in the advertising: "Some of these foods are not reduced calorie foods."

C. Making any representation, directly or by implication, about the health-related comparability of one sweetener to another sweetener, unless at the time of dissemination of each such representation respondent possesses and relies on a reasonable basis which substantiates each such representation, consisting of competent and reliable scientific evidence of the type and quantum appropriate for the representation made.

D. Representing, directly or by implication, that a food:

1. will or will not affect blood sugar levels in any manner, or
2. has any health-related property or quality for diabetics or hypoglycemics,

unless at the time of dissemination of each such representation respondent possesses and relies on a reasonable basis which substantiates each such representation, consisting of competent and reliable scientific evidence of the type and quantum appropriate for the representation made.

E. Misrepresenting, directly or by implication:

1. the existence or truthfulness of any endorsement or recommendation,
2. the identity of any sweetener,
3. that any food which contains fructose or high fructose corn syrup does not contain any sugar, *provided*, that, this provision shall not prohibit respondent from truthfully representing that a food does not contain "sucrose" or "table sugar."

4. that a food is reduced in calories compared to other foods or is appropriate for weight control.

II

It is further ordered, That respondent shall, within twenty-four (24) months after the date of service of this order, provide the aggregate sum of \$25,000 to the American Diabetes Association, Inc. or the Juvenile Diabetes Foundation. Said funds shall be designated as "for the purposes of research into dietary management of diabetes," *provided* that, if any of such funds are not used by the recipient organization(s) for said purposes, such funds shall revert to the general research funds of the organization(s).

III

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

IV

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

V

It is further ordered, That respondent shall maintain files and records of all substantiation for claims made under Parts IC and ID of this order for a period of three (3) years after the dissemination of any advertisement containing such claim. Additionally, such material shall be made available to the Federal Trade Commission or its staff within fifteen (15) days of a written demand for such material.

VI

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

IN THE MATTER OF

ENDICOTT-JOHNSON CORPORATION

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

Docket C-1009. Consent Order, Oct. 29, 1965—Modifying Order, Nov. 17, 1983

On Nov. 17, 1983, the Federal Trade Commission modified the order issued against Endicott-Johnson Corp. on Oct. 29, 1965 (68 F.T.C. 842). The modification eliminates the provision which prohibited the company from acquiring any concern engaged in the manufacture and sale of footwear in the U.S. without prior Commission approval.

ORDER MODIFYING CEASE AND DESIST ORDER
ISSUED ON OCTOBER 29, 1965

On October 29, 1965, the Federal Trade Commission, pursuant to Section 5 of the Federal Trade Commission Act and Section 11 of the Clayton Act, issued the consent order in this case against Endicott-Johnson Corporation prohibiting, for a period of twenty years, acquisitions of certain firms engaged in the manufacture or sale of shoes or footwear in the United States or the District of Columbia, without prior approval of the Commission.

The Commission has determined that absent special circumstances an order provision that requires prior Commission approval of acquisitions by the respondent should not exceed ten years in duration. In most cases, the Commission believes that such prior approval provisions will have served their remedial and deterrent purposes after ten years and that the findings upon which such provisions are based should not be presumed to continue to exist for a longer period of time. The order in this case has been in effect for 17 years and the Commission has determined that no special circumstances warrant continued prior approval of respondent's acquisitions. The Commission therefore has determined that it would be in the public interest to modify its order in Docket No. C-1009 to provide that prior approval will not be required after October 31, 1983.

On October 7, 1983 the Commission issued an order to show cause why the order in Docket No. C-1009 should not be modified. The proposed modification was accepted by respondent.

Accordingly,

It is ordered, That this matter be, and it hereby is, reopened and that the order in Docket No. C-1009 be modified.

Modifying Order

102 F.T.C.

IN THE MATTER OF

TEAC CORPORATION OF AMERICA

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-2752. Consent Order, Oct. 24, 1975—Modifying Order, Nov. 25, 1983*

The Federal Trade Commission has modified the order issued against TEAC Corporation of America on Oct. 24, 1975 (86 F.T.C. 981) to allow the company to prevent transshipment of its products to dealers who do not meet reasonable, non-discriminatory standards of promotion, service and display.

ORDER MODIFYING CEASE AND DESIST ORDER
ISSUED ON OCTOBER 24, 1975

On October 24, 1975, the Federal Trade Commission ("Commission") issued an order against TEAC Corporation of America ("TEAC") in Docket No. C-2752, 86 F.T.C. 981 (1975), prohibiting TEAC from, among other things, restricting or limiting in any manner the customers or classes of customers to whom dealers may sell TEAC's products.

On March 8, 1983, the Commission issued a modified order in *U.S. Pioneer Electronics Corporation*, Docket No. C-2755 [101 F.T.C. 372], allowing Pioneer (one of TEAC's competitors) to prevent transshipment of its products to dealers who do not meet reasonable, non-discriminatory standards of promotion, service and display. The initial *Pioneer* order contained the same provisions that are contained in the TEAC order. Both orders contain a most favored respondent clause pursuant to which the Commission may modify the respective orders in order to bring them into conformity with less stringent restrictions imposed on the respondents' competitors.

On August 1, 1983, the Commission issued an order to show cause why the proceeding in Docket No. C-2752 should not be reopened to modify Paragraph I(11) of the order in this case to read as follows:

Preventing or prohibiting any independent dealer or distributor from reselling his products to any persons or group of persons, business or class of businesses, except as expressly provided herein. This order shall not prohibit respondent from establishing lawful, reasonable, and non-discriminatory minimum standards for its dealers, including standards that relate to promotion and store display, demonstration, inventory levels, service and repair, volume requirements and financial stability, nor shall this order prohibit respondent from requiring its dealers who sell respondent's products for resale to make such sales only to dealers who maintain such minimum standards.

The proposed modification was accepted by TEAC. In view of the Commission's action in *Pioneer*, the Commission believes that this modification is in the public interest.

Accordingly,

It is ordered, That this matter be, and it hereby is, reopened and that Paragraph I(11) of the order in Docket No. C-2752 be modified as indicated above.

IN THE MATTER OF

JIM WALTER CORPORATION, ET AL.

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

Docket 8986. Amended Complaint, June 15, 1982—Decision, Nov. 30, 1983

This consent order requires a leading manufacturer of shell housing and construction materials, and its wholly-owned subsidiary, among other things, to timely divest, to a Commission-approved buyer, the asphalt roofing plants located in Wilmington, Ill., Philadelphia, Pa., Chester, W. Va. and Memphis, Tenn., including their adjacent felt mills. Should any of the plants not be divested within 15 months of the effective date of the order, a trustee appointed by the Commission will effect divestiture of the remaining plant or plants. The order requires respondents to cooperate with the trustee in the discharge of his/her duties, and compensate him/her for the reasonable value of his/her services, including expenses. Further, for a period of 10 years, respondents are prohibited from acquiring any asphalt roofing plant in 41 specified states without prior Commission approval.

Appearances

For the Commission: *David W. Long.*

For the respondents: *W. Donald McSweeney, William A. Montgomery, John J. Voortman and Walter C. Greenough, Schiff, Hardin & Waite, Chicago, Ill.*

AMENDED COMPLAINT

In the exercise of authority vested in it by the Federal Trade Commission Act, the Federal Trade Commission, having reason to believe that respondents Jim Walter Corporation, a corporation, and The Celotex Corporation, a corporation, have violated Section 7 of the Clayton Act (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and that a further proceeding in respect thereof concerning the acquisition of and merger with Panacon Corporation, would be in the public interest, issues this amended complaint charging as follows:

I. DEFINITIONS

1. For the purpose of construing this complaint the following definitions shall be controlling:

(a) *Saturated felts* consist of a dry felt base, made from rags, wood,

and other cellulose fibers or from glass fibers or asbestos, which is saturated, coated or impregnated with an asphalt or tar saturant.

(b) *Roll roofing* is made from a saturated felt by applying an additional coating of more viscous, weather-resistant asphalt.

(c) *Asphalt shingles* are mineral-surfaced roll roofing machine-cut into squares or strips.

(d) *Asphalt and tar roofing materials* and *asphalt roofing materials* are used interchangeably herein to refer to saturated felts, roll roofing, and asphalt shingles, but specifically excludes accessory items such as asphalt cements, adhesives, primers, and mineral granules.

(e) *Elastomeric roofing materials* includes both solid pre-formed sheets and liquids made of synthetic polymer materials. The principal elastomeric roofing materials, available in either liquid or sheet applied systems, include acrylic, butyl, chlorosulphinated polyethylene, EPDM, neoprene, polyvinyl chloride (PVC), vinyl, rubberized asphalt, silicone and urethane.

II. RESPONDENTS

2. Jim Walter Corporation (hereafter "JWC") is a publicly-held corporation chartered and operating under the laws of the State of Florida, with its principal place of business at 1500 North Dale Mabry Highway, Tampa, Florida.

3. The Celotex Corporation (hereafter "Celotex" or the "Celotex Division") is a fully-owned subsidiary of JWC, chartered under the laws of the State of Delaware. Its principal place of business is 1500 North Dale Mabry Highway, Tampa, Florida.

4. In addition to being the leading manufacturer of shell (partially finished) housing, JWC also ranks as a major producer of construction materials. At the time of the acquisition in question here (*see IV, infra*), most of the corporation's activities were conducted through eight operational groups: mineral and fiber products; metals and wood products; stone and concrete products; pipe products; homebuilding supplies; paper; sugar operations; and oil and gas operations. Since its incorporation in 1955, JWC has managed to increase its share of the shell house market by internal expansion, and diversified into homebuilding supplies via acquisition. During the period 1964 to 1974 alone, JWC acquired no fewer than seventeen separate companies. For its fiscal year ending August 31, 1972, the year of the acquisition in question, JWC reported revenues of \$881,737,000; total assets of \$983,217,000; and a net income of \$44,568,000. On the basis of these figures, the May 1973 *Fortune 500* issue ranked JWC as the 161st largest industrial corporation in the United States.

5. On July 12, 1962, JWC revealed the details of its agreement to purchase a 34 percent stock interest in Celotex. A principal manufac-

turer of insulation fiberboard, mineral wool, gypsum, and asphalt roofing materials, Celotex became a fully-owned subsidiary of JWC by the close of 1964. JWC further expanded its capacity to produce building materials and, in particular, roofing products by acquiring the Barrett Building Materials Division of Allied Chemical Corporation in 1967. The merger of Barrett into JWC's Celotex Division extended Celotex' capabilities in roofing materials from one plant to eight.

6. At all times relevant to this complaint JWC and Celotex sold and shipped, and continue to sell and ship, their products in interstate commerce throughout the United States. Consequently, JWC and Celotex were at the date of the acquisition in question here, and are now, engaged in or affecting commerce as "commerce" is defined in the Clayton Act (15 U.S.C. 12) and the Federal Trade Commission Act (15 U.S.C. 44).

III. PANACON CORPORATION

7. Prior to April 17, 1972, Panacon Corporation (hereafter "Panacon") was a corporation chartered and operating under the laws of the State of Michigan, with a principal place of business at 320 South Wayne Ave., Cincinnati, Ohio. The Glen Alden Corporation owned 89 percent of the outstanding common stock of Panacon prior to April 1972.

8. At the time of its acquisition, Panacon was a substantial manufacturer of a wide range of products for residential and commercial construction and industrial applications. Organized in six operating divisions, Panacon produced and marketed such diverse products as vitreous china, porcelain-on-steel plumbing ware, floor tiles, roofing materials, insulations, bathroom cabinets, lighting fixtures, ventilating fans, electric fireplaces, and water heaters. For its fiscal year ending December 31, 1971, Panacon reported revenues of \$181,129,000; total assets of \$106,008,000; and a net profit of \$10,591,000.

9. On April 9, 1970, the Plan and Agreement of Merger executed on December 31, 1969, by the Philip Carey Corporation and Briggs Manufacturing Company was consummated. Under the terms of this agreement Carey was merged into Briggs, and Briggs, as the surviving entity, adopted the new name of Panacon Corporation. Each share of the Briggs common stock was exchanged for one share in Panacon; all of the Carey common stock was converted into 4,644,000 shares of common and 7,356,000 shares of Class A common stock in Panacon.

10. At all times relevant to this complaint Panacon sold and shipped products in interstate commerce and, therefore, was engaged in or affected commerce as "commerce" is defined in the Clayton Act (15 U.S.C. 12) and the Federal Trade Commission Act (15 U.S.C. 44).

IV. THE ACQUISITION

11. Pursuant to an agreement signed earlier in the month, JWC purchased an 89 percent stock interest in Panacon from Glen Alden Corporation for \$62,000,000 on April 17, 1972. On June 29, 1972, the shareholders of Panacon voted to approve the merger of Panacon into the Celotex Division of JWC. Thereafter, JWC completed its takeover by giving the remaining shareholders cash for their 11 percent interest. The total cost of the acquisition was approximately \$73,000,000.

V. TRADE AND COMMERCE

12. Functionally, the production of asphalt and tar roofing materials breaks down into two distinct processes: (1) the preparation of a base (dry felt, asbestos, or fiberglass) mat; and (2) the conversion of this mat into saturated felts, roll roofing, or shingles. The majority of asphalt roofing materials derive from a dry felt base saturated with asphalt flux, coated with mineral granules, and cut into sheets or shingles.

13. Today a substantial percentage of all roofing applied in the United States is produced by the asphalt roofing industry. There are approximately 24 manufacturers of asphalt roofing materials operating a total of approximately 120 plants in the United States.

14. By 1980, elastomeric roofing materials accounted for approximately 11 percent of the combined domestic sales of asphalt roofing materials and elastomeric roofing materials used in commercial and industrial roofing applications.

15. There are two competitively significant lines of commerce or relevant product markets in which to analyze the effects of the acquisition. The first product market consists of all asphalt and tar roofing materials. The second product market consists of all asphalt and tar roofing materials and elastomeric roofing materials.

16. There are two competitively significant sections of the country or relevant geographic markets in which to analyze the effects of the acquisition. The first geographic market consists of all States within the continental United States except the States of California, Oregon, Washington, Arizona, Nevada, Utah and Idaho (hereafter the "41-state market"). The second geographic market consists of 26 contiguous States (listed in alphabetical order): Alabama, Arkansas, Connecticut, Delaware, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin (hereafter the "26-state market").

17. In 1971, the year prior to the acquisition, sales by producers of

asphalt and tar roofing materials in the 41-state market totalled approximately \$579.7 million, with the four largest firms accounting for approximately 51.7 percent and the eight largest firms accounting for approximately 82.5 percent of sales. In that year in the 41-state asphalt and tar roofing materials market, Panacon was the fourth largest firm, accounting for approximately 10.1 percent of sales, and JWC was the sixth largest firm, accounting for 8.8 percent of sales.

18. In 1972, the year of the acquisition, sales of asphalt and tar roofing materials in the 41-state market totalled approximately \$654.4 million, with the four largest firms accounting for approximately 61.6 percent and the eight largest firms accounting for approximately 85.8 percent of sales. As a result of the acquisition, JWC became the second largest firm in the 41-state asphalt and tar roofing materials market with approximately 18.4 percent of sales in 1972.

19. In 1971, the year prior to the acquisition, sales by producers of asphalt and tar roofing materials in the 26-state market totalled approximately \$477 million, with the four largest firms accounting for approximately 52.4 percent and the eight largest firms accounting for 84.7 percent of sales. In that year in the 26-state asphalt and tar roofing materials market, Panacon was the second largest firm, accounting for approximately 11.7 percent of sales, and JWC was the sixth largest firm, accounting for approximately 9.7 percent of sales.

20. In 1972, the year of the acquisition, sales of asphalt and tar roofing materials in the 26-state market totalled approximately \$532.9 million, with the four largest firms accounting for approximately 62.6 percent and the eight largest firms accounting for approximately 87.3 percent of sales. As a result of the acquisition, JWC became the largest firm in the 26-state asphalt and tar roofing materials market with approximately 20.7 percent of sales in 1972.

21. In 1971 and 1972, sales of elastomeric roofing materials in both the 41-state and 26-state markets were relatively minor compared to sales of asphalt and tar roofing materials. Thus, in those years, the size and concentration of the market for asphalt and tar roofing materials and elastomeric roofing materials in both the 41-state and 26-state sections of the country were substantially similar to the markets described in Paragraphs 17 through 20 above.

VI. EFFECTS OF THE ACQUISITION

22. The effect of the acquisition of Panacon by JWC has been and may be substantially to lessen competition or to tend to create a monopoly in the manufacture, sale, and distribution of asphalt and tar roofing materials, and asphalt and tar roofing materials, and elastomeric roofing materials, in both the 41-state and 26-state sections of the country in the following ways, among others:

(a) By eliminating actual competition between JWC and Panacon in the manufacture, sale and distribution of asphalt roofing materials.

(b) The ability of JWC's competitors to compete in the manufacture, sale and distribution of asphalt and tar roofing materials or elastomeric roofing materials has been, and may be, further substantially diminished.

(c) The probability of JWC's competitors pricing their asphalt and tar roofing materials or elastomeric roofing materials on an independent basis has been, and may be, further substantially impaired as a result of the increased potential for price leadership among manufacturers of asphalt and tar roofing materials and among manufacturers of asphalt and tar roofing materials or elastomeric roofing materials.

(d) The entry of new asphalt and tar roofing materials manufacturers may have been, and may be, significantly discouraged or retarded.

(e) The ability of purchasers of asphalt roofing materials, as defined herein, to select from alternative manufacturers has been and may be substantially limited.

VII. VIOLATIONS CHARGED

23. The acquisition of Panacon by JWC constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

24. The acquisition of Panacon by JWC constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

Commissioner Pertschuk did not participate.

DECISION AND ORDER

The Commission having heretofore issued its amended complaint charging the respondents named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that amended complaint, together with a notice of contemplated relief; and

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

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

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

1. Respondent Jim Walter Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 1500 North Dale Mabry Highway, in the City of Tampa, State of Florida.

2. Respondent The Celotex Corporation, a wholly-owned subsidiary of Jim Walter Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1500 North Dale Mabry Highway, in the City of Tampa, State of Florida.

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

ORDER

For the purpose of this Order the following definitions shall apply:

1. *Respondents* means Jim Walter Corporation ("JWC"), a corporation incorporated under the laws of the State of Florida, with its principal place of business at 1500 North Dale Mabry Highway, Tampa, Florida, The Celotex Corporation ("Celotex") (a wholly-owned subsidiary of JWC), a corporation incorporated under the laws of the State of Delaware with its principal place of business at 1500 North Dale Mabry Highway, Tampa, Florida, their subsidiaries, successors and assigns, and their officers, directors and agents.

2. *Plants* means the asphalt roofing plants owned by Celotex, together with all properties and assets thereof, including their adjacent felt mills, if any, and all additions and improvements thereto, that are located at:

- (a) Wilmington, Illinois;
- (b) Philadelphia, Pennsylvania;
- (c) Chester, West Virginia; and
- (d) Memphis, Tennessee;

provided, however, that the term plants does not include those assets

or properties disposed of by respondents in the ordinary course of the business of operating or renovating such facilities for the manufacture of asphalt roofing products; and *provided further* that the term *plants* does not include such properties or assets as would otherwise be part of a plant, where the eligible person acquiring a plant elects, in its sole discretion, but subject to the approval of the Commission, not to acquire those properties or assets.

3. *Person* means any individual, corporation, partnership, joint venture, trust, unincorporated association, or other business or legal entity.

4. *Asphalt Roofing Plant* means a plant for the manufacture of *asphalt roofing products* as such products are defined in Paragraphs I(1)(a)-(d) of the Amended Complaint.

5. *Eligible Person* means any person or persons approved in advance by the Commission who has the capacity and intention to operate the plant(s) to be acquired as a facility or facilities for the manufacture of asphalt roofing products.

6. *Commission* means the Federal Trade Commission.

7. *Director* means the Director of the Commission's Bureau of Competition.

8. *Relevant Market* means the Continental United States with the exception of the States of California, Oregon, Washington, Arizona, Nevada, Utah and Idaho.

I.

It is ordered, That, within twenty-four months of the effective date of this Order, respondents, either directly or through the trustee provided in Paragraphs II and III below, shall divest the plants located at Wilmington, Illinois; Philadelphia, Pennsylvania; Chester, West Virginia; and Memphis, Tennessee, either separately or in any combination, to one or more eligible persons in such a way as to reasonably ensure that the plants can be operated by the eligible person or persons as a facility or facilities for the manufacture of asphalt roofing products. The divestiture or divestitures shall be absolute and unconditional and on terms and conditions approved in advance by the Commission. Nothing in this Order shall be deemed to prohibit respondents from accepting and enforcing a bona fide lien, mortgage, deed of trust or other form of security interest received by respondents to secure full payment of the consideration for which the plants are divested. If respondents, by enforcement or settlement of any such bona fide lien, mortgage, deed of trust or other form of security interest, reacquire ownership, possession or control of any of the plants, within three years from the date of divestiture, they shall promptly

notify the Director in writing, and shall dispose of any such plant or plants in accordance with the terms of this Order as if this Order were reissued on the date of such reacquisition.

II.

It is further ordered, That any plants not divested by respondents within fifteen months from the effective date of this Order shall be subject to divestiture by a trustee to be appointed by the Commission in accordance with the following procedures: (a) if any plants remain to be divested at the end of twelve months following the effective date of this Order, respondents and the Director or his designee shall promptly begin negotiations to identify mutually acceptable candidates for trustee; (b) respondents and the Director shall submit the name of one or more mutually acceptable candidates (or if respondents and the Director fail to agree, the names of their separate candidates), to the Commission no later than the end of the fourteenth month following the effective date of this Order; (c) such nominations shall be accompanied by a proposed trust agreement and such other information as may be helpful to the Commission's determination; and (d) the Commission will then appoint the trustee from among the candidates nominated by respondents and the Director. Promptly upon the appointment of the trustee, respondents shall execute a trust agreement consistent with the provisions of this Order and subject to approval by the Director, that transfers to the trustee all rights and powers necessary to permit him to divest the remaining plant or plants in accordance with the terms of this Order. The trustee shall be charged to attempt diligently and in good faith to effect divestiture of the plant or plants in any manner consistent with the terms of this Order as quickly as possible within nine months from the date of the execution of the trust agreement. Pending divestiture of the plant or plants, respondents shall be permitted to continue to manage the plant or plants for their own accounts. Upon divestiture of one or more plants, and after deducting his/her fees and expenses, as provided in this Order and the trust agreement, the trustee shall pay to respondents any remaining proceeds. If the trustee is unable to divest a plant or plants within such nine-month period, then respondents are relieved from the provisions of this Order requiring divestiture of such plant or plants; *provided, however,* that if divestiture is delayed by reason of a disagreement between or among respondents, the trustee and the Commission concerning the interpretation or implementation of this Order, the nine-month period for divestiture by the trustee shall be extended day-for-day by the number of days such disagreement remains unresolved. If the trustee

resigns or fails or ceases to act diligently, the Commission may appoint a substitute trustee to divest the plant or plants in accordance with the terms of this Order. The appointment of a trustee shall not preclude the Commission from seeking any remedy that may be available to it for any failure by respondents to undertake their obligations set forth in Paragraphs II through VIII of this Order.

III.

It is further ordered, That if a trustee is appointed:

A. Respondents shall compensate the trustee for the reasonable value of his/her services necessary to effect the divestiture of the plant or plants.

B. Respondents shall reimburse the trustee for the reasonable value of all expenditures and other obligations incurred by the trustee that are reasonably related to his/her efforts to divest the plant or plants.

C. Respondents shall provide the trustee with such access to their books and records as may be necessary for the trustee to ascertain such facts as are reasonably related to his efforts to divest the plant or plants.

D. Respondents shall empower the trustee to disclose information respecting the plant or plants to potential acquirers so that they may evaluate the plant or plants being offered, and shall allow inspection of the plants by prospective acquirers. With respect to such information designated by the respondents as proprietary or confidential, the trustee shall secure an agreement from each person to whom disclosure is made to hold confidential any information disclosed and to use the information solely for the purpose of evaluating plant or plants and not to employ it for any business or competitive purpose.

E. Respondents shall make available to the trustee their employees who have knowledge of the history, characteristics and operating potential of the plant or plants so that the trustee may ascertain such facts as are reasonably related to his efforts to divest the plant or plants. The trustee shall give reasonable notice to the respondents of any request for access to their personnel who, at the sole election of respondents, may be accompanied by attorneys representing the respondents at any meeting with the trustee.

F. The trustee shall be authorized to retain independent legal counsel and other persons for purposes of discharging the functions set forth above. Respondents shall reimburse the trustee for the reasonable value of all expenses so incurred.

G. Respondents shall cooperate with the trustee in the discharge of his/her duties and shall provide all evidences of transfer, consents

and related documents as may be necessary to divest any plant or plants approved for divestiture by the Commission.

H. If respondents and the trustee are unable to resolve a dispute regarding the reasonable value of his/her services or the reasonableness of an expenditure or obligation incurred by the trustee in connection with his/her efforts to divest the plant or plants, then the respondents and the trustee shall submit the dispute to the Commission for resolution. The trust agreement shall recite that the Commission's determination of the reasonable value of the trustee's services or the reasonableness of expenditures and other obligations incurred by the trustee shall be binding upon respondents and the trustee.

IV.

It is further ordered, That pending the divestitures required by this Order, respondents shall not cause, and shall use their best efforts to prevent, any deterioration of the plants that may impair the marketability of any such plants, normal wear and tear excluded. Respondents may, but shall not be required to, make capital expenditures for the improvement of the plants. Nothing in this Order shall prevent respondents from operating or not operating the plants or furloughing employees at the plants in a manner consistent with normal business practice, comparable to the manner in which they operate or furlough at their other asphalt roofing plants, pending the divestitures required by this Order.

V.

It is further ordered, That for a period of ten years from the date of this Order, respondents shall not directly or indirectly acquire, through purchase, lease or other transaction that would confer ownership, possessory interest or control, any asphalt roofing plant located in the relevant market, without the prior approval of the Commission. The provisions of this Paragraph shall not apply to the reacquisition by respondents of any plant or plants through the enforcement of any bona fide lien, mortgage, deed of trust, or other form of security interest as provided in Paragraph I.

VI.

It is further ordered, That respondents and the trustee, if a trustee is appointed, shall within ninety days from the effective date of this Order and every ninety days thereafter until the divestitures required by this Order are completed, submit in writing to the Commis-

sion a verified report setting forth in detail the manner and form in which respondents or the trustee, as applicable, intend to comply, are complying, and have complied with the terms of this Order and such additional information relating thereto as the Commission may from time to time reasonably require.

VII.

It is further ordered, That respondents notify the Commission at least thirty days prior to effecting any proposed change in corporate respondents which may affect compliance with the obligations arising out of this Order, 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 corporations.

VIII.

It is further ordered, That respondents shall, upon written request of the Director made to respondents at their principal offices for the purpose of securing compliance with this Order, and for no other purpose, permit duly authorized representatives of the Commission, subject to any legally recognized privilege:

(1) reasonable access during the office hours of respondents, which may have counsel present, to those books, ledgers, accounts, correspondence, memoranda, and other records and documents in respondents' possession or control which relate materially and substantially to any matter contained in this Order; and

(2) an opportunity, subject to the reasonable convenience of respondents, to interview officers or employees of respondents, who may have counsel present, regarding such matters.

The foregoing provision shall not be interpreted to provide any access for the Commission to records relating to any of the business activities of respondents other than those relevant to the plants subject to this Order.

Commissioners Pertschuk and Calvani did not participate.

Complaint

102 F.T.C.

IN THE MATTER OF

LLOYD'S FURS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-3128. Complaint, Dec. 5, 1983—Decision, Dec. 5, 1983*

This consent order requires a Denver, Colo. company engaged in the advertising, sale and distribution of furs and fur-containing garments, among other things, to cease falsely representing a garment's designer or manufacturer. The order requires that any fur or fur-containing garment bearing a manufacturer's or designer's label accurately identify the manufacturer or designer of the garment. Further, respondent must comply with all written labeling instructions received from a manufacturer or designer, and maintain records documenting from whom a garment was received and to whom it was sold, as well as records documenting compliance with the Fur Products Labeling Act and this order.

*Appearances*For the Commission: *F. Kelly Smith.*For the respondent: *James E. Hartley, Holland & Hart, Denver, Colo.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by that Act, the Federal Trade Commission, having reason to believe that Lloyd's Furs, Inc., a corporation, hereinafter 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 in that respect as follows:

PARAGRAPH 1. Respondent Lloyd's is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Colorado, having its office and principal place of business at 1543 Stout Street, Denver, Colorado.

PAR. 2. Respondent is now, and for some time last past has been engaged in the purchasing, offering for sale, sale, and distribution of fur-containing garments and related products to the public at retail.

PAR. 3. In the ordinary course and conduct of its business, respondent operates retail sales outlets in Denver, Colorado, and in several midwestern and western states. It causes and has caused the conduct

of business in each of these states through the U.S. mail and other facilities of interstate commerce. Respondent maintains and has maintained a substantial course of business, including the acts and practices hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of its business, respondent offers for sale and sells to the general public at retail furs or fur-containing garments to which are attached or affixed labels purporting to reflect the manufacturer or designer of the garments. Respondent, by attaching or affixing such labels to the garments it offers for sale and sells to the general public, represents directly or by implication to consumers that said garments were manufactured or designed by the persons or firms indicated on the labels.

PAR. 5. In truth and in fact labels reflecting the manufacturers or designers of fur and fur-containing garments have been attached or affixed to said garments by respondent without regard to whether those garments were actually designed or manufactured by the designer or manufacturer designated on the labels. Therefore, respondent's aforesaid representations, acts or practices are false, misleading, deceptive or unfair.

PAR. 6. The use by respondent of the aforesaid false, misleading, deceptive or unfair representations, acts or practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said representations, acts or practices are true and into the purchase of substantial quantities of furs or fur-containing garments by reason of said erroneous and mistaken belief.

PAR. 7. The acts and practices of respondent Lloyd's, as herein alleged, were and are all to the prejudice and injury of the public and constituted and now constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

Commissioner Calvani did not participate.

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 draft of complaint which the Denver 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 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 the 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 Lloyd's Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business at 1543 Stout Street, in the City of Denver, State of Colorado.

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

ORDER

I.

It is ordered, That respondent, Lloyd's Furs, Inc. ("Lloyd's"), a corporation, its successors and assigns, and respondent's officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the purchasing, advertising, offering for sale, sale and distribution of any fur or fur-containing garment 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 any such fur or fur-containing garment has been manufactured or designed by any particular manufacturer or designer, unless such is the case and respondent has in good faith complied with all written labeling instruc-

tions received from the manufacturer or designer of the fur or fur-containing garment and maintained accurate records demonstrating such compliance and showing from whom the fur or fur-containing garment was received and to whom it was sold.

B. Attaching or affixing to any fur or fur-containing garment a label purporting to identify the manufacturer or designer of the garment, unless such fur or fur-containing garment has, in fact, been manufactured or designed by that manufacturer or designer and respondent has in good faith complied with all written labeling instructions received from the manufacturer or designer of the fur or fur-containing garment and maintained accurate records demonstrating such compliance and showing from whom the fur or fur-containing garment was received and to whom it was sold.

II.

It is further ordered, That within thirty (30) days after this order becomes final, respondent shall provide a copy of this order to its officers, managers, supervisors and sales personnel. Respondent shall also provide a copy of this order to all its officers, managers, supervisors and sales personnel who join the corporation within five (5) years from the date of this order.

III.

It is further ordered, That respondent shall maintain records sufficient to demonstrate its compliance with this order and with the Fur Products Labeling Act and the rules and regulations promulgated thereunder. It shall make such records available for inspection by the staff of the Federal Trade Commission upon request.

IV.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent 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 that may affect compliance obligations arising out of the order.

V.

It is further ordered, That respondent shall within sixty (60) days after service upon it of this order, file with the Commission a report

in writing setting forth in detail the manner and form in which it has complied with this order.

Commissioner Calvani did not participate.

CONSOLIDATED FOODS CORP.

1833

Modifying Order

IN THE MATTER OF

CONSOLIDATED FOODS CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT

Docket C-1024. Consent Order, Dec. 21, 1965—Modifying Order, Dec. 7, 1983

On Dec. 7, 1983, the Federal Trade Commission deleted Paragraph VIII from the order issued against Consolidated Foods Corp. on Dec. 21, 1965 (68 F.T.C. 1137). The Commission has determined that order provisions requiring prior approval of future acquisitions generally should not have terms exceeding ten years.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER

By petition filed August 8, 1983, respondent Consolidated Foods Corporation ("Consolidated") requests, pursuant to Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), that the Commission modify its final order in this matter to remove the prior approval requirement contained in Paragraph VIII of the order. Pursuant to Section 2.51 of the Commission's Rules of Practice and Procedure, the petition was placed on the public record for thirty days. No comments were received.

The Commission has determined that order provisions requiring prior Commission approval of future acquisitions generally should not have terms exceeding ten years. In most cases, the Commission believes that such prior approval provisions will have served their remedial and deterrent purposes after ten years and that the findings upon which such provisions are based should not be presumed to continue to exist for a longer period of time. The Commission has reviewed respondent's petition and has concluded that the order has served its law enforcement and remedial goals.

Therefore, upon consideration of the petition, the Commission, in the exercise of its discretion, finds that elimination of Paragraph VII is in the public interest.

Accordingly, *it is ordered*, that the proceeding be, and it hereby is reopened for the purpose of modifying the Order entered therein;

It is further ordered, That Paragraph VIII shall terminate upon service of this order.

Modifying Order

102 F.T.C.

IN THE MATTER OF

BULOVA WATCH COMPANY, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-1887. Consent Order, April 1, 1971—Modifying Order, Dec. 12, 1983*

This order reopens the proceeding and modifies the Commission's order issued on April 1, 1971 (78 F.T.C. 556), by deleting Paragraphs 2 and 4.B. from the order. The modification allows the company to prevent transshipping of its watch and clock products by its dealers.

ORDER REOPENING AND MODIFYING CEASE AND DESIST ORDER

By petition of August 11, 1983, respondent Bulova Watch Company, Inc. ("Bulova") requests that the Commission vacate its April 1, 1971 Order against Bulova in its entirety or, in the alternative, suspend the Order for a ten-year period, at the end of which period Bulova would have the burden of demonstrating that the Order should be permanently vacated. The Order in this matter prohibits Bulova from engaging in certain acts and practices, including resale price maintenance and restricting transshipment by sellers of its watch or clock products. Pursuant to Section 2.51 of the Commission Rules of Practice, Bulova's petition was placed on the public record for comment. No comments were received.

Upon consideration of Bulova's petition and supporting materials, the Commission has determined that the petition makes a satisfactory showing that changed conditions of fact and law and the public interest require reopening the Order and modifying it by deleting its transshipment provisions. The Supreme Court has now determined that non-price vertical restraints such as transshipment restrictions are not *per se* illegal, but instead should be evaluated pursuant to the rule of reason. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 57-59 (1977). From that perspective, the Commission has determined that the transshipment provisions in the Order are no longer necessary to prevent injury to competition in this industry, and that Bulova will likely suffer significant competitive injury unless those provisions are eliminated. The Commission also finds that Bulova has failed to demonstrate that the remaining provisions of the Order should be modified or set aside. Bulova's petition does not point to changes in law or fact or public interest considerations sufficient to require modifying or deleting those provisions.

Accordingly,

BULOVA WATCH CO., INC.

1834

Dissenting Statement

It is ordered, That this matter be reopened and that the order be modified, as of the effective date of this Order, by deleting paragraph 2 of the Order, which reads:

2. Entering into, maintaining, or enforcing any contract, agreement, combination, understanding, or course of conduct which has as its purpose restricting the persons to whom any Bulova dealer or other person may resell Bulova watch or clock products;

and by deleting paragraph 4.B. of the Order, which reads:

B. because the dealer transshipped or sold Bulova watch or clock products to a retailer.

Commissioners Pertschuk and Bailey voted in the negative.

DISSENTING STATEMENT OF COMMISSIONER PATRICIA P. BAILEY

A Commission majority has voted to allow Bulova to impose transshipping bans on its dealers: that is, Bulova can now order its dealers not to sell to discounters. Indeed, Bulova admits that it wants the order modification for this very purpose. (Bulova petition, p. 9) My motion to reject Bulova's petition having failed, I now dissent from the majority's vote.

Bulova claims that it needs to ban transshipping in order to prevent "free riding" on the pre- and post-sale services offered by authorized dealers. There is, however, nothing in Bulova's petition which demonstrates that its inability to prevent transshipment decreases dealer loyalty and sales efforts.

There are only two pre-sale "services" which Bulova expects of its dealers: (1) that their displays be kept "clean and neat"; (2) a very nebulous commitment to its cooperative advertising program. The extent of this participation is determined by the retailer; Bulova requires only that the dealer be "capable" of using "some" of the company's advertising or promotion. The advertising samples included in the petition merely picture the watch, sometimes with a descriptor and price. This is not surprising. As I noted in *Lenox, Inc.*, D. 8718 there are many products whose function or esthetic appeal is self evident. Sales of these goods do not require a blandiloquent persons sales effort or major consumer education program. I would pu watches (both digital and mechanical) in this category. Authorize and non-authorized watch dealers advertise in the same way. Ther are no special promotional efforts which are discouraged by tran shipping.* It follows, then, that the only pre-sale "service" which

* Even the seminal "Chicago School" exploration of the free rider theory limited its applicability to spe services "specific to the commodity and unrelated to the retailers' methods of generally doing business. . . ." argument applies to products which are unfamiliar to the mass of consumers either because the product is

fostered by this ban on transshipping is a non-discountable price, which some would say conveys an image of quality. I have never accepted this argument because it leads very logically to the position that resale price maintenance is an even stronger guarantee of that precious "prestige image".

Bulova demands the following of its authorized dealers in post-sale service capabilities: "The Bulova dealer must be capable of servicing and repairing the Bulova product or to [sic] expeditiously forward the product to Bulova corporate headquarters for service". Sixty percent of Bulova's authorized dealers fulfill their service obligations via the mailbox option. (Bulova petition pp. 4-5) Under these circumstances, I fail to see how a discount house's "no frills" sale tarnishes Bulova's image by allegedly offering the consumer less than is provided by authorized dealers.

bodies new features) or because it is purchased infrequently by a relatively small proportion of households." ; "Why Should Manufacturers Want Fair Trade," J. Law and Econ. 86, 89, 105 (October, 1960).

IN THE MATTER OF
BENTON & BOWLES, INC.

VACATING ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-2403. Consent Order, May 22, 1973—Vacating Order, Dec. 28, 1983

On Dec. 28, 1983 the Federal Trade Commission vacated the Decision and Order issued against Benton & Bowles on May 22, 1973 (82 F.T.C. 1444).

ORDER GRANTING REQUEST TO REOPEN THE PROCEEDING
AND VACATE THE DECISION AND ORDER

Respondent, Benton & Bowles, Inc., requested on August 30, 1983, that the Commission reopen the proceeding in Docket No. C-2403 and vacate the Decision and Order entered in that matter on May 22, 1973.

The Commission placed this request upon the public record, for a period of thirty days, pursuant to Section 2.51 of its Rules of Practice.

The Commission is of the opinion that the public interest would be served by reopening the proceeding and vacating the Decision and Order. The charges against Benton & Bowles in this proceeding were based upon certain advertisements for Vanquish, a non-prescription internal analgesic product manufactured by Sterling Drug, Inc. In its decision in the matter of *Sterling Drug, Inc.*, Docket No. 8919 (July 5, 1983) [102 F.T.C. 395], the Commission dismissed similar charges against Sterling Drug and Lois Holland Callaway, Inc., that were based on advertisements for Vanquish nearly identical to those that were the subject of the complaint against Benton & Bowles. Thus, the Commission's decision in *Sterling Drug, Inc.*, constitutes a change in law which requires that the Order against Benton & Bowles be vacated.

Now therefore, it is ordered, That the proceeding in Docket No. C-2403 is hereby reopened, and the Decision and Order issued on May 22, 1973, is hereby vacated.

Divestiture of a subsidiary of an acquired company to a newly-formed joint venture would satisfy the requirements of a proposed consent agreement entered to resolve an alleged anticompetitive acquisition. [821 0100, The Coca-Cola Company]

July 22, 1983

Dear Mr. Dreyer:

This is in response to Coca-Cola's request dated April 22, 1983, for a Commission advisory opinion. In June, 1982, Coca-Cola signed a consent agreement that required Coca-Cola to divest Doric Foods Corporation ("Doric"), a subsidiary of a company acquired by Coca-Cola, to an acquirer approved in advance by the Commission. The Commission provisionally has accepted that consent agreement and Coca-Cola is asking whether, if the proposed consent order becomes final, divestiture of Doric to the proposed acquirer would constitute compliance with the proposed order. The Commission has determined that divestiture of Doric to Doric Holdings, Inc., a newly-formed joint venture ("Doric Holdings"), would constitute compliance with the proposed order. In making its determination, the Commission has relied upon the information submitted and the representations made by Coca-Cola and Doric Holdings and has assumed the same to be accurate and complete.

Coca-Cola characterizes its submission of materials to the Commission as a voluntary submission in place of compulsory process in an ongoing investigation and requests confidentiality for its submission under Section 4.10(a)(8) of the Commission's Rules of Practice. The Commission has determined that Coca-Cola's submission was voluntarily made in connection with an advisory opinion request and not in lieu of compulsory process and thus is not protected under Section 4.10(a)(8). With respect to Coca-Cola's alternate request for confidentiality for portions of the agreement between Coca-Cola and Doric Holdings, portions of the supplement to the agreement, Doric's financial statements, and the summary of transactions during the last year between Coca-Cola and companies related to the parties forming the joint venture, the Commission has concluded that Articles III, VI, IX and X of the agreement, the financial statements, the summary, Mr. Sherman's letter dated June 16, 1983, and pages 2-4, 7-10, 12-22, 24-39, 44-46, and 48-51 of the supplement to the agreement contain confidential commercial and financial information within the meaning of Section 6(f) of the Federal Trade Commission Act. The Commission will not disclose this information without affording Coca-Cola ten days' notice of its intent to do so, except as provided in Sections 6(f) and 21 of the Federal Trade Commission Act.

Coca-Cola has requested that after the Commission has reviewed the materials Coca-Cola submitted, the Commission return the documents to Coca-Cola. Section 4.12(a) of the Commission's Rules of Practice provides that the Commission will return material submitted to the Commission that has not been received into evidence (1) after the close of the proceeding in connection with which the documents were submitted or (2) when no proceeding in which the material may be used has been commenced within a reasonable time after completion of the examination of all relevant information. Since the matter is still pending, the Commission has determined that Commission action at this time on your request for the return of documents would be premature. Additionally, Section 4.12(b) of the Rules provides that even after the proceeding has closed, the Commission will retain copies it has made of the materials submitted by Coca-Cola unless, upon a showing of extraordinary circumstances, the Commission determines that return would be required by the public interest.

By direction of the Commission.

Letter of Request

April 22, 1983

Dear Mr. Berman:

This is a request pursuant to Section 1.1(a)(2) of the Rules of the Federal Trade Commission, 16 C.F.R. 1.1(a)(2), for an advisory opinion confirming that the proposed sale by The Coca-Cola Company ("Company") of Doric Foods Corporation ("Doric") to a joint venture would constitute compliance with the order envisaged in the Agreement containing Consent Order to Divest and Other Relief, dated June 16, 1982 (Consent Order Agreement) if the sale were to occur before that order became final. The Company asks that this request receive expedited treatment.

I. QUESTION ON WHICH ADVISORY OPINION IS SOUGHT

The Coca-Cola Company seeks an advisory opinion from the Commission on the following question:

Assuming that the order envisaged in the Consent Order Agreement would be entered by the Federal Trade Commission and become final, will the sale of Doric prior thereto to the joint venture described herein be to an "acquiror approved in advance by the Federal Trade Commission" within the meaning of Article II of that order and in compliance with all other requirements thereof?

II. BACKGROUND OF THE REQUEST

The Company and the staff of the Commission entered into the Consent Order Agreement in connection with an investigation by the Commission of the proposed acquisition by the Company of Associated Coca-Cola Bottling Co., Inc. ("Associated") and its subsidiaries, which included Doric. The order envisaged therein provides in relevant part that:

It is ordered, That within one year from the date on which this Order becomes final Coca-Cola shall divest itself absolutely and in good faith of all of its right, title and interest in Doric including any additions to Doric that may have occurred since its acquisition by Coca-Cola. Divestiture shall be made only to an acquiror approved in advance by the Federal Trade Commission.

At present, the Consent Order Agreement is before the Commission, but as of yet it has not been provisionally accepted by the Commission nor placed on the public record for the 60 day comment period pursuant to the procedure for accepting consent order agreements set forth in Section 2.32 *et seq* of the Commission's Rules, 16 C.F.R. 2.32 *et seq*.

Subsequent to the execution of the Consent Order Agreement, the Company diligently sought a purchaser for Doric who would be acceptable to the Commission. In March 1983, two firms which proposed to form a joint venture for that purpose presented the only acceptable offer to purchase Doric thus far received by the Company. The Company accepted the offer and an understanding was reached for the acquisition of Doric by the joint venture. A definitive acquisition agreement pursuant to which The Coca-Cola Company would sell all the capital stock of Doric to the joint venture is being finalized. The parties hope to complete and execute that definitive acquisition agreement such that all conditions precedent to the sale are fulfilled by April 30, 1983, thereby clearing the way for the sale to be consummated promptly upon receipt of the advisory opinion requested hereby.

III. DESCRIPTION OF THE BUYER

The facts set forth in this Part III of this request have been furnished to the Company by Skadden, Arps, Slate, Meagher & Flom, counsel to the joint venture. Though it has no independent knowledge of them, the Company believes that those facts are true and correct.

The proposed acquisition of Doric is to be by a newly formed Delaware joint venture corporation to be called Doric Holdings, Inc. ("Holdings"). Holdings will be owned 45% by American Fruit Juice Company, Inc. ("AFJC"), also a newly formed Delaware company; 45% in some combination by Luctor B.V., a Netherlands company ("Luctor"), and certain officers of Charterhouse Group International, Inc., a Delaware company ("Charterhouse International") and 10%

by Doric's management. AFJC will be a wholly-owned subsidiary of Asfika, B.V., a Netherlands holding company. Asfika is part of a group of related foreign corporations. Luctor and Charterhouse International are both wholly-owned subsidiaries of the Charterhouse Group, p.l.c., a United Kingdom company ("Charterhouse").

Asfika and its related corporations, all of which are non-United States companies, conduct no business in the United States except as described below. Related companies are engaged in a wide variety of businesses outside the United States, including: hops farming; barley malting; beer brewing and bottling; wine and spirits production and wholesaling; liquor retailing; fruit juice processing and marketing; hotel ownership and operation; variety discount retailing; furniture retailing; footwear retailing; television and appliance repair service; furniture and upholstery manufacturing; bedding manufacturing; textile manufacturing; particle board manufacturing; appliance manufacturing; footwear manufacturing; and leather goods manufacturing.

The Charterhouse companies are engaged in a wide variety of businesses both within and outside the United States. Subsidiaries of Charterhouse, all of which are non-United States companies, are engaged in the following businesses: banking, merchant banking, management and venture capital; hydraulic products manufacturing; office design; insurance; concrete product manufacturing; property development; tool rental; control and instrumentation manufacturing; pipe coupling manufacturing; wholesale cash and carry of groceries and various hard goods; film processing; generator manufacturing; marine propulsion manufacturing; power and hand tool distributing; electrical and refrigeration engineering; freight forwarding; advertising; and personnel recruiting. Non-United States companies associated with Charterhouse are engaged in the following businesses: providing development capital in the United Kingdom; oil exploration and production; towel rental; and electronics and hi-fi distribution. United States companies associated with Charterhouse are engaged in the following businesses: woolen fabric manufacturing; ice cream manufacturing and distribution; meat product manufacturing; garden product distributing; pharmaceutical packaging; and bedroom and bathroom textile furnishing manufacturing.

In addition, Charterhouse has, either directly or through an associated (45% owned) United Kingdom company, minority investments in more than 55 other companies in the U.K., France and Canada. None of these investee companies is engaged in the manufacture, sale or distribution of beverages and all of the investee companies' business activities are primarily outside of the United States.

Asfika, its related companies and the companies in the Charterhouse group are not engaged in the manufacture, sale or distribution

of beverages in the United States. Companies related to Asfika have interests ranging from 21-60% in four non-United States companies which are bottlers and distributors of brand Coca-Cola and other soft drinks and mixers outside the United States. Another company related to Asfika (which is not a subsidiary of it) is primarily engaged in the sale of 100% fruit juice outside the United States.*

IV. CONCLUSION

The nature of the businesses in which the participants in the joint venture currently are engaged in such that the proposed sale is free of any potential anticompetitive effect of significance.

By the proposed sale of Doric to the joint venture the Company will absolutely divest itself of all right, title and interest in Doric. Doric presently is a wholly-owned subsidiary of the Company. The proposed sale would assume the form of a transfer of all of the capital stock of Doric to the joint venture. Any additions to Doric that may have occurred since Doric was acquired by the Company have remained as assets of Doric, and ownership of such would perforce pass to the joint venture.

We understand that as a prerequisite to its determination whether or not to issue the advisory opinion requested herein, the Commission will place this request upon the public record for a period not to exceed 30 days to provide interested parties an opportunity to comment. We urge the Commission to do this as soon as possible so as to minimize the delay in closing. A delay between the execution of the acquisition agreement and the closing could result in the occurrence of an unforeseen or intervening development that could weaken Doric's competitive position.

We are confident that if any comments are received, they will provide no basis for the Commission to withhold issuance of the advisory opinion requested herein.

Respectfully,

/s/ William M. Dreyer
Senior Staff Counsel
The Coca-Cola Company

* That related company sells a small amount of pure fruit juice concentrate to importers, for sale to manufacturers in the United States for use in making juices, jams and sauces. These imports constitute less than 1% of total 1982 fruit juice imports into the United States based on U.S. Department of Agriculture statistics. In 1981 an independent United States importer test marketed a carbonated fruit juice produced by that related company on a limited basis in the United States. The total value of the product sold in that test was approximately \$10,000. This project was not successful and the product was never introduced to the United States on a commercial basis. (It may be mentioned that the Consent Order Agreement defines the relevant product market as "drinks, punches and ades" which are described as *non-carbonated drinks with less than 50% fruit juice, sold under refrigeration.*)

Export association's participation in a proposed barter program involving exchange between the association's members and the governments of Mexico and Poland would pose no restraint of trade or competitive problems. [833 0007, *Phosphate Rock Export Association*]

Aug. 1, 1983

Dear Mr. Fogt:

This is in response to your request on behalf of the Phosphate Rock Export Association ("Phosrock") for an advisory opinion concerning a proposed barter program. By letter of March 18, 1983, you requested the Commission's approval of participation by Phosrock in a plan involving the exchange of phosphate rock on behalf of Phosrock members for products available from Phosrock's foreign customers. In that letter and in a subsequent letter dated May 9, 1983, addressed to Joseph M. Mattingly, an attorney in the Commission's Bureau of Competition, you mentioned in particular the opportunity to exchange phosphate rock for sulfur with the Governments of Mexico and Poland. In a later telephone conversation with Mr. Mattingly, you stated that Phosrock would be satisfied if the Commission were to limit its advisory opinion to participation by Phosrock in the exchange with the Governments of Mexico and Poland of phosphate rock for up to 400,000 metric tons of sulfur on an annual basis. Since your request raises a novel question of fact or law for which there is no clear Commission or court precedent, under Section 1.1 of the Commission's Rules of Practice an advisory opinion by the Commission is warranted.

Based on the information provided, the Commission understands that Phosrock is an export association formed pursuant to Section 5 of the Webb-Pomerene Act (the "Act"), 15 U.S.C. 65, membership in which is open to any person, firm or corporation engaged in the mining of phosphate rock in the United States. The Commission also understands that Phosrock is engaged solely in "export trade," as that term is defined in Section 1 of the Act, 15 U.S.C. 61; that Phosrock makes no sales for United States domestic use or consumption; and that Phosrock has nothing to do with determining the price of phosphate rock or any other product sold for consumption or use in the United States. The Commission further understands that the proposed barter program would work as follows. Each Phosrock member would determine individually whether it wished to participate in the barter transactions. Phosrock would negotiate the exchange ratio for the products involved and arrange for barter receipts to be transferred to Phosrock members on the basis of each member's proportionate contribution of the exported phosphate rock. Each member

company would then either consume the product received in exchange for the phosphate rock internally in its manufacturing operations or resell the received product individually on terms it chooses to domestic or foreign purchasers. Phosrock itself would neither consume nor resell the received product.

The Commission is of the opinion that as long as Phosrock limits its participation in the proposed barter program to that described above, its participation would constitute an "act done in the course of export trade," as that phrase is used in Section 2 of the Act, 15 U.S.C. 62, and Phosrock would remain engaged solely in "export trade" as that term is defined in Section 1 of the Act, 15 U.S.C. 61. Based on an examination of the world and United States markets for phosphate rock and sulfur, the Commission is of the further opinion that the proposed barter program, if limited to the exchange with the Governments of Mexico and Poland of phosphate rock for up to 400,000 metric tons of sulfur on an annual basis, would not be in restraint of trade in phosphate rock or sulfur within the United States or in restraint of the export trade of any of Phosrock's domestic competitors. The proposed barter program, if so limited, would also, in the Commission's opinion, neither artificially enhance or depress phosphate rock prices in the United States nor substantially lessen competition or otherwise restrain trade in the United States markets for phosphate rock and sulfur.

This advisory opinion, like all those the Commission issues, is limited to the proposed conduct your submission describes. Thus, Phosrock should be careful not to enlarge its participation in the proposed barter program beyond that described above.

Finally, the Commission reserves the right to reconsider the questions involved and to rescind or revoke its opinion in accordance with Section 1.3(b) of the Rules of Practice if implementation of the proposed barter program results in substantial anticompetitive effects, if Phosrock enlarges its role in the proposed barter program beyond that described above, or if the public interest otherwise so requires.

By direction of the Commission.

Letter of Request

March 18, 1983

Dear Mr. Thomas:

We are submitting this request on behalf of the Phosphate Rock Export Association ("Phosrock" or the "Association") and its members for an advisory opinion from the Federal Trade Commission pursuant to its Rules of Practice regarding a proposed barter pro-

gram. We set out below the pertinent background facts, an outline of the transactions Phosrock proposes 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 agent of its members. 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 offices in Paris, France and Tokyo, Japan.

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 or any other product 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 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 controlled.⁶ For example, Morocco, which has a commanding share of

¹ 15 U.S.C. 65.

² The members of Phosrock are: Agrico Chemical Company, AMAX Chemical Corporation, American Cyanamid Company, Freeport Phosphate Rock Company, Gardinier, Inc., International Minerals & Chemical Corporation, 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).

⁶ Countries in which phosphate rock miners are government controlled include Morocco, Algeria, Egypt, Senegal, Tunisia, Jordan, Syria, China, Viet Nam, Ocean Islands, U.S.S.R., Brazil and Mexico.

international phosphate trade, derives over one-third of its gross national product from the export sale of phosphate rock. Furthermore, many actual and potential customers of Phosrock are foreign governments or companies that are totally or substantially owned or controlled by their governments.

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. U.S. production and exports of phosphate rock have each declined by more than one-third since 1980. The industry is currently operating at roughly 50% capacity; unemployment exceeds 25% and inventories have recently been at the highest levels ever recorded.⁷ According to the United Nations, world phosphate supply will far exceed demand until at least the end of 1987.

In such a depressed market, Phosrock's problems have been compounded by the inability of its customers—almost always foreign governments—to pay hard currency for phosphate rock. This is particularly true in the East Bloc where American producers, acting through Phosrock, have a great chance to increase export sales and penetrate markets previously dominated by Russia and Morocco. It is also increasingly true with respect to developing countries, particularly Mexico, who are experiencing significant financial difficulties.

In order to maintain its market share in certain countries and have any chance of expanding phosphate rock sales, Phosrock must be able to accept some alternative to hard currency as compensation for the phosphate rock it sells in the export market. The situation in Mexico provides a useful example of this issue. For many years, Phosrock sold Mexico's only privately-owned fertilizer company approximately 700,000 M/T each year. The phosphate rock was sold on open account with payment in dollars due 45 days after receipt of documents; the other principal supplier to this customer was the Government of Morocco. In 1977, the Mexican fertilizer industry was nationalized. Now the Mexican Government controls all purchases of fertilizer components as well as fertilizer production and sale in Mexico. After nationalization, Phosrock continued to sell phosphate rock to Mexico on open account, but in diminished amounts. Morocco increased its tonnage position.

In April, 1982, the severe financial difficulties which Mexico was encountering forced Phosrock to alter its payment terms from open account to confirmed letter of credit. At that time, a Phosrock invoice in the amount of one million four hundred thousand dollars

⁷ Attached is a copy of a March 5, 1983 *New York Times* article entitled "Phosphate Slumps In Bone Valley". Products other than phosphate rock have been similarly affected. Exports of diammonium phosphate (DAP) have declined 25% from 1980 levels. [Not reproduced herein. Copies of all attachments are available for inspection in Room 130, Public Reference Branch, Federal Trade Commission, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580.]

(\$1,400,000) came due but was not paid for over ten months. During this period, Phosrock was in frequent contact with the Mexican Government and the U.S. Embassy in Mexico City, and was only recently able to establish a timetable for the payment of this receivable in dollars. Moreover, since changing its payment terms last April Phosrock has been able to confirm only one letter of credit for Mexico and there is no prospect that adequate letters of credit will be available to provide assured payment for the phosphate rock Mexico desires. Unless an alternative to hard currency is found, Phosrock will make no sales of phosphate rock to Mexico in 1983.

The Mexican Government continues to desire to have Phosrock as a supplier, but it is clear that some form of compensation for the phosphate rock other than dollars will have to be found if this important export trade relationship is to continue. Mexico produces a number of products, including sulphur and petroleum, which the Mexican Government has indicated are available to exchange for phosphate rock. These products are particularly appealing since they could be consumed by Phosrock's members in connection with their fertilizer production activities. It would be highly desirable from a commercial point of view if Phosrock could arrange barter transactions, involving the exchange of phosphate rock for products which Association members regularly purchase for internal consumption in their manufacturing operations. In this way, Phosrock could promote export trade by making sales of phosphate rock that otherwise would not occur. There are many other customers (the Government of Poland, for example) where barter provides the only realistic prospect of export sales.

We are requesting the Federal Trade Commission to render an advisory opinion with regard to Phosrock's participation in the following proposed barter program. The plan contemplates the exchange of phosphate rock on behalf of Phosrock members for products available from the Association's foreign customers. The Association would negotiate the exchange ratio for the products involved and arrange for the barter receipts to be transferred to Association members on the basis of each member's proportionate contribution of the exported phosphate rock. As is the case with all the Association's export operations, each member would determine individually whether it wished to participate in the transaction. Each member of Phosrock would then consume the product received internally in its manufacturing process; but if the product were not suitable for member company consumption or if the company chose not to do so for some reason, it could resell individually the product to foreign or domestic purchasers on whatever terms it determined. 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.

It is well-established that the Webb-Pomerene Act confers a qualified antitrust immunity upon "acts of an association entered into for the sole purpose of engaging in export trade and actually engaged solely in export trade, or an agreement made or act done in the course of export trade by such association."⁸

The first question raised by this proposal is whether export transactions involving the Association's receipt of a bartered product rather than cash in exchange for its phosphate rock is an action which can qualify for antitrust immunity under the Webb-Pomerene Act. The statute's extension of protection to acts done "solely in export trade" or to an act "done in the course of export trade" suggests that immunity is available for trade by barter.

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. Even if the phrase "solely in export trade" is construed so narrowly as to exclude the exporter's receipt of barter from the concept of an export transaction, this receipt of the barter product must be considered nevertheless to be an "act done in the course of export trade." It is one of a variety of ways of implementing an export sale; in some circumstances, it may be the only available way.

The conclusion that Congress expected the Webb-Pomerene Act to apply to export trade via barter is supported by the Act's history and purpose as well as its language. The clear and overriding objective of this legislation was to promote export trade by permitting American companies to combine in export associations without fear of antitrust exposure, so that they could be better matches for their powerful rivals in international markets where barter—as it is today—was an important trade method. Accordingly, it would be unwarranted to attribute to Congress the desire to constrain the *form* of the receipts that American firms could take in exchange for their exported goods. Such a limitation would too greatly undercut the legislative purpose of expanding export trade to be read into the Act without some clear evidence that it was intended to accomplish some identified goal.

It is quite true that Congress sought to foreclose the potential for the abuse of this grant of 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

⁸ 15 U.S.C. 62. See generally *United States v. United States Alkali Export Association*, 325 U.S. 196 (1945), *aff'd* 58 F.Supp. 785 (S.D.N.Y. 1944); *United States v. Minnesota Mining and Mfg. Co.*, 92 F.Supp. 942 (D. Mass. 1950).

The immunity is qualified because the Association may still be found to violate the antitrust laws if it is found that the Association acted in restraint of trade within the United States; in restraint of the export trade of a domestic competitor of the Association; to artificially enhance or depress prices within the United States of commodities of the class exported by the Association; or to substantially lessen competition within the United States. See text at notes 11 and 12.

the domestic market, Congress added the following 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 reselling 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 this proviso directly addresses the congressional concern to prevent members of export associations from colluding to restrain domestic trade in the class of products they are selling overseas,¹⁰ it does not foreclose the receipt by members of a Webb-Pomerene association of other products in exchange for exported products.¹¹ 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 categorically would make exportation by barter ineligible for Webb-Pomerene immunity. Barter is export trade.

In any event, according to the language of the Webb-Pomerene Act, even if the proposed barter program were considered to be an act "solely in export trade" or one undertaken "in the course of export trade," it would be subject, nonetheless, to antitrust attack if it had any of the following effects: it restrained trade within the United States; it restrained the export trade of any domestic competitor of the Association; it served artificially or intentionally to enhance or depress prices with the United States of commodities of the class exported by the Association; or it substantially lessened competition within the United States.¹²

Pointing to the foregoing qualifications which appear as provisos in Section 2 of the Webb-Pomerene Act, U.S. antitrust officials have observed that because an action having none of these four effects would fall outside the application of the Sherman Act anyway, it

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 This purpose is also evident in the following excerpt from the Senate Interstate Commerce Committee Report that accompanied the present Webb-Pomerene Act of "export trade:"

We desire, of course, to authorize associations for the sole purpose of selling abroad. In order to do this, they must have the right to acquire or buy within the United States for the foreign market, but in the view of the settled domestic policy of the United States under the Sherman law, clearly these associations should not be permitted to organize for the purpose of making sales abroad and use their organizations to sell for consumption within the United States.

S. Rep. No. 1056, 64th Cong., 2d Sess., February 14, 1917, p. 2.

¹¹ It deserves emphasis that Phosrock's proposal does not contemplate either the introduction or the reintroduction for 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.

¹² 15 U.S.C. 62.

would not have to be immunized from antitrust liability in the first place.¹³ Whether Phosrock's direct participation in barter transactions is analyzed strictly on the basis of the provisos of Section 2 of the Webb-Pomerene Act or it is considered in terms of the subject matter jurisdiction of the Sherman Act, however, the proposal does not yield anticompetitive effects that would make it subject to antitrust challenge.

With or without a program of direct participation in barter, Phosrock 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 enhance 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 directly in barter. 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.¹⁴

Finally, no aspects of Phosrock's proposed barter program will restrain trade within the United States or substantially lessen competition within the United States. The bulk of the product that would be received in the United States in exchange for the phosphate rock exports would be received directly from the foreign customer and consumed by the individual members of Phosrock. With respect to that portion of the product received in barter which might be sold in the United States, the proposed barter program hypothesizes that such domestic sales would be undertaken only by a Phosrock member individually, both independently of the Association and in competition with any other Phosrock member who might elect to sell its bartered receipts in the United States. Under no circumstances would

¹³ On the basis of the clauses qualifying Webb-Pomerene immunity in Section 2 of the Act, the Department of Justice has taken the view that the Webb-Pomerene Act is unnecessary legislation. According to a long line of spokesmen for the Department, unless joint activity in foreign commerce does have effects on commerce in the United States that are direct, substantial and reasonably foreseeable, the joint activity will not raise problems under the United States antitrust laws anyway. See, e.g., Shenefield, *Antitrust & Trade Reg. Rep.* (BNA) No. 875, at A3 (August 3, 1978); Turner, *International Aspects of Antitrust, Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 124* (1967). This view of the jurisdictional reach of the Sherman Act has been incorporated in a new Section 7 which reads:

This act shall not apply to conduct involving trade or commerce other than import trade or import commerce with foreign nations unless . . . such conduct has a direct, substantial and reasonably foreseeable effect on [commerce in the United States or the export commerce of a U.S. resident]. [Section 402 of the Export Trading Company Act of 1982.]

¹⁴ It is difficult to see how the results of the proposed barter program would differ from those occasioned by Phosrock's traditional operations involving the receipt of money in exchange for phosphate rock. The Association divides this money among its members in proportion to the amount of phosphate rock they each have contributed. The amount of the bartered product that the members could buy with their share of this money would be likely to correspond quite closely to the amount they could obtain under the barter proposal. This is true because even if the Association's economic power in the foreign market for phosphate rock may enable it to extract a fair price (or a premium) for this product, the Association's power vis-a-vis the exchanged product is so limited that its combined efforts would be unlikely to produce any significant price concession in this market.

the Association sell for consumption or resale within the United States any product on behalf of its members or for its own account. Indeed, any sale of the bartered goods in U.S. commerce by a Phosrock member would be made under exactly the same circumstances of unrestrained competition that would exist irrespective of an association engaging in the joint exportation of some other product.

Even if Phosrock's proposed barter program is viewed as a joint buying arrangement whereby each member of the Association consumes or individually resells the purchased commodity, it is well-established that such cooperative buying 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 when the arrangement is accompanied by anticompetitive restrictions on the members' ability to resell the commodity purchased.¹⁵ Neither of those conditions would be present under Phosrock's proposal.

In *United States v. Topco Associates, Inc.*,¹⁶ the Supreme Court scrutinized the practices of a cooperative buying association composed of 25 small- and medium-sized regional supermarket chains. It was apparent from the practices reviewed that the association possessed considerable "economic muscle."¹⁷ Notwithstanding the existence of this joint power, nowhere in the entire course of the litigation all the way up to the Supreme Court was an issue made of any perceived anticompetitive consequences flowing from the group-buying arrangement itself. Instead, what troubled the Department of Justice and the Court about the Topco arrangement were the restrictions placed on the territories in which members could resell their jointly-purchased products and on their ability to resell products at wholesale as well as the members' veto power over the admission of new members, factors which together appeared to facilitate a horizontal division of markets.

Indeed, once the Court ruled that the foregoing practices violated the antitrust laws, the parties entered into a court-approved consent judgment, which established Topco's continued viability as a group-buying association and permitted Topco to utilize areas of primary responsibility to determine the business locations of its trademark licensees and to formulate and implement profit passovers, unless

¹⁵ The courts have frequently held that the operations of buying groups (e.g., of theatre owners jointly purchasing films; of small grocers purchasing food-stuffs in bulk; and of greeting card buyers using a buying corporation) 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). See also *National Macaroni Manufacturing Ass'n v. FTC*, 345 F.2d 421, 427 (9th Cir. 1965).

¹⁶ 405 U.S. 594 (1972). The association's primary function was to serve as a joint purchasing agent for its members. As is true of Phosrock, it was run by a board of directors which consisted, generally, of high-ranking executive officers of the member chains.

¹⁷ *Id.* at 600.

such practices maintained the territorial exclusivity which the Supreme Court had earlier determined to be illegal.¹⁸

In contrast, Phosrock's proposed barter program places no restrictions whatsoever on the reselling of the bartered-for product. It expressly contemplates that if an Association member chooses to resell the product obtained from the barter rather than consume it, it will do so independently of or in competition with the other Association members and the numerous other sellers of the product.

In passing the Webb-Pomerene Act, Congress sought to provide American companies with the flexibility for combating 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. Domestic commerce in either phosphate rock or the exchanged product will not be even affected, let alone substantially restrained.¹⁹

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 of this matter.

Very truly yours,

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

Supplement To Request For Advisory Opinion

May 9, 1983

Dear Mr. Mattingly:

This letter supplements the March 18, 1983 request of the Phosphate Rock Export Association ("Phosrock" or the "Association") for an advisory opinion and provides additional market information which you requested regarding the products which Phosrock is likely to obtain through its proposed exchange of phosphate rock. Under this program, Phosrock would barter phosphate rock for other products, which would be transferred directly to Phosrock's members for their internal consumption or individual resale. As is the case with

¹⁸ See 1973-1 (CCH) Trade Cas. ¶ 74,391 (N.D. Ill. 1972) and 1973-1 (CCH) Trade Cas. ¶ 74,485 (N.D. Ill. 1973), *aff'd*, 414 U.S. 801 (1973).

¹⁹ 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).

l the Association's export operations, each member will determine individually whether it desires to participate in the transaction.

In Phosrock's view, the receipt of bartered products, rather than cash, in consideration for the phosphate rock sold to foreign customers does not alter the basic character of the Association's transaction from one of "export trade" or "an act in the course of export trade." We believe the proposed product exchanges fall within the protective immunity accorded by the Webb-Pomerene Act for concerted export trade activity. Thus, the program's ultimate legality depends upon the question whether the barter transactions will substantially lessen domestic commerce or restrain the export trade of a domestic competitor of the Association. Phosrock submits that the proposed barter program will not have these prohibited effects.

In substance, the competitive consequences of the program are no different than Phosrock's sales of phosphate rock for cash. The Association will divide the receipts of product, just as it does currency, among its members according to the amount of phosphate rock each member contributes. Each member then will individually dispose of the bartered product as it sees fit. Thus, no feature of the proposed barter program could be expected to result in a substantial restraint of domestic competition in either the sale or export of phosphate rock or in the market for the product obtained via barter.

While Phosrock believes that there are a large variety of potential products that could be exchanged, the Association has immediate opportunities to exchange phosphate rock for sulfur. The Governments of Mexico and Poland, two of the Association's largest customers, are volume producers of sulfur and have expressed a desire to exchange sulfur for phosphate rock. Barter of sulfur may be the only effective way to do business with them. On an annual basis, no more than 400,000 metric tons of sulfur would be involved. In addition, sulfur is an appealing commodity for Phosrock to obtain in exchange for phosphate rock because its individual members could consume the product in their respective phosphate fertilizer operations.¹

No prohibited restraint of trade could result from such a phosphate rock/sulfur exchange. Sulfur is one of the most abundant of the elements in the earth, ranking 13th in amount and one of the few that is found in a native state.² Accordingly, sulfur is produced world-wide, with no one country being a predominate producer or supplier to world markets.

In 1981, world production of sulfur in all forms amounted to 52

¹ Sulfur is critically important to most sectors of the fertilizer industry. Approximately 60% of the sulfur consumed world-wide is used in the manufacture of fertilizers because it provides the most satisfactory method of producing these essential products in useable form. The remainder is used in a wide range of applications in industry. See "Sulfur," A Chapter from Mineral Facts and Problems, 1980 ed. (Bureau of Mines preprinted from Bulletin 671) p. 1.

² "Sulfur," A Chapter from Mineral Facts and Problems, 1980 ed. (Bureau of Mines preprinted from Bulletin 671) p. 1.

million metric tons. The United States was the leading producer, accounting for 12.145 million metric tons or 22.5% of world output.³ Notwithstanding the large amount of sulfur produced domestically, the United States has been a net importer of sulfur since 1968.⁴ The Bureau of Mines estimates that demand for sulfur is expected to increase at an annual rate of about 4.6% through 1990. It also estimates that in 1983, domestic production of sulfur will be approximately 10.5 million metric tons and that U.S. apparent consumption will be at 11.5 million metric tons.⁵ The amounts of sulfur involved in the proposed Phosrock transactions (400,000 metric tons) could, thus, have only the most *de minimus* impact on domestic sulfur trade.

Not only is there an abundant supply of the sulfur for which Phosrock would most likely be bartering, but there is fierce competition in, and a more than adequate supply of, phosphate rock in the world market. In 1981, 137,839,000 metric tons of phosphate rock were produced, 138,962,000 metric tons were sold and 45,837,300 metric tons were exported in the world market.⁶ Phosrock's exports amounted to 5,412,000 metric tons or just under 4% of world sales. Thus, it is difficult to imagine that competition in phosphate rock could be substantially restrained by Phosrock's proposed barter transactions.⁷

For these reasons and those stated in our initial letter, we urge the Commission to approve Phosrock's proposed barter program. If you have any questions about the foregoing or if we can provide you with any further information, please let us know. As I mentioned above, Phosrock has current opportunities to do business with the Governments of Mexico and Poland. Accordingly, the Association's ability to increase 1983 phosphate rock exports will be materially assisted by the Commission's prompt response to the Association's request.

Sincerely yours,

/s/ Howard W. Fogt, Jr.

³ "Sulfur," Bureau of Mines Yearbook (Preprinted 1981).

⁴ "Sulfur," *supra* n.1 at pp. 203.

⁵ 1983 Sulfur Data, Bureau of Mines (Prerelease).

⁶ International Fertilizer Association, 1981 Phosphate Rock Statistics (Paris 1982).

⁷ Another commodity for which Phosrock might barter and for which these conclusions are equally applicable is petroleum. As with sulfur, any proposed barter involving petroleum would literally constitute a "drop in the bucket" of domestic or world oil supply. For example, in 1981, the United States consumed 11,788,000 barrels of crude oil condensate and natural gas liquids *per day*. American Petroleum Institute, Discussion Paper O-14R, October 1982, Market Shares and Industry Co. Data for U.S. Energy Markets 1960-81. By contrast, the *annual* number of barrels which Phosrock would anticipate receiving in barter transactions would probably not exceed 500,000 barrels.

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