FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

In the Matter of

XIDEX CORPORATION

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 9146. Complaint, Sept. 16, 1980—Decision, July 1, 1983

This consent order requires a Mountain View, Ca. manufacturer of diazo and vesicular duplicate microfilm, among other things, to timely divest to a Commission-approved buyer, the vesicular duplicate microfilm technology and know-how it acquired from Kalvar Corp. or Anacomp, Inc. Under the divestiture, Xidex must make available to the purchaser its customer lists; a royalty-free license for its diazo duplicate microfilm technology and know-how; and 12 months of technological training, with periodic consultations thereafter. Xidex must also license its proprietarily developed vesicular microfilm technology to all interested parties; train them in the use of such technology for a period of 1 year; and make available to them and the acquirer of the Kalvar technology, 10,000,000 squre feet of its vesicular duplicate microfilm for private label sales. Additionally, Xidex must sell such parties a major ingredient necessary to the manufacture of its vesicular microfilm which is not commercially available.

Appearances

For the Commission: *George S. Cary.*

For the respondent: *Richard A. Kleine* and *J. Wallace Adair, Howrey & Simon,* Washington, D.C. and *John W. Larson* and *William F. Boyd, Brobeck, Phleger & Harrison,* San Francisco, Ca.

Complaint

The Federal Trade Commission, having reason to believe that Xidex Corporation, Respondent herein, subject to the jurisdiction of the Commission, has violated Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45) through the acquisition of the microfilm business of the Scott Graphics Division of the Scott Paper Company and has violated the same statutory provisions through the acquisition of certain assets of the Kalvar Corporation, and that a proceeding in respect thereof would be in the public interest, hereby issues its

Complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. Definitions

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

(a) *Respondent* shall mean Xidex Corporation, a corporation, and its subsidiaries, affiliates, successors and assigns.
(b) *Non-silver duplicate microfilm* is vesicular and/or diazo microfilm used to make duplicates of original microfilm photographs.
(c) *Diazo microfilm* is a photosensitive material coated on a polyester or acetate substrate which forms images with diazonium salts and dye couplers when exposed to light. It is developed through exposure to an alkaline substance, such as ammonia, and is used to make duplicates of original microfilm.
(d) *Vesicular microfilm* is a photosensitive material coated on a polyester or acetate substrate which releases nitrogen gas when exposed to intense light. The nitrogen gas creates bubbles which expand through the application of heat to form images. Vesicular microfilm is used to make duplicates of original microfilm.

II. Respondent

2. Respondent is a corporation organized and doing business under and by virtue of the laws of the State of California, with its principal place of business at 305 Soquel Way, Sunnyvale, California.
3. Respondent is primarily engaged in the manufacture and sale of non-silver duplicate microfilm and related equipment and services. Respondent sells these products domestically and abroad through direct sales and distributors. In the fiscal year ending June 30, 1979, Respondent had total assets of $37,108,000 and sales of $48,552,000. Respondent is the world's largest producer of non-silver duplicate microfilm, accounting for over 60% of domestic production in 1978.
4. At all times relevant herein, Respondent sold and shipped its products throughout the United States and was engaged in commerce within the meaning of the Clayton Act, as amended, and was a corporation whose business was in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

COUNT I

III. Scott Graphics Division of Scott Paper Company

5. At all times relevant herein, the Scott Paper Company was a corporation organized and doing business under and by virtue of the

laws of the State of Pennsylvania, with its principal place of business at Scott Plaza, Philadelphia, Pennsylvania.

6. The Scott Graphics Division of the Scott Paper Company (hereinafter "Scott Graphics") was primarily engaged in the solvent coating of paper and film, including the manufacture of diazo duplicate microfilm. In 1975, the year prior to the acquisition, Scott Graphics had total sales of approximately $9,303,000 and was the third largest manufacturer of non-silver duplicate microfilm in the United States.

7. At all times relevant herein, the Scott Paper Company sold and shipped its products throughout the United States and was engaged in commerce within the meaning of the Clayton Act, as amended, and was a corporation whose business was in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

IV. The Acquisition

8. On June 1, 1976, Respondent acquired the microfilm business of Scott Graphics for $4.225 million in cash and notes. Included in the acquisition were: a manufacturing facility at Holyoke, Massachusetts; the business and goodwill of Scott Graphics; customer lists; and certain technology. The acquisition included an agreement by Scott Graphics not to compete against Respondent in the duplicate microfilm business for four years.

V. Trade and Commerce

9. For the purposes of Count I of this Complaint, the relevant lines of commerce are the manufacture and sale of non-silver duplicate microfilm and the diazo duplicate microfilm submarket thereof. The relevant geographic market is the United States as a whole.

A. *Non-Silver Duplicate Microfilm Market*

10. United States sales of non-silver duplicate microfilm are substantial and the market is experiencing rapid growth. 1979 United States production of non-silver duplicate microfilm was approximately $72 million.

11. Prior to the acquisition of the microfilm business of Scott Graphics, concentration in the domestic manufacture and sale of non-silver duplicate microfilm was high with the top two firms accounting for approximately 64.2% of sales and the top four firms accounting for approximately 84.2%.

12. Prior to this acquisition, Scott Graphics and Respondent were and had been substantial and actual competitors in the manufacture and sale of non-silver duplicate microfilm.

13. On a *pro-forma* basis, the acquisition of the microfilm business of Scott Graphics by Respondent increased Respondent's share of the

1975 United States sales of non-silver duplicate microfilm from approximately 46% to approximately 54.5%.

14. On a *pro-forma* basis, the acquisition of the microfilm business of Scott Graphics by Respondent increased the 1975 level of two-firm concentration from 64.2% to 72.7% and four-firm concentration from 84.2% to 89.3% in the relevant market.

15. Barriers to entry into the manufacture and sale of non-silver duplicate microfilm are substantial.

B. *Diazo Duplicate Microfilm Market*

16. United States sales of diazo duplicate microfilm are substantial and the market is experiencing rapid growth. 1979 United States production of diazo duplicate microfilm was approximately $49 million.

17. Prior to the acquisition of the microfilm business of Scott Graphics, concentration in the domestic manufacture and sale of diazo duplicate microfilm was high, with the top two firms accounting for approximately 57.1% of sales and the top four firms accounting for approximately 84.6% of sales.

18. Prior to this acquisition, Scott Graphics and Respondent were substantial and actual competitors in the manufacture and sale of diazo duplicate microfilm.

19. On a *pro-forma* basis, the acquisition of the microfilm business of Scott Graphics by Respondent increased Respondent's share of the 1975 United States sales of diazo duplicate microfilm from approximately 40.4% to approximately 55.5%.

20. On a *pro-forma* basis, the acquisition of the microfilm business of Scott Graphics by Respondent increased the 1975 level of two-firm concentration from approximately 57.1% to 72.2% of sales and four-firm concentration from 84.6% to 95.7% in the relevant market.

21. Barriers to entry into the manufacture and sale of diazo duplicate microfilm are substantial.

VI. Effects of the Acquisition

22. The effects of the acquisition set forth in Paragraph 8 may be substantially to lessen competition or tend to create a monopoly in the relevant markets, in violation of Section 7 of the Clayton Act, as amended, and the effects of the acquisition may be to restrain trade and hinder competition in the relevant markets, thereby constituting an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act, as amended, in the following ways, among others:

(a) eliminating substantial and actual competition between Scott

Graphics and Respondent and among Scott Graphics, Respondent and other competitors in the relevant lines of commerce;

(b) significantly increasing the already high levels of concentration in the relevant lines of commerce;

(c) significantly raising the already high barriers to entry into the relevant lines of commerce; and

(d) strengthening the already dominant position of Respondent in the relevant lines of commerce.

VII. Violations Charged

23. The aforesaid acquisition constitutes a violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

COUNT II

VIII. Kalvar Corporation

24. At all times relevant herein, Kalvar Corporation (hereinafter "Kalvar") was a corporation organized and doing business under and by virtue of the laws of the State of Louisiana, with its principal place of business at 909 South Broad Street, New Orleans, Louisiana.

25. Kalvar was primarily engaged in the manufacture of vesicular duplicate microfilm and related equipment. In the fiscal year ending March 31, 1979, Kalvar reported total assets of $1,603,755 and total sales of $5,359,382.

26. At all times relevant herein, Kalvar sold and shipped its products throughout the United States and was engaged in commerce within the meaning of the Clayton Act, as amended, and was a corporation whose business was in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

IX. Anacomp, Inc.

27. Anacomp, Inc. (hereinafter "Anacomp") is a corporation organized and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 6161 Hillside Avenue, Indianapolis, Indiana.

28. Anacomp is primarily engaged in providing computer software services and computer micrographic services to financial institutions and local government agencies. In the fiscal year ending June 30, 1979, Anacomp had total assets of $27,719,000 and total sales of $38,-118,154.

29. Prior to its acquisition by Respondent, the Kalvar Marketing Division of Anacomp was the sole distributor of Kalvar products.

30. At all times relevant herein, Anacomp sold and shipped its

products throughout the United States and was engaged in commerce within the meaning of the Clayton Act, as amended, and was a corporation whose business was in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

X. The Acquisition

31. On February 14, 1979, Kalvar and Respondent entered into an agreement, which was effected March 23, 1979, under which Respondent agreed to and did purchase substantially all the assets of Kalvar, including Kalvar's manufacturing facilities, accounts receivable, trade name, patents and trade secrets. In addition, Kalvar entered into a five-year covenant not to compete in the duplicate microfilm business. The acquisition was valued at approximately $6 million. In a related transaction, Respondent purchased certain assets of the Kalvar Marketing Division of Anacomp.

XI. Trade and Commerce

32. For the purposes of Count II of this Complaint, the relevant lines of commerce are the manufacture and sale of non-silver duplicate microfilm and the vesicular duplicate microfilm submarket thereof. The relevant geographic market is the United States as a whole.

A. *Non-Silver Duplicate Microfilm Market*

33. United States sales of non-silver duplicate microfilm are substantial and the market is experiencing rapid growth. 1979 United States production of non-silver duplicate microfilm was approximately $72 million.

34. In 1978, prior to the acquisition of certain assets of Kalvar by Respondent, concentration in the domestic manufacture and sale of non-silver duplicate microfilm was high with the top two firms accounting for approximately 70.7% of sales and the top four firms accounting for approximately 87.4%.

35. Prior to this acquisition, Kalvar and Respondent were and had been for many years substantial and actual competitors in the manufacture and sale of non-silver duplicate microfilm.

36. On a *pro-forma* basis, the acquisition of the assets of Kalvar Corp. by Respondent increased Respondent's market share from approximately 61% to approximately 69.8% of the 1978 sales of non-silver duplicate microfilm.

37. On a *pro-forma* basis, the acquisition of Kalvar by Respondent increased the 1978 level of two-firm concentration from 70.7% to 79.5% and four-firm concentration from 87.4% to 92.4% in the relevant market.

38. Barriers to entry into the manufacture and sale of non-silver duplicate microfilm are substantial.

B. *Vesicular Duplicate Microfilm Market*

39. United States sales of vesicular duplicate microfilm are substantial and the market is experiencing rapid growth. 1979 United States production of vesicular duplicate microfilm was approximately $23 million.

40. In 1978, prior to the acquisition of certain assets of Kalvar by Respondent, concentration in the domestic manufacture and sale of vesicular microfilm was high with the top two firms accounting for approximately 92.9% of sales and three firms accounting for 100% of sales.

41. Prior to this acquisition, Kalvar and Respondent were and had been for many years substantial and actual competitors in the manufacture and sale of vesicular duplicate microfilm.

42. On a *pro-forma* basis, the acquisition of the assets of Kalvar Corp. by Respondent increased Respondent's market share from approximately 67.4% to approximately 92.9% of the 1978 sales of vesicular duplicate microfilm.

43. On a *pro-forma* basis, the acquisition of the assets of Kalvar by Respondent increased the 1978 level of two-firm concentration from 92.9% to 100%.

44. Barriers to entry into the manufacture and sale of vesicular duplicate microfilm are substantial.

XII. Effects of the Acquisition

45. The effects of the acquisition set forth in Paragraph 31 may be substantially to lessen competition or tend to create a monopoly in the relevant markets, in violation of Section 7 of the Clayton Act, as amended, and the effects of the acquisition may be to restrain trade and hinder competition in the relevant markets, thereby constituting an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act, as amended, in the following ways, among others:

(a) eliminating substantial and actual competition between Kalvar and Respondent and among Kalvar, Respondent and other competitors in the relevant lines of commerce;

(b) significantly increasing the already high levels of concentration in the relevant lines of commerce;

(c) tending to create a monopoly in the vesicular duplicate microfilm market through the acquisition of relevant technology, know-how and patents;

(d) significantly raising the already high barriers to entry into the relevant lines of commerce; and

(e) strengthening the already dominant position of Respondent in the relevant lines of commerce.

XIII. Violations Charged

46. The aforesaid acquisition constitutes a violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

Decision and Order

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

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, 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 Xidex Corporation is a corporation organization, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 2141 Landings Drive, in the City of Mountain View, State of California.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I.

It is ordered, That Xidex Corporation, its successors and assigns, and its officers, directors, agents, representatives and employees shall, upon written application made within seven (7) years after the effective date of this Order, grant to any and all sole proprietorships, partnerships, corporations or other business entities, which state in their application a "bona fide" intention to engage in (a) the production of vesicular duplicate microfilm within the United States for sale within the United States or export sale from the United States, or (b) the production of vesicular duplicate microfilm outside the United States for sale including export sales to the United States, a non-exclusive license to produce and sell vesicular duplicate microfilm in the form of the non-exclusive license agreement set forth in Appendix A.

Provided, however, That if respondent disputes the "bona fide" nature of an applicant's stated intention to engage under the requested license in the production or sale of vesicular duplicate microfilm within the United States, Xidex shall, within thirty (30) days from the date that the written application was received by Xidex, submit to the Federal Trade Commission a written statement setting forth its reasons for disputing the "bona fide" nature of the applicant's stated intention. The Commission may, at its election, request further information and itself determine the issue of whether such stated intention is "bona fide."

II.

It is further ordered, That within twelve (12) months after the effective date of this Order Xidex shall divest absolutely to an acquirer (hereinafter the "acquirer") approved in advance by the Federal Trade Commission, all books and records, patents, patent applications, trade secrets, technology and knowledge acquired from Kalvar Corporation or Anacomp, Inc., together with any improvements thereto (hereinafter the "Kalvar Technology"). This paragraph shall not be construed to prevent the acquirer, at its option, from also entering into a license agreement pursuant to Paragraph I of this Order.

Xidex shall also grant to the acquirer, on a royalty free basis, a non-exclusive license to produce and sell diazo duplicate microfilm in the form of the non-exclusive license agreement set forth in Appendix B.

III.

It is further ordered, That, as soon as practicable, but no later than thirty (30) days after the divestiture required by Paragraph II of this Order, Xidex will commence teaching a reasonable number of persons designated by the acquirer how to practice the Kalvar Technology. At that time, Xidex will deliver to the acquirer all of its manuals, drawings, blueprints, specifications and other tangible documents or documentation pertaining to the Kalvar Technology. Training sessions shall be conducted at the acquirer's plant or at such other places as are mutually satisfactory to Xidex and the acquirer and shall continue for a period of time sufficient to satisfy the management of the acquirer that its personnel are well enough trained in the Kalvar Technology to produce vesicular duplicate microfilm similar to that which Xidex was able to produce using the Kalvar Technology, *provided, however,* that Xidex shall not be required to continue this training program for a period of more than one year. The acquirer will pay Xidex its expenses incurred in conducting such training sessions, including salaries of its employees and travel and lodging costs. Upon reasonable notice to Xidex, the acquirer may also designate a reasonable number of persons to take up to two (2) tours of Xidex' Sunnyvale facility during the one year training period to observe the commercial production of vesicular duplicate microfilm. Xidex shall make available during the tours knowledgeable employees to respond to questions regarding the manufacture of vesicular duplicate microfilm.

IV.

It is further ordered, That at six (6) month intervals, commencing twelve (12) months after the divestiture required by paragraph II of this Order and continuing thereafter for two (2) years, at the acquirer's request Xidex will have a reasonable number of persons familiar with the Kalvar Technology meet with the acquirer to discuss any problems which may have developed pertaining solely to the acquirer's use of the Kalvar Technology. The acquirer will pay Xidex its expenses incurred in attending such meetings, including salaries of its employees, and travel and lodging costs.

V.

It is further ordered, That at the time of divestiture Xidex shall provide to the person or entity acquiring the technology pursuant to paragraph II of this Order a current list of its customers for diazo duplicate microfilm and a current list of its customers for vesicular duplicate microfilm, ranked according to volume of purchases from Xidex.

VI.

It is further ordered, That Xidex shall not seek to enforce any agreement by Kalvar Corporation, Anacomp, Inc. or Scott Graphics, Inc., their successors and assigns, that might limit the ability of those firms to compete in the production or sale of non-silver duplicate microfilm or limit the ability of those firms to purchase non-silver duplicate microfilm from any available source. Xidex shall not enforce those portions of any secrecy agreements with respect to duplicate microfilm that might have been entered into by former Kalvar Corporation, Anacomp, Inc., or Scott Graphics, Inc. employees that would prevent or limit their employment in any capacity by the acquirer.

VII.

It is further ordered, That, for a period of ten (10) years from the date this Order becomes final, Xidex, its subsidiaries, affiliates, divisions, successors and assigns shall not, without the prior approval of the Federal Trade Commission, directly or indirectly acquire any stock, share capital or equity interest, except an interest of not more than 10% purchased for investment purposes only, in any concern engaged in, or the assets of any concern used in the manufacture of diazo or vesicular duplicate microfilm; *provided, however,* nothing in this Order shall prohibit Xidex from (1) becoming a licensee of any patents or technology from such concerns, or (2) making purchases or sales in the ordinary course of business.

VIII.

It is further ordered, That within sixty (60) days after the effective date of this Order, and every sixty (60) days thereafter until the divestiture required by paragraph II is effected, Xidex shall submit to the Federal Trade Commission a written report setting forth the manner and form in which it has complied with paragraph II of this Order.

Within sixty (60) days of the effective date of this Order, and annually thereafter for a period of seven (7) years, Xidex shall submit to the Federal Trade Commission a written report setting forth the manner and form in which it has complied with paragraph I of this Order.

All such compliance reports shall include a summary of all discussions and negotiations with any persons who are potential acquirers of the technology to be divested or licensees of the technology to be licensed, the identity of all such persons, copies of all communications to and from such persons and reports and recommendations concerning divestiture or licensing.

IX.

It is further ordered, That, commencing on the effective date of this Order, Xidex shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in its corporate structure which may affect compliance obligations arising from this Order.

APPENDIX A

NON-EXCLUSIVE LICENSE AGREEMENT

THIS AGREEMENT is made this ______ day of __________, 198__, between XIDEX CORPORATION ("Xidex"), a California corporation, and ______________________ ______________, a ______________ corporation, and provides for the grant by Xidex to ______________ of a non-exclusive license to practice certain technology now owned and possessed by Xidex, relating to the manufacture of vesicular duplicate microfilm, for the consideration and upon the conditions hereinafter set forth.

1. *Grant of License*

Xidex hereby grants to ______________ a non-exclusive license, without the right to sublicense, to make, have made, use, sell and practice all of the inventions covered by United States patents and patent applications owned or controlled by Xidex, which patents and patent applications relate to vesicular duplicate microfilm or its components and the manufacturing and processing thereof, and are all of the patents and patent applications or extensions thereof which Xidex or any of its subsidiaries own relating to such subject matter (except patents or patent applications acquired from Kalvar Corporation) and any patents or patent applications relating to the manufacture of vesicular duplicate microfilm which Xidex may file or obtain after the date of and during the term of this Agreement. In addition thereto, Xidex hereby grants to ______________ a non-exclusive license, without the right to sublicense, to employ in the manufacture of vesicular duplicate microfilm all of the knowledge and technology now possessed or hereafter developed by Xidex which relates to the manufacture of vesicular duplicate microfilm, including, without limitation, its know-how, inventions (whether or not patented or patentable), process knowledge, manufacturing practices (as applied to mix preparation, coating process and quality control), resin formulae and resin technology, regardless of how such knowledge or technology was obtained. All of the matter licensed under this Agreement is hereinafter referred to as the "Technology" and the license herein granted is hereinafter referred to as the "License."

2. *Training*

As soon as is practicable, but not more than sixty (60) days, after the execution of this Agreement, Xidex will commence teaching a reasonable number of persons designated by ______________ how to practice the Technology. At that time, Xidex will deliver to ______________ copies of all of its manuals, drawings, blueprints, specifications, formula books, quality control specifications and other tangible documents or documentation pertaining to the Technology (the "Technology Documents"). Training sessions shall be conducted at the plant of ______________ or at such other places as are mutually satisfactory to Xidex and _____________ and shall continue for a period of time sufficient to satisfy the management of _____________ that its personnel are well enough trained in the Technology to produce vesicular duplicate microfilm similar to that which Xidex is able to produce; provided, however, that Xidex shall not be required to continue this training program for a period of more than twelve months. _____________ will pay Xidex its expenses incurred in conducting such training sessions, including salaries of its employees and travel and lodging costs. Upon reasonable notice to Xidex, _____________ may also designate a reasonable number of persons to take up to two (2) tours of Xidex' Sunnyvale facility during the one year training period to observe the commercial production of vesicular duplicate microfilm. Xidex shall make available during such tours knowledgeable employees to respond to questions regarding the Technology.

3. *Royalties, Records and Reports*

a. For the License, _____________ will pay Xidex during the term of this Agreement, in the manner hereinafter provided, royalties equal to the following listed percentages of the net sales of vesicular duplicate microfilm manufactured by or for _____________ with the use of all or any part of the Technology; *provided, however,* that after December 31, 1988, _____________ can use all of the matter which is the subject of the License, without paying any royalty.

Year of License	Royalty (Percent of Net Sales)
1	3%
2	3%
3	2%
4	2%
5	2%
6	2%
7	2%

b. As used herein, the phrase "net sales" shall mean the amounts which _____________ bills for sales of epoxy-based vesicular duplicate microfilm manufactured by _____________ with the use of all or any part of the Technology, less the following deductions, if applicable:

(1) Discounts allowed and taken;
(2) Transportation costs separately billed or prepaid;
(3) Special packaging costs;
(4) Sales and use taxes imposed with respect to such sales; and
(5) Amounts refunded or credited to customers who return any such vesicular duplicate microfilm.

No allowance or deduction shall be made for commissions.

c. _____________ shall keep books of account containing such information as may be necessary to determine the amounts payable to Xidex as royalties. Said books of account shall be kept at _____________ place of business, _____________, _____________, and said books, and any supporting data, shall be open for inspection at all reasonable times by Xidex' independent certified public accountants who must agree, prior to examining same, that they will only report to Xidex whether the amounts represented by _____________ to be payable to Xidex under the License are accurate.

d. Within 90 days after the close of each of its fiscal years, _____________ shall deliver to Xidex a true and complete report giving such particulars of the business conducted by ____________ pursuant to the License as are pertinent to an account for royalty purposes under the License. In addition, ____________ shall deliver to Xidex a best estimate of these same particulars every 90 days in sufficient time to be incorporated into the Xidex Quarterly Report.

e. All royalties due pursuant to the License shall be paid at the time of the submission of the annual report required by paragraph d. above.

f. Xidex covenants that if it shall have reason to believe, after inquiry, that any person, firm or corporation is infringing upon any of the patents which are the subject of the License, and which patent is actively being used by ____________ at that time, it will institute and pursue such legal steps as required to determine the validity of such patent. If the patent is found to be invalid by an appropriate court of law, no further royalties shall be due on materials utilizing that patent only.

g. If Xidex should grant a License for the use of all or any part of the Technology to another at a more favorable royalty rate than that charged herein, Xidex will afford ____________ the benefit of such more favorable rate from and after the date it is established.

4. *Technology Review*

At six-month intervals, commencing twelve months after the execution of this Agreement and continuing thereafter for three (3) years, ____________ and Xidex will each have a reasonable number of persons familiar with the subject matter of the License meet to review and update each other as to any problems which may have developed as a result of the License and as to new developments involving the Technology and the manufacture of vesicular duplicate microfilm. At such meetings, any Technology Documents not previously delivered shall be delivered to ____________. The first such meeting shall be held at a place designated by Xidex, the second at a place designated by ____________ and thereafter at places designated alternatively by Xidex and ____________. In addition, at such meeting or prior thereto, each party hereto will notify the other of any new developments which it has made in the Technology and of its new research projects related to the Technology if, prior to the next such meeting, it proposes to announce such development or project to the public or to any person, firm or corporation other than its own patent counsel.

5. *Confidentiality—Assignability*

a. Any technical matters known to Xidex, transmitted in writing or orally transmitted to ____________ and identified as confidential which are

(1) not publicly known,
(2) not already possessed by ____________, or
(3) not disclosed to ____________ by an unrelated third party, other than information which, of necessity, must be passed on to production workers to be used in the manufacturing process,

will be treated as confidential information. ____________ will use its best efforts to prevent such confidential information from being made known to others.

b. Any technical matters known to ____________ transmitted in writing or orally transmitted to Xidex and identified as confidential which are

(1) not publicly known,
(2) not already possessed by Xidex, or
(3) not disclosed to Xidex by an unrelated third party, other than information which, of necessity, must be passed on to production workers to be used in the manufacturing process,

will be treated as confidential information. Xidex will use its best efforts to prevent such confidential information from being made known to others.

c. Neither of the parties which receives confidential information from the other will assign or license the right to use such information.

6. *Sales of Vesicular Duplicate Microfilm to* ____________

Xidex hereby agrees that during the first year of the License it will, at the option of ____________, sell up to 10,000,000 square feet of vesicular duplicate microfilm of the type(s) specified in the purchase orders in mill rolls at a price of $.09 per square foot for 5-mil film (the prices to be charged for vesicular duplicate microfilm on a base other than 5-mil to be adjusted to reflect the difference between the price paid by Xidex for that base and the price paid by Xidex for 5-mil base) during the calendar year 1982. The prices shall also be adjusted annually to reflect changes in Xidex' costs of manufacturing vesicular duplicate microfilm. Xidex shall not be required to sell ____________ more than 10,000,000 square feet of such film. Xidex will deliver one-third of each order within thirty (30) days after receipt thereof, one-third within sixty (60) days after receipt thereof, and the balance within ninety (90) days after receipt thereof. The material delivered pursuant to the provisions of this paragraph shall be first quality by Xidex standards. Xidex shall be paid the net amount due within thirty (30) days of delivery of such film.

7. *Sale of Resin Solutions to* ____________

Xidex will, during the term of this Agreement, sell ____________ such epoxy resin solutions as ____________ may need in order to employ the Technology insofar as epoxy resin capacity is available. (If in any year the total resin demands of Xidex and its licensees are in excess of Xidex capacity, Xidex will not be obligated to provide to ____________ during that year more resin than is required to produce 10,000,000 square feet of vesicular duplicate microfilm.) As of the date of this Agreement, the price for such epoxy resin solutions shall be $5.00 per kilogram of 20 percent by weight solution, if in any one year, ____________ purchases less resin than is required to produce 10,000,000 square feet of vesicular duplicate microfilm. Otherwise, the price of such epoxy resin solutions shall be $6.00 per kilogram of 20 percent by weight solution. The price of this solution may be adjusted no more than once per calendar quarter to reflect changes in prices to Xidex of necessary raw materials. It is understood that Xidex' gross margin percentage for such sales will not be increased during the life of this Agreement.

8. *Sales to Which Royalties Do Not Apply*

a. Xidex shall not be entitled to any royalties based on sales of vesicular duplicate microfilm based wholly or in part upon poly-alpha-chloro-acrylonitrile technology, as covered by patents owned or licensed by Norman Notley, 3M, Eastman Kodak or other persons or corporations, or upon saran or resin blend technology as covered by patents previously owned or licensed by Kalvar Corporation or by Xidex as a result of any transaction with Kalvar Corporation, or upon any technology independently developed or licensed by ____________ which is not based on an epoxy technology.

b. ____________ will not be required to pay any royalty to Xidex for manufacturing vesicular duplicate microfilm for other parties who request to do such work and agree to indemnify ____________ against actual or alleged patent infringements, including infringement of Xidex patents, resulting from such work. ____________ will not accept any order for the manufacture of vesicular duplicate microfilm under this provision which would cause it to employ the Technology.

c. ______________ will not be required to pay any royalty to Xidex for vesicular duplicate microfilm purchased and resold pursuant to paragraph 6 of this Agreement.

9. *Termination of Agreement*

This Agreement shall terminate at the end of seven (7) years after its date.

10. *Arbitration*

Any controversy whatsoever relating to this Agreement shall be settled by arbitration in Mountain View, California, under the rules of the American Arbitration Association and shall be binding on the parties except for errors apparent on its face unless it appears to have been procured by corruption or other undue means, or that there was partiality or misbehavior by the arbitrators or any of them.

11. *Governing Law*

This Agreement shall be construed under the laws of the State of California.
WITNESS the following signatures and seals:

XIDEX CORPORATION

By: ______________________________

(Corporate Seal)
ATTEST:

____

(Corporate Seal)
ATTEST:

____

By: ______________________________

____

APPENDIX B

NON-EXCLUSIVE LICENSE AGREEMENT

THIS AGREEMENT is made this ______ day of __________, 198_, between XIDEX CORPORATION ("Xidex"), a California corporation, and ______________, a corporation, and provides for the grant by Xidex to ______________ of a non-exclusive license to practice certain technology now owned and possessed by Xidex, relating to the manufacture of diazo duplicate microfilm in accordance with the provisions of the Order of the Federal Trade Commission dated ______________.

1. *Grant of License*

Xidex hereby grants to ______________ a non-exclusive license, without the right to sublicense, to employ in the manufacture of diazo duplicate microfilm all of the knowledge and technology now possessed by Xidex which relates to the manufacture of diazo duplicate microfilm, including, without limitation, its know-how, inventions (whether or not patented or patentable), process knowledge, manufacturing practices (as applied to mix preparation, coating process and quality control), resin formulae and resin technology, regardless of how such knowledge or technology was obtained. All of the matter licensed under this Agreement is hereinafter referred to as the "Technology" and the license herein granted is hereinafter referred to as the "License."

2. *Training*

As soon as is practicable, but not more than sixty (60) days, after the execution of this Agreement, Xidex will commence teaching a reasonable number of persons designated by __________ how to practice the Technology. At that time, Xidex will deliver to __________ copies of all of its manuals, drawings, blueprints, specifications, formula books, quality control specifications and other tangible documents or documentation pertaining to the Technology (the "Technology Documents"). Training sessions shall be conducted at the plant of __________ or at such other places as are mutually satisfactory to Xidex and __________ and shall continue for a period of time sufficient to satisfy the management of __________ that its personnel are well enough trained in the Technology to produce diazo duplicate microfilm similar to that which Xidex is now able to produce; provided, however, that Xidex shall not be required to continue this training program for a period of more than twelve months. __________ will pay Xidex its expenses incurred in conducting such training sessions including salaries of its employees and travel and lodging costs. Upon reasonable notice to Xidex, __________ may also designate a reasonable number of persons to take up to two (2) tours of Xidex's Sunnyvale facility during the one year training period to observe the commercial production of diazo duplicate microfilm. Xidex shall make available during such tours knowledgeable employees to respond to questions regarding the Technology.

3. *Technology Review*

At six-month intervals, commencing twelve months after the execution of this Agreement and continuing thereafter for three (3) years, __________ and Xidex will each have a reasonable number of persons familiar with the subject matter of the License meet to review and update each other as to any problems which may have developed as a result of the License and as to new developments involving the Technology and the manufacture of diazo duplicate microfilm. At such meetings, any Technology Documents not previously delivered shall be delivered to __________. The first such meeting shall be held at a place designated by Xidex; the second at a place designated by __________ and thereafter at places designated alternatively by Xidex and __________. In addition, at such meeting or prior thereto each party hereto will notify the other of any new developments which it has made in the Technology and its new research projects related to the Technology if prior to the next such meeting, it proposes to announce such development or project to the public or to any other person, firm or corporation other than its own patent counsel.

4. *Confidentiality—Assignability*

a. Any technical matters known to Xidex, transmitted in writing or orally transmitted to __________ and identified as confidential which are

(1) not publicly known,
(2) not already possessed by __________,
or
(3) not disclosed to __________ by an unrelated third party, other than information which, of necessity, must be passed on to production workers to be used in the manufacturing process,

will be treated as confidential information. __________ will use its best efforts to prevent such confidential information from being made known to others.

b. Any technical matters known to __________, transmitted in writing or orally transmitted to Xidex and identified as confidential which are

(1) not publicly known,
(2) not already possessed by Xidex, or

(3) not disclosed to Xidex by an unrelated third party, other than information which, of necessity, must be passed on to production workers to be used in the manufacturing process,

will be treated as confidential information. Xidex will use its best efforts to prevent such confidential information from being made known to others.

c. Neither of the parties which receives confidential information from the other will assign or license the right to use such information.

5. *Sales of Diazo Duplicate Microfilm to* ______________

Xidex hereby agrees that during the first year of the License it will, at the option of ______________, sell up to 10,000,000 square feet of diazo duplicate microfilm of the type(s) specified in the purchase orders in mill rolls at a price of $.08 per square foot for 5-mil film, (the prices to be charged for diazo duplicate microfilm on a base other than 5-mil to be adjusted to reflect the difference between the price paid by Xidex for that base and the price paid by Xidex for 5-mil base) during the calendar year 1982. The prices shall also be adjusted annually to reflect changes in Xidex' costs of manufacturing diazo duplicate microfilm. Xidex shall not be required to sell ______________ more than 10,000,000 square feet of such film. Xidex will deliver one-third of each order within thirty (30) days after receipt thereof, one-third within sixty (60) days after receipt thereof, and the balance within ninety (90) days after receipt thereof. The material delivered pursuant to the provisions of this paragraph shall be first quality by Xidex standards. Xidex shall be paid the net amount due within thirty (30) days of delivery of such film.

6. *Arbitration*

Any controversy whatsoever relating to this Agreement shall be settled by arbitration in Mountain View, California, under the rules of the American Arbitration Association and shall be binding on the parties except for errors apparent on its face unless it appears to have been procured by corruption or other undue means, or that there was partiality or misbehavior by the arbitrators or any of them.

7. *Governing Law*

This Agreement shall be construed under the laws of the State of California.
WITNESS the following signatures and seals:

XIDEX CORPORATION

By: ______________________________

(Corporate Seal)
ATTEST:

____

(Corporate Seal)
ATTEST:

____

By: ______________________________

____

SEPARATE STATEMENT OF CHAIRMAN JAMES C. MILLER III

I write separately in this matter to reiterate that the Commission's action in accepting this consent agreement should not be misconstrued or mischaracterized as the uncritical adoption of mandatory licensing as a remedy in merger cases and to note my concern about the possible chilling effects of this remedy on innovation. Despite my vote to accept the consent agreement, I remain troubled that the Commission's action will decrease incentives to innovate in the private sector and thus I would be hesitant to apply similar remedies in other matters that do not offer the highly unusual set of circumstances present here.

In this case, the need for mandatory licensing arose because of the competitive distortions resulting from the unlawful acquisitions by Xidex. As the Commission noted in its Analysis of Proposed Consent Order to Aid Public Comment, the purpose of this order is to encourage and facilitate new entry into the duplicate microfilm marketplace, with the hope that "this new entry will result in a more competitive market structure in less time than would be required to achieve such relief through continued litigation and eventual divestiture of the assets alleged to have been acquired unlawfully."

The Analysis emphasized that, by provisionally accepting this agreement, the Commission did not intend "to establish a general principle that compulsory licensing is an appropriate remedy in every merger case, or even in every merger case where technology innovations are important to the industry." The Commission indicated its belief, however, that compulsory licensing was appropriate in this case because of the circumstances described in the Analysis, including the market share of Xidex, its elimination of Kalvar as a technological rival, and the impracticability of obtaining an effective divestiture remedy. These principles need to be reiterated as the Commission gives final approval to the consent agreement.

In addition to the limited circumstances in which mandatory licensing represents an appropriate remedy, the highly regulatory nature of this relief raises a number of concerns, of which the possible "chilling" effects on innovation are perhaps most troubling. I am convinced that one of the most important, and most often overlooked, costs of government regulation is the effect it has on innovation and, thus, on productivity. In this case, the mandatory licensing of not only existing technology but also technology developed in the future may deter Xidex from engaging in the full measure of innovation-producing activities it would have undertaken in the absence of the order. In addition, the expropriation of property rights in innovations represented by the mandatory licensing provision may send signals to others in the private sector, with the result of reducing innovation.

The Commission's Analysis of the proposed order in this case correctly stresses that the mandatory licensing provision is necessary only because Xidex allegedly violated the antitrust laws. It is intended to assure law-abiding companies that they have no fear of such expropriation. On the other hand, it is not always clear whether a contemplated acquisition or practice will be deemed to violate the antitrust laws. Thus, if the possibility of being required to engage in mandatory licensing begins to pose a significant threat to property rights in innovation, firms will discount these property rights in innovation, firms will discount these property rights by the probability of successful antitrust actions and imposition of such a remedy. At least at the margin, firms will begin to revise their asset portfolios and the net result will be that firms will channel fewer resources toward innovative activities. The costs of such decreased innovation may be sufficiently large to offset any competitive benefits resulting from the mandatory licensing.

I am disappointed that the public comments received in this proceeding failed to address these significant questions of the order's effects on innovation. In the absence of any indication from the public comments that such effects are likely to occur as a result of this order, I have voted for final approval of the consent agreement.

As we observe the business community's response to this order, we should gain additional insights regarding the effects of mandatory licensing on innovation. I look forward to such information and to the opportunity to expand and refine our analyses of these important issues.