Findings, Opinions and Orders

IN THE MATTER OF

ENCYCLOPAEDIA BRITANNICA, INC., ET AL.

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

Docket 8908. Final Order, March 9, 1976—Modifying Order, July 5, 1988

This order reopens the proceeding and modifies the Preambles to Paragraphs I through IV, Paragraph II.C (Telephone Talk), and Paragraph II.L (No-Contact Period) of the Commission's final order issued on March 9, 1976 [87 FTC 421]. The Commission concludes that the modifying order is in the public interest. The modification of the Preambles clarifies that the Commission's final order applies only to subsidiaries and employees of Encyclopaedia Britannica, Inc. engaged in selling or being recruited to sell via in-home, over-the-counter, direct mail, or telephone solicitations. The modification of Paragraph II.C requires respondents to disclose the sales purpose of a call or an appointment within 30 seconds of beginning a sales call or a call to make a sales appointment. The modification of Paragraph II.L allows respondents to contact purchasers to correct inadvertent errors on sales forms, or to obtain necessary information that respondent inadvertently failed to obtain during a sales presentation.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On September 22, 1987, Encyclopaedia Britannica, Inc. ("EB") filed with the Commission a request that the above-referenced proceeding be reopened and that the order issued therein on March 9, 1976, either

(1) be set aside in its entirety; or

(2) be modified by setting a date certain when the order would expire and in the interim modifying specific provisions; or

(3) be modified by altering specific order provisions. The specific modifications requested were alterations to Parts I.B., II.C, II.H., IV., and the Preambles I- IV, and deletion of Parts I.D., I.E., II.L., and V. [2]

This petition replaced an earlier petition filed on April 2, 1987, that was subsequently withdrawn.

The petition contends that changed conditions of fact and law and the public interest require that the proceeding be reopened and the order be set aside or modified as respondent requests. One comment was received from placement of the petition on the public record.

On Decembr 11, 1987, EB asserted that its petition had requested sunsetting of the order in its entirety, or, in the alternative, sunsetting of all the affirmative fencing-in provisions of the order. We disagree with EB. The petition sets forth the relief requested in its first page, and does not request sunsetting all of the affirmative fencing-in provisions. If EB had wished to request such action, it could have clearly done so in its subsequent refiling of January 22, 1988 so that the request would have clearly been presented to the public for comment. EB failed to do so. Even if the petition did request such relief, we would deny it for the reasons we here deny a sunsetting of the entire order.

On December 29, 1987, EB submitted alternative language for the requested specific modifications and stated that it would accept whatever modifications the Commission would agree to.

On January 19, 1988, another comment regarding EB was received.

On January 22, 1988, EB withdrew its petition, and simultaneously refiled its petition with the addition of two **[3]** affidavits, one from the president and one from the general counsel of EB. These affidavits provided clarification and additional evidence of some of the assertions EB made in its petition.

HISTORY OF THE ORDER AGAINST EB

The complaint against EB and Britannica Home Library Services, Inc., ("BHLS") was issued by the Commission on December 11, 1972. It alleged that EB and BHLS had made certain false and misleading representations to induce consumers to purchase encyclopedias and accessories, to induce job recruits to accept sales positions, and to collect debts.

After several years of litigation, the Commission issued an order on March 9, 1976, which became effective on March 17, 1980, after the company exhausted its appeals. Since its effective date, the order has twice been modified at EB's request, first on October 28, 1980, and again on October 5, 1982.

DESCRIPTION OF EB

EB publishes encyclopedias and continuity book plans, and markets

them through in-home sales talks, telephone solicitations, and over-the-counter sales. EB publishes and markets both the Encyclopaedia Britannica and the Compton's Encyclopedia brands of encyclopedias. BHLS publishes and markets the annual supplements to encyclopedias published by EB. **[4]**

DESCRIPTION OF THE ORDER

The order comprises nine parts. Part I prohibits certain misrepresentations during employee recruitment and requires that certain information be supplied to prospective recruits. Part II prohibits certain misrepresentations during marketing of merchandise or services and requires that certain information be supplied to prospective buyers. Part III prohibits creation of any training devices or sales aids which are inconsistent with Parts I or II of the order. Part IV prohibits certain misrepresentations in the marketing of continuity book programs and requires that certain information be supplied to prospective buyers. Part V prohibits certain misrepresentations during attempts to collect debts. Part VI requires measures to ensure compliance to the order by all respondents and their agents. Parts VII through IX are standard provisions requiring distribution of the order, notification to the Commission of any change in the corporate respondents, and filing of a compliance report with the Commission.

SUMMARY OF EB'S ARGUMENTS FOR REOPENING AND VACATING OR SUNSETTING THE ORDER

In a request to reopen based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. Both the language of Section 5(b) and its legislative history make it clear that the petitioner has the burden of showing, other than by conclusory **[5]** statements, why an order should be modified. The Commission may properly decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979). The Commission is not required to reopen the order if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. In the present case, the petitioner has not met its burden to show that the order should be vacated or set to expire, and the Commission now declines to reopen the order to consider granting such relief.

Respondent alleges that three changed conditions of fact require the reopening and setting aside or modification: (1) the ownership and control of EB had been transferred to a private, noncommercial foundation, with profits from its operation going to the University of Chicago; (2) EB has instituted policies and procedures rendering the order unnecessary; and (3) EB has ceased the practices which caused the Commission to issue the complaint.

None of these allegations set forth changed conditions of fact that support reopening this matter. The Comission has previously considered and rejected in the context of EB's 1982 petition the argument that its transfer of ownership to the University of Chicago constitutes a change in fact. The implementation of internal policies to ensure adherence to an **[6]** order, and the alleged cessation of the practices giving rise to an order, are not the type of conduct to be rewarded by termination of an order, but are the minimum we require of a respondent for it to avoid civil penalties for violating the order.

Respondent further alleges that two changed conditions of law require the reopening and setting aside or modification: (1) consumer protection statutes and regulations now render the order unnecessary; and (2) EB's situation is similar to that of various respondents whose orders (in decisions cited) were sunsetted or modified.

EB misconstrues the requirements for reopening an order based upon changed conditions of law. The Commission has consistently declined to reopen proceedings based upon changed conditions of law absent a specific showing that the order prohibits activity that subsequently has been found or made lawful. The petition makes no such showing, and therefore fails to state sufficient cause on this ground.

EB has cited several cases as precedent for reopening and sunsetting or vacating orders on public interest grounds. These cases establish that the petitioner must demonstrate either that an order places it at a competitive disadvantage in the marketplace or that an order is no longer necessary because of changes in the marketplace. EB has shown neither.

EB has similarly not made a sufficient showing to support **[7]** reopening the order to sunset the affirmative disclosure requirements on public interest grounds.

EB'S REQUESTS FOR MODIFICATIONS TO SPECIFIC PROVISIONS

Respondent's petition alternatively alleges that several specific

modifications to the order should be made. On December 29, 1987, EB stated that it would accept certain alternative modifications to those proposed in the petition. On January 22, 1988, EB provided additional evidence and clarification of its arguments for specific modifications. On June 9, 1988, EB stated that it would accept a proviso limiting Para. II.L. of the order in lieu of the deletion of that paragraph as EB had originally requested.

The Commission concludes that it is in the public interest to reopen the order and grant some of the modifications sought by the petitioners, but to deny other modifications requested.

Para. II.C.—Telephone Talks

Para. II.C. requires EB to disclose the sales purpose of a telephone call before beginning any "sales presentation." The respondent complains that it has expended considerable legal resources in defining what constitutes a "sales presentation." As respondent devises new telephone talks in the future, it is likely that this issue will continue to arise.

To prevent this, EB proposed in its petition that Para. II.C. be modified to require that in any telephone sales call, EB **[8]** disclose the sales purpose within thirty seconds of the beginning of the call, and that in any call to set a sales appointment, EB disclose the sales purpose of the appointment before setting the date and time of the appointment. However, EB fails to show that it is in the public interest to reopen the order and grant a proposed modification that would, in effect, lessen consumer protection.

In its letter of December 29, 1987, EB indicated that it would accept a more limited modification of Para. II.C., which would require that EB disclose the sales purpose of a call or an appointment within thirty seconds of beginning a sales call or a call to make a sales appointment. This modification would not lessen consumer protection, and would effectively eliminate any conceivable ambiguity by establishing a bright line standard to measure future compliance.

Because of these advantages, we conclude that it is in the public interest to modify Para. II.C. of the order in accordance with the proposal in the letter of December 29, 1987.

Para. II.L. No-Contact Period

Para. II.L. forbids EB from contacting purchasers during the "cooling off" period when purchasers may cancel their contracts. One

effect of this paragraph is to prevent EB from correcting certain inadvertent errors during this period.

In its petition, EB alleges that Para. II.L. should be deleted in the public interest to allow EB to contact consumers **[9]** before the cooling-off period has expired so that EB may expedite corrections in the interests of consumers. EB has stated that this paragraph sometimes prevents it from contacting consumers to correct errors, such as when salespersons calculate incorrectly the date until which a consumer may cancel his or her order under the Commission's *Trade Regulation Rule, Cooling-Off Period for Door-to-Door Sales* (16 CFR 429.1). Such a calculation, if uncorrected, could mistakenly deprive a consumer of his or her rights. Therefore, there would be some benefit to the public if EB were allowed to contact persons to correct inadvertent mistakes or oversights. However, EB has not shown that it would be in the public interest to delete Para. II.L. and allow EB to have unrestricted access to contact purchasers. EB has not shown that allowing such unrestricted access would benefit the public, or that allowing such access would relieve a burden from EB without potentially harming consumers' interests. On the other hand, we find that it would be in the public interest to modify the order to include the proviso to Para. II.L. agreed to by EB in its June 9, 1988 letter. That proviso allows EB to contact purchasers to correct inadvertent errors on sales forms, or to obtain necessary information that EB inadvertently failed to obtain during a sales presentation. **[10]**

Preambles

The Preambles to paragraphs I through IV define the scope of coverage of the order. In its petition, EB alleges that changes in fact require that the Preambles to paragraphs I through IV be modified so that the order covers EB subsidiaries only when they are engaged in certain selling practices and only when they are marketing merchandise or services related to encyclopedias, textbooks, reference materials, or educational materials. EB alleges that, because it has diversified its business, this modification is necessary to prevent the order from requiring EB to demand "false statements" from employees, *i.e.*, statements from employees that they will comply with the order when in fact the order does not apply to them. However, the present order merely requires an agreement that the employee will comply with the order, and assumes that they are engaged in practices covered by the order. Obviously if the employee is not engaged in

practices covered by the order, no obligation arises. EB has not made a showing sufficient to reopen the order for this proposed modification, because no requirement exists that employees file "false statements."

In its letter of December 29, 1987, EB indicated that it would accept a more limited modification of the Preambles. This modification would clarify that the order applies only to subsidiaries and employees of EB engaged in selling or being recruited to sell via in-home, over-the-counter, direct mail, or telephone solicitations. Such has been the interpretation FTC **[11]** staff has worked under, and the more limited modification is therefore a clarification of the coverage of this order.

This proposed modification, which merely states the Commission's interpretation of the order more clearly than does the present language, should be made for purposes of clarification, and we so modify the order. Consistent with this modification and with our interpretation of the scope of the order, we interpret the phrase "successors and assigns, officers, agents, representatives and employees" in the preambles to Paras. I.-IV. as "excluding independent retailers who derive the majority of their income from products or services not covered by the order, and who sell in-store." We also interpret the phrase "any of the publications, merchandise or services included in this order" in Para. VI.A. of the order as referring only to "any textbook, encyclopedia, reference or educational product or any publication, merchandise or service related thereto." And finally, we interpret the phrase "any person" in Para. VI.A. to exclude independent retailers who derive the majority of their income from products or services not covered by the order, and who sell in-store. We note that the exclusion of retailers is meant only to allow bona fide independent retailers to sell publications or merchandise covered by the order without being required to have their employees or assigns agree to the terms of the order, and without risking liability for infractions of the order. We note, however, that EB and BHLS are still liable under this order for violations of the order incurred "through any **[12]** . . . device," including those incurred by independent retailers and their successors and assigns, officers, agents, representatives and employees, directly and indirectly.

Paras. I.B., I.D., I.E.

Para. I.B. prohibits EB from making misrepresentations regarding certain factors that would affect a recruit's income. Paras. I.D. and

I.E. require certain disclosures be made to prospective sales representatives.

In its petition, EB alleges that Para. I.B. should be modified, and Paras. I.D. and I.E. deleted, to allow EB more flexibility in presenting prospective sales recruits with disclosures regarding employment. EB alleges that this modification would serve the public interest by eliminating needless burdens upon EB.

EB has not demonstrated that any burdens presented by the language it seeks to modify in Para. I are so great as to outweigh benefits conferred by the language. If the order were modified as proposed, EB would not be required to make the disclosures which are presently required. These disclosures are necessary to inform prospective sales representatives of EB's unusual compensation methods, which in many ways treat the sales representatives as independent contractors rather than employees, and which require sales representatives to bear many costs and risks normally borne by an employer rather than by a salesperson. **[13]**

Para. II.H. Instant Research Service

Para. II.H. requires EB to disclose conditions and limitations on the use of its research services in writing in promotional materials and orally during sales presentations.

In its petition, EB alleged that Para. II.H. should be modified in the public interest to require respondents to disclose orally only that conditions and limitations upon its Instant Research Service exist. The petition also proposes to confine written disclosures to a single document that would be given to consumers during oral sales presentations, but would not necessarily be left with consumers. EB argues that this change would eliminate the present burden upon EB sales representatives to recite certain disclosures regarding EB's Instant Research Service to prospective purchasers when those same disclosures are given in writing to prospective purchasers. However, EB fails to show that it is in the public interest to reopen and modify the order as proposed.

In its letter of December 29, 1987, EB indicated that it would accept a modification of Para. II.H. that would require all advertising describing the features of a research service to disclose that conditions and limitations exist, and would require that these conditions and limitations be fully described in a written document to be left with purchasers during oral sales presentations. This modification would

still lessen consumer protection, though less so than the modification proposed in the **[14]** petition, because EB would no longer have to orally disclose the features of a research service to consumers. Such oral disclosure is more likely to ensure effective understanding by consumers than is a written disclosure, which may or may not be read by consumers. Therefore, it is not in the public interest to modify Para. II.H.

Para. IV. Continuity Book Sales

Para. IV.C. requires respondents EB and BHLS to make detailed disclosures about EB's continuity book plans on the return coupons, order forms, or any other documents used for responding to those plans.

EB alleges that Para. IV.C. should be modified to require on order forms only directions on where to find accompanying detailed disclosures of the terms and conditions for continuity book programs, not the detailed disclosures themselves. EB alleges that it is presently at a competitive disadvantage in the marketplace, and that the proposed modification to Para. IV.C. would eliminate this disadvantage. EB further alleges that the proposed modification is consistent with the decisions in *G.R.I. Corp.*, 103 FTC 442 (1984) and *Golden Tabs Pharmaceutical Co.*, 101 FTC 410 (1983). Those decisions involved orders that originally required the companies to disclose all the terms and conditions to a "free" offer every time the offer was repeated within an advertisement and its attached coupon. **[15]**

The Commission finds that EB has not established that the present order places EB at a substantial competitive disadvantage requiring modification of the order. Furthermore, the proposed modification would lessen consumer protection by lowering the likelihood that consumers will be fully informed about the terms of sale for EB's continuity book programs. In *G.R.I. Corp.* and *Golden Tabs,* the orders contemplated that full disclosure should always be made on or near a coupon. Both orders required that disclosure be made "in close proximity to the coupon," effectively requiring that a coupon either include complete disclosure itself or be a part of a document which includes the complete disclosure. EB's proposed modification, in contrast, would require only that complete disclosure be made in an "accompanying letter or advertisement." This language would allow EB to make its disclosures on a separate document from the coupon, which consumers may lose or not locate easily. Because EB's proposed

modification to Para. IV.C. would lessen the likelihood that consumers will make fully informed decisions, it would not be in the public interest to modify the order as requested.

EB alleges that Para. IV.B.2. should be modified: (1) to clarify that EB may offer open-ended continuity book programs where the eventual number of volumes in a program is undetermined and (2) to clarify that the order requires only a disclosure that the eventual number of volumes is undetermined, and that the Para. IV preamble should be modified in accordance with EB's **[16]** contention that Para. IV was never intended to cover annual supplements.

EB has not made a sufficient showing to reopen the order for either modification. Para. IV has never been interpreted to make it impracticable for EB to offer open-ended continuity programs, and we decline to so interpret it today. If EB does not know the total number of volumes that will comprise a program, it may so state in its promotional material for that program, and in so doing it will be within the present order. Since the present order does not prevent EB from offering open-ended continuity programs, it is unnecessary to modify the order for the purpose of allowing EB to offer open-ended continuity programs.

We also decline to accept EB's contention that Para. IV was never intended to include annual supplements. EB has not offered any proof of its contention, but has merely pointed out that annual supplements are not mentioned in the documents recording the decisionmaking process leading to the order. However, the language of the preamble unmistakably applies Para. IV to annual supplements. Absent evidence that the Commission intended something other than the plain meaning of this provision, we decline to reopen the order to modify Para. IV.

Para. V. Debt Collection

EB alleges that deletion of Para. V is required by a change of law. It alleges that Para. V is rendered unnecessary by the Fair Debt Collection Practices Act. The order, however, covers **[17]** EB's collection activities related to its own debts. These activities are not covered by the Fair Debt Collection Practices Act, which primarily covers activities by third party debt collectors.

EB has not demonstrated that the requirements of Para. V are a significant burden upon it, nor has it demonstrated that these practices should not be covered by the order. Therefore, EB has not

made a showing sufficient to warrant reopening the order for consideration of this proposed modification.

It is therefore ordered, That the Preambles to Paras. I through IV and Paras. II.C. and II.L. of the order be reopened and modified so that the order will read as follows:

This matter having been heard by the Commission upon the cross-appeals of complaint counsel and respondents' counsel from the initial decision and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying Opinion, having granted the appeals in part:

It is ordered, That pages 1–117 of the initial decision of the administrative law judge be, and they hereby are, adopted as the Findings of Fact and Conclusions of Law of the Commission, with the following exceptions: those portions of pages 103–110 ("The Remedy") which are inconsistent with the opinion of the Commission herein.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion. **[18]**

I. *It is ordered,* That respondent Encyclopaedia Britannica, Inc., and its successors and assigns, officers, agents, representatives and employees, directly or indirectly, through any corporation, subsidiary, division, or other device, engaged in direct selling to consumers, by means of in-home, over-the-counter, direct mail or telephone sales solicitations, in connection with the recruitment of persons to sell, rent, lease or distribute any textbook, encyclopedia, reference or educational product, or any other publication, merchandise or service, in commerce, 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, either orally or in writing, that:

(1) Respondent is offering positions in such fields as advertising analysis, public relations, marketing, interviewing, or in any field other than door-to-door sales, if door-to-door sales is included, to any extent, in the position for which persons are being recruited; or misrepresenting, in any manner, the job for which any person is being solicited;

(2) persons will be trained as management trainees, or for other positions of responsibility concerned with administrative office functions unless, in fact, a formal management training program is available to persons accepting employment on the basis of such representations; or misrepresenting, in any manner, the amount and type of training that will be given;

(3) Any person who may be employed will contact prospects in their homes or places of business for the purposes of conducting surveys, advertising promotions, or other nonselling functions; or misrepresenting, in any manner, the purposes for which any person is engaged.

B. Misrepresenting, in any manner, the amount of income to be earned by any person or that may be earned by any person, the expenses **[19]** that may be incurred by any person, the method of payment, or any condition or limitation imposed upon the compensation of any person.

C. Failing clearly and conspicuously to disclose in all advertising offering

employment in any way involving door-to-door sales that respondent is recruiting persons for the sole purpose of soliciting or selling.

D. Failing clearly and conspicuously to provide, both orally and in writing, to any prospective sales employee at the initial face-to-face interview, and prior to executing any employment agreement with any such persons, the following information:

(1) (a) that respondent is recruiting persons for the sole purpose of soliciting or selling;

(b) that the products or services being sold are encyclopedias or services to be used in connection therewith, or in the event that encyclopedias or such related services are not being sold, the products and services being sold; and

(c) the basis for compensating persons so engaged;

(2) that conditions or limitations upon the receipt of compensation, if any, do in fact exist, together with an example of such a material condition or limitation, and that all such conditions and limitations will be stated in detail in an interview in the event an offer of employment is made to such person;

(3) where applicable, notification that such person will not be paid for time spent during orientation and training;

(4) that expenses will be incurred by such person in performing required duties, together with an example of such material expense, and that all such expense items will be stated in detail in an interview in the **[20]** event an offer of employment is made to such person;

(5) (DELETED)

(6) that such soliciting or selling will be on an "in-home" basis, if such is the fact, or will include soliciting or selling on an "in-home" basis, if such is the fact.

E. Failing clearly and conspicuously to provide, both orally and in writing, to any prospective sales employee at an interview at which an offer of employment is made and prior to executing any employment agreement with any such person, the following information:

(1) A complete and detailed description of each condition and limitation imposed upon the receipt of any compensation;

(2) a complete and detailed description of any expense or expenses any such person may incur in performing the required duties;

(3) (a) the total number of sales employees employed by the office offering the position during the most recent calendar quarter, and

(b) the number of sales employees employed by the office who, during the prior calendar quarter, received net earnings equivalent to or greater than the amount represented in the advertisement to which the prospective employee is responding; provided, however, that if the office has been in existence for less than three months or has fewer than five sales employees, respondents shall provide the information described above pertaining to the division in which the office is located; provided further that such information need not be furnished if the prospective sales employee contacts respondents more than ten days following the dissemination of the most recent advertisement that contains representations of earnings.

Respondent shall afford any prospective sales employee an adequate opportunity to review and consider the above information prior to **[21]** requesting execution of any employment agreement.

F. Failing to furnish to persons at an interview when an offer of employment is

made, and prior to executing any employment agreement with any such person, a copy of Paragraphs I, II, III, and VI of this order, together with a cover letter as set for in *Appendix A* attached hereto. Respondent shall afford any prospective sales employee an adequate opportunity to review and consider these provisions of the order prior to requesting execution of any employment agreement.

II. *It is further ordered,* That respondent Encyclopaedia Britannica, Inc., and its successors and assigns, officers, agents, representatives and employees, directly or indirectly, through any corporation, subsidiary, division or other device, engaged in direct selling to consumers, by means of in-home, over-the-counter, direct mail or telephone sales solicitations, in connection with the publishing, advertising, offering for sale, sale, rental, lease or distribution of any textbook, encyclopedia, reference or educational product, or any other publication, merchandise or service, in commerce, 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, in any advertisement or promotional material that solicits participation in any contest, drawing, or sweepstakes, or solicits any response to any offer of merchandise, service, or information, and that employs any return card, coupon, or other device to respond to such solicitation, that a person who replies as requested will not be contacted directly by a salesperson for the purpose of selling respondents' products, unless such is the fact. Such advertisements or promotional material shall comply with this Paragraph only if they meet the criteria set forth in Appendix B. **[22]**

B. Failing, upon the written request of the Associate Director for Enforcement or his designee, to (1) submit any advertisement or promotional material or (2) test any such advertisement or promotional material, using the procedure set forth in Appendix B, to determine whether it complies with Paragraph II.A.

C. Failing to disclose, clearly and conspicuously, during the first 30 seconds of any telephone contact with prospective customers, the fact that the individual making the call is either soliciting the sale, rental, or lease of publications, merchandise, or services for respondents, or is arranging for a sales solicitation to be made, and that if the prospective customer so agrees, respondents will send a salesperson to visit said prospect for the purpose of soliciting the sale, rental, or lease of said publications, merchandise, or services.

D. Visiting the home or place of business of any person for the purpose of soliciting the sale, rental or lease of any publications, merchandise or service, unless at the time admission is sought into the home or place or business of such person, a business card of at least 2 inches by 3-1/2 inches containing only the following information is presented to such person:

(1) the name of the corporation;
(2) the name of the salesperson;
(3) the term "sales representative":
(4) an address and telephone number at which the corporation or sales person may be contacted;
(5) the product or the corporation logo or identifying mark.

E. Failing to give the card, required by Paragraph II(D) above, to each person and to provide each such person with an adequate opportunity to read the card before engaging any such person in any sales solicitation. **[23]**

F. Representing, directly or by implication, either orally or in writing that:

(1) Any person telephoning or visiting the home of any prospective purchaser is:

(a) engaged in or connected with "advertising," "marketing," "promotion," "education" or anything other than the door-to-door sale of encyclopedias or other reference materials,

(b) conducting, taking or participating in a survey, advertising research analysis or any other information gathering activity, or

(c) telephoning or visiting the home of said prospect for the primary purpose of delivering or disseminating prizes, gifts, gift certificates, chances in any contest, drawing, sweepstakes, educational fund, or any other merchandise or item of chance.

(2) only a few minutes will be required to complete the visit inside the prospective purchaser's home or place of business; or misrepresenting, in any manner, the period of time required to complete the sales or other presentation;

(3) an offer is limited, must be accepted immediately or within any specified time period, or is a special offer, unless such is a fact; or misrepresenting, in any manner, the duration of any sales offer;

(4) any publication, merchandise or service is being offered free, without cost, or is given as a bonus or otherwise to any prospective purchaser of respondent's publications, merchandise or services agreeing to perform any advertising, promotional or selling function, including but not limited to, any of the following acts or similar acts:

(a) permit their names to be listed as local owners of the product or service;

(b) provide the name of any person who may be interested in purchasing any publication, merchandise or service; **[24]**

(c) write a letter evaluating the merits of any publication or other item which may be used in advertising; or

(5) any publication, merchandise, or service is being offered free, without cost, or is given as a bonus or otherwise to any purchaser of respondents' publications, merchandise, or services, pursuant to any agreement to purchase, rent, or lease any other publication, merchandise, service, or combination thereof from respondent, unless respondent complies with all of the terms of the Federal Trade Commission's "Guide Concerning Use of the Word 'Free' and Similar Representations," 16 CFR Part 251, which is hereby incorporated into this order, and with any modifications or changes that are made to this Guide. All of the provisions of the aforesaid Guide shall be construed as mandatory and binding upon the respondents.

G. Representing, directly or by implication, either orally or in writing that:

(1) Any person using any research service will receive answers to questions regarding all subjects other than legal or medical advice; or misrepresenting, in any manner, the research service that will be furnished to subscribers;

(2) any answer provided by any research service is the product of detailed, exhaustive or original research generated by the specific question asked by any person utilizing said service, unless such is the fact; or misrepresenting, in any manner, the extent of research, preparation or quality of any answer furnished by any such research service.

H. Failing to disclose, clearly and conspicuously, in writing on all promotional materials describing any research service, and orally during the course of any sales or

other presentation relating to said service, each condition or limitation placed upon the use of such research service. **[25]**

I. Representing to any person, directly or by implication, either orally or in writing that:

(1) any price is the retail, regular, usual, or words of similar import or effect, price for any publication in any binding, merchandise or service, unless such price is an actual, bona fide price for which each such publication has been openly and actively offered for sale in the recent and regular course of business for a reasonably substantial period of time.

(2) any price is the retail, regular, usual or words of similar import or effect, price for any set of publications in any binding and in combination with any other publication, merchandise or service, unless such price is an actual, bona fide price for which each such publication has been openly and actively offered for sale in the recent and regular course of business for a reasonably substantial period of time.

(3) savings may be realized by the purchase, rental or lease of any publication, merchandise or service, or any combination thereof, from respondent's former prices for its products unless:

(a) such savings claims are based upon retail, regular, or usual prices, or combination prices, arrived at in accordance with Paragraph II(1) and (2) above;

(b) respondent clearly and conspicuously specifies the publication, merchandise or service, or combination thereof, and the price from which the savings are to be realized; and

(c) the publication, merchandise or service is of comparable quality in all material respects with the publication, merchandise or service sold at the higher price;

(4) savings may be realized by the purchase, rental or lease of any publication, merchandise or service, or any combination thereof, from comparable products of competitors unless: **[26]**

(a) respondent clearly and conspicuously specifies the publication, merchandise or service, or combination thereof, from which the savings are to be realized;

(b) the price utilized for comparison purposes is the price at which a substantial number of persons have purchased the item referred to in (a) immediately above;

(c) the item referred to in (a) above is of comparable quality in all material respects to the product being sold.

J. Misrepresenting in any manner, either orally or in writing:

(1) the amount of savings to be realized by any person who enters into an agreement with respondent for any publication, merchandise or service; or

(2) that any publication, merchandise or service is being offered free or without charge, or is given to any such person.

K. Failing to comply with any and all provisions of the Commission's *Trade Regulation Rule, Cooling-Off Period for Door-to-Door Sales,* (16 CFR 429.1), which are in effect on the date this order becomes effective, and with any modifications or changes in the aforesaid Rule which may be made from time to time. A copy of the said Rule shall be made a part of this order for purposes of complying with other provisions hereof.

L. Initiating contact with any purchaser through any means for any reason from the time said purchaser enters into any agreement containing a NOTICE OF CANCEL-

LATION, as required by Paragraph II K of this order, until said buyer's cancellation period has expired. *Provided, however,* that nothing in this paragraph shall be construed to prevent respondent from contacting any purchaser to correct inadvertent errors on necessary sales forms, or to obtain necessary information that **[27]** respondent inadvertently failed to obtain during the sales presentation.

M. Failing to maintain a copy of each NOTICE OF CANCELLATION received pursuant to Paragraph II.K. of this order, and making said documents available for inspection and copying by the Commission's staff upon reasonable notice. Any such notice shall be maintained for a period of three (3) years from the date of receipt by respondent.

N. Failing to keep adequate records, which shall be maintained for a period of three (3) years and made available to the Commission's staff for inspection and copying upon reasonable notice, from which the validity of any savings claims, retail price claims, comparative value claims, or other representations of the type described in Paragraphs II.F.(5), II.I and II.J of this order can be determined.

O. (DELETED)

P. (DELETED)

III. *It is further ordered,* That respondent Encyclopaedia Britannica, Inc., and its successors and assigns, officers, agents, representatives and employees, directly or indirectly, through any corporation, subsidiary, division, or other device, engaged in direct selling to consumers, by means of in-home, over-the-counter, direct mail or telephone sales solicitations, in connection with the recruitment, training, or orientation of any person to sell, rent, lease or distribute any textbook, encyclopedia, reference or educational product, or any other publication, merchandise or service, in commerce, or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making, distributing, or using any training tapes, sales manuals, or any other document, method or device which contains any representation or instruction inconsistent with any provision of Paragraph I or Paragraph II of the order. **[28]**

IV. *It is further ordered,* That respondents Encyclopaedia Britannica, Inc. and Britannica Home Library Services, Inc. and their successors and assigns, officers, agents, representatives and employees, directly or indirectly, through any corporation, subsidiary, division or other device, engaged in direct selling to consumers, by means of in-home, over-the-counter, direct mail or telephone sales solicitations, in connection with the advertising, offering for sale, sale or distribution of any textbook, encyclopedia, reference or educational product, or any other publication, merchandise or service, through the use of any program, plan, method, or device, that provides or purports to provide for the sale or distribution of any of said items to any person at intervals on an approval basis, in commerce, 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, either orally or in writing that:

(1) Any person has the option to receive each publication, merchandise or service, separately and individually, and to accept or reject same, unless such person is allowed in all instances to receive and to purchase or reject each such publication, merchandise or service separately and individually;

(2) any person will not receive any further publication, merchandise or service after he notifies respondents of his cancellation of any such program, plan or method of sale

or distribution, unless such is the fact; or misrepresenting, in any manner, any consequence resulting from any person's cancellation of his participation in any such program, plan, or method of sale or distribution; and

(3) any person incurs no risk or obligation by joining or participating in any such program, plan, or method of sale or distribution; or misrepresenting, in any manner, any condition, right, duty, or obligation imposed on any person. **[29]**

B. Disseminating, or causing the dissemination of, any advertisement which fails to disclose in a clear and conspicuous manner:

(1) A description of the conditions and terms of any such program, plan, or method or sale or distribution, and the duties, risks and obligations of any subscriber thereto; and

(2) A description of each publication, merchandise or service to be offered for sale, the billing charge to be made therefor, the anticipated total number of publications, merchandise or services included in any such program, plan or method of sale or distribution, the number of publications, merchandise or services that will be included in each shipment of such items, and the number of and the intervals between each such shipment.

C. Failing to disclose, clearly and conspicuously, on any return coupon, order form or any other document used for responding to any such program, plan, or method of sale or distribution, the following information:

(1) The anticipated total number of publications, merchandise or services included in any such program, plan, or method of sale or distribution;

(2) the number of publications, merchandise or services that will be included in each shipment of such items; and

(3) the number of and the intervals between each such shipment.

D. Failing to disclose, clearly and conspicuously, in immediate conjunction with any publication, merchandise, service or notice thereof sent to any subscriber, the anticipated date on which respondents will initiate processing of the next shipment of any such item.

E. Failing to provide to any person in conjunction with each notice of any shipment **[30]** of any publication, merchandise or service, a clear and conspicuous means by which said person may exercise his option or right to cancel said shipment, if such is his right.

V. *It is further ordered,* That respondents Encyclopaedia Britannica, Inc. and Britannica Home Library Services, Inc. and their successors and assigns, officers, agents, representatives and employees, directly or indirectly, through any corporation, subsidiary, division or other device, in connection with the collection or attempted collection of any debt allegedly owing to respondents for the purchase or other receipt of any textbook, encyclopedia, reference or education product, or any other publication, merchandise or service, in commerce, or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, either orally or in writing that:

A. Any letter, notice or other communication which has been prepared, originated or composed by respondents has been prepared, originated or composed by any other person, firm or corporation; and

B. Suit will be instituted to recover any delinquent debt, or that any delinquent debt will be transferred to any attorney with instructions to institute suit, or that any other

legal step to collect any outstanding debt will be taken, unless a definite date is set forth for such action and such are the facts; or misrepresenting, in any manner, respondents' relationship with, or instructions to, any attorney, or the course of action that will be taken by any attorney.

VI. *It is further ordered,* That respondents, Encyclopaedia Britannica, Inc. and Britannica Home Library Services, Inc., do the following:

A. Deliver, by registered mail, a copy of this order to each of their salesmen, agents, solicitors, independent contractors, or to any person engaged in the promotion, sale or **[31]** distribution of any of the publications, merchandise or services included in this order, and to any person engaged by respondents to perform such duties in the future at the time such person is so engaged;

B. Obtain from each person described in Paragraph VI(A) a signed statement setting forth his intention to conform his business practices to the requirements of this order; retain said statement during the period of three (3) years thereafter; and make said statement available to the Commission's staff for inspection and copying upon reasonable notice;

C. Advise each such present and future salesman, agent, solicitor, independent contractor or any person engaged in the promotion, sale or distribution of any of the publications, merchandise or services included in this order that respondents will terminate the engagement or services of any such person, unless such person agrees to and does furnish to respondents a statement required by Paragraph VI(B), above; and

D. If any such person will not agree to file a statement with respondents as required by Paragraph VI(B) above and be bound by the provisions of this order, the respondents shall immediately terminate the services of such person.

VII. *It is further ordered,* That the respondents shall forthwith distribute a copy of this order to each of their operating divisions.

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

IX. *It is further ordered,* That respondents shall, within sixty (60) days after the effective date of this order, file with the **[32]** Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

APPENDIX A

NOTICE

Attached hereto are the pertinent provisions of a cease and desist order entered against Encyclopaedia Britannica by the Federal Trade Commission, an agency of the Federal Government. Violation of any provision of this order can result in severe monetary penalties to Encyclopaedia Britannica. If you are employed by Encyclopaedia Britannica, you will be required to observe the provisions of this order. Violation of any provision of this order by an employee constitutes a violation of Federal law.

You should carefully read this order before agreeing to any employment arranged with Encyclopaedia Britannica.

1 Modifying Order

[President]
Encyclopaedia Britannica

APPENDIX B

This appendix sets forth the methodology respondents shall employ to determine whether advertisements or promotional materials represent that a person who replies as requested may be contacted directly by a salesperson for the purpose of selling respondents' products, and the criteria for determining whether such advertisements or promotional materials comply with Paragraph II.A.

1. Format—Respondents shall test the comprehension level of advertisements or promotional material by conducting a mallintercept test, using the questionnaire attached hereto as exhibit 1.

2. Sample size—The sample shall consist of at least 150 subjects.

3. Demographics—Test subjects must: **[33]**

a) be between 25 and 49 years of age;

b) have at least one child fifteen years of age or younger living at home;

c) have household incomes of at least $15,000 per year; provided that, upon respondents' request, the Division of Enforcement shall increase this figure by increments of $5,000 whenever the percentage of households earning at least the requested amount equals or exceeds the percentage of households that, according to the 1980 United States Census, have household incomes of at least $15,000 per year. The data for future changes shall be based on the most recently published edition of the *Statistical Abstract of the United States.*

4. Location of Markets—The interviewing will be conducted in four geographically dispersed markets. The same central location facilities will be used wherever possible. If it is necessary to change any interviewing facility, the new facility shall have demographic characteristics similar to those of the facility it is replacing.

5. Criteria for acceptability of new coupon copy—New coupon copy shall comply with Paragraph II.A if at least seventy-five percent of the test subjects answer "yes" to question 6(b) of the questionnaire (exhibit 1).

Modifications to this appendix, including the questionnaire, may be made upon a request by respondents and the approval of the Associate Director for Enforcement.

EXHIBIT 1

STUDY: COUPON COMPREHENSION STUDY

MARKETS: Cleveland ( )-1 Boston ( )-3

(9)

New York ( )-2 Kansas City ( )-4 **[34]**

CARD:

INTERVIEWER'S NAME: _____

DATE: _____ TIME INTERVIEW BEGINS: _____

Hello, I'm _____ from _____ . Today we are conducting a

survey among men and women between the ages of 25 and 49 years of age.

1. Please tell me your approximate age(READ LIST) (11)

Under 25 .....TERMINATE	40 to 44 years.....( )
25 to 29 years ...( )-1	45 to 49 years.....( )
30 to 34 years ...( )-2	50 years and older..TERMINATE
35 to 39 years ...( )-3	Refused.....TERMINATE

2. Do you have any children living at home 15 years of age or younger?

Yes .....( ) No .....( ) TERMINATE

3. What are the ages of your children who live at home? (CHECK AS MANY AS APPLY) (12)

16 years or above .....( )-1
12 years to 15 years .....( )-2
8 years to 11 years .....( )-3
4 years to 7 years .....( )-4
3 years or younger .....( )-5

4a. Is your total family income:

$15,000 and above .....( )
Below $15,000 .....TERMINATE
Refused .....TERMINATE

4b. Sex:

Male.....( )-1 Female .....( )-2

TAKE RESPONDENT TO A PRIVATE INTERVIEWING AREA IN YOUR CENTRAL LOCATION FACILITY FOR THE BALANCE OF THE INTERVIEW.

(HOLD UP AD IN A MANNER THAT PERMITS RESPONDENT TO SEE IT—COLOR CODED WITH QUESTIONNAIRE—AND SAY:)

"Suppose you saw this ad, and the coupon that was attached to it".

[35]

(HAND COUPON CARD—COLOR CODED WITH QUESTIONNAIRE—TO RESPONDENT AND SAY:)

"Now, using your imagination for a moment, assume you want to fill in and return this coupon which would be part of this ad for ENCYCLOPAEDIA BRITANNICA".

"Read this coupon as though you were interested enough to fill it in".

(DO NOT RUSH RESPONDENT. TAKE COUPON CARD FROM RESPONDENT WHEN HE/SHE HAS FINISHED READING.)

BE SURE TEST COUPON CARD AND AD ARE OUT OF SIGHT BEFORE ASKING:

5a. Based on your reading of the coupon, what would you expect to happen if you send in the coupon? (PROBE FULLY AND CLARIFY)

_____(14)_____
_____(15)_____
_____(16)_____
_____(17)_____

5b. What else would you expect to happen? (PROBE FULLY AND CLARIFY)

_____(18)_____
_____(19)_____
_____(20)_____
_____(21)_____

5c. Is there anything else you would expect to happen?

_____(22)_____
_____(23)_____
_____(24)_____
_____(25)_____

"Now, I'd like to ask you a few more questions".

(INTERVIEWER: START AT THE "X" MARKED QUESTION AND PROCEED TO NEXT ONE, AND THEN BACK TO THE FIRST ONE, ETC.)

( ) 6a. Based on your reading of the coupon, would you expect to receive a free booklet, if you send in the coupon?

(26)

Yes .....( )-1
No .....( )-2
Don't Know...(VOLUNTEERED) .....( )-3 **[36]**

( ) 6b. Based on your reading of the coupon, would you expect a sales representative for ENCYCLOPAEDIA BRITANNICA to contact you, if you send in the coupon?

(27)

Yes .....( )-1
No .....( )-2
Don't Know...(VOLUNTEERED) .....( )-3

( ) 6c. Based on your reading of the coupon, would to expect to get a free book rack, if you send in the coupon?

(28)

Yes .....( )-1
No .....( )-2
Don't Know...(VOLUNTEERED) .....( )-3

( ) 6d. Based on your reading of the coupon, would you expect to get a free globe of the world, if you send in the coupon?

(29)

Yes .....( )-1
No .....( )-2
Don't Know...(VOLUNTEERED) .....( )-3

If yes to Q. 6b

7. If someone sent in the coupon, how likely do you think it would be that a sales representative from ENCYCLOPAEDIA BRITANNICA would contact that person? (READ FIRST FOUR RESPONSES ONLY)

(30)

Very Likely .....( )-1
Fairly Likely .....( )-2
Not Too Likely .....( )-3
Not Likely At All .....( )-4
Don't Know...(VOLUNTEERED) .....( )-5 **[37]**

THANK RESPONDENT FOR HIS/HER COOPERATION.

RESPONDENT'S NAME: _____
ADDRESS: _____
CITY/STATE/ZIP: _____
TELEPHONE: _____ TIME INTERVIEW ENDED: _____
(Area Code)
VALIDATED BY: _____ (31)_____
(32)_____
(33)_____
(34)_____
(35)_____

Commissioner Calvani dissenting.

STATEMENT OF CHAIRMAN DANIEL OLIVER
CONCURRING IN PART AND DISSENTING IN PART

This is the third time in eight years the Commission has found it necessary to modify the order issued against Encyclopaedia Britannica, Inc. ("EB"). That experience should teach us something about the wisdom of entering orders of such length and excruciating detail. I doubt that it is necessary for the Commission to micro-manage a respondent's business so closely in order to achieve effective relief. Nevertheless, that issue is water under the bridge. Accepting the EB order as a given, I turn to the merits of EB's latest modification petition.

I agree with the conclusion that EB has failed to demonstrate that changed conditions of fact or law require vacating, sunsetting, or modifying the order. I also agree that EB has not shown that public interest considerations support vacating or sunsetting the entire order, but that such considerations do support modifying specific provisions of the order. I therefore concur in the modifications and interpretations set forth in the Commission's order reopening this proceeding. I would go further, however, and grant two of EB's other requests.

First, I would grant EB's request to modify Paragraph II.H of the order.[1] Paragraph II.H requires detailed disclosure of all conditions and limitations on the use of EB's research services, both orally during sales presentations and in any written promotional materials. EB proposes to streamline this requirement. The requested modification would require all advertising describing the features of a research service to disclose that conditions and limitations exist, and would require that the conditions and limitations themselves be spelled out in a document left with consumers during oral sales presentations. Sales representatives would also be required to disclose orally that conditions and limitations exist and to refer consumers to the disclosure document for complete details.

In my view, this modification would not lessen the protection consumers derive from Paragraph II.H. The Commission order asserts that "oral disclosure is more likely to ensure effective understanding by consumers than is a written disclosure," but no support is offered for that assertion. Even assuming its truth, however, I would not

[1] I refer here to the revised request presented in EB's December 29, 1987 letter, not to the request as presented in its original petition.

automatically conclude that consumers would be less informed under the modification. It seems to me that a system in which consumers are alerted not once, but twice (in advertising and orally during the sales presentation), to the existence of conditions and limitations, are twice directed to a document explaining those conditions and limitations in full, and are then left with the document to study at their leisure, is reasonably calculated to ensure effective understanding. I fail to see how requiring EB to duplicate the disclosures orally produces additional benefits.

At the same time, the costs of complying with Paragraph II.H would decrease dramatically under the proposed revision. EB would no longer be required to train sales representatives to memorize and recite detailed disclosures. Neither EB's counsel nor FTC enforcement staff would have to devote as many resources to reviewing ads and sales scripts. And oral sales presentations would be shortened, reducing opportunity costs for consumers— who, according to EB, often prefer not to listen to long-winded disclosures—and allowing EB's representatives to increase productivity by conducting a greater number of presentations in a given amount of time.

Because the costs imposed on a firm by a Commission order presumably are passed on to consumers in the form of higher prices, consumers benefit from modifications that increase an order's economic efficiency (i.e., achieve the same level of protection at lower cost or achieve a greater level of protection with no increase in costs). EB's proposed change to Paragraph II.H, which would maintain the current level of protection at less cost, is just such an efficiency-enhancing modification. Thus, I believe the public interest would be served by making this modification.

For similar reasons, I would also grant EB's request to modify Paragraph IV.C of the order. That provision requires EB to place detailed disclosures about its continuity book plans on return coupons and order forms. The respondent urges that Paragraph IV.C be modified so that order forms are requested only to refer to full disclosures in accompanying materials or advertisements. Like the proposed change to Paragraph II.H, this approach would eliminate needless duplication while still providing ample safeguards to ensure that consumers understand the terms of EB's offer. Granting the request would therefore be in the public interest.[2]

[2] Granting this request would also be consistent with the Commission's actions in *G.R.I. Corporation*, 103 [illegible] 101 FTC 410 (1983). Those cases both involved

Finally, although I concur in the decision not to modify Paragraphs I.B, I.D. and I.E of the order in the specific manner requested by EB, I have no doubt that those provisions also could be modified in a way that reduces costs without lessening the protection afforded consumers. The Commission's order states that EB has not demonstrated that the burdens imposed by the language it seeks to modify outweigh the benefits conferred by that language. That may be so, but that observation skips over the question whether the burdens could be reduced while maintaining the same level of benefits.

For the reasons stated above, I dissent from the portions of the Commission's order denying the requests to modify Paragraphs II.H and IV.C. I also urge the Commission to consider carefully before issuing another order as detailed as this one. While we must ensure that law violations are effectively remedied, we should be conscious of the enormous amount of staff resources consumed in judging compliance with such detailed requirements— and in reviewing the repeated order modification petitions they spawn. This case is already a prime example of that type of resource commitment, and I doubt that we have seen the last of EB.

DISSENTING STATEMENT OF COMMISSIONER TERRY CALVANI

The majority modifies the order against Encyclopedia Britannica (EB) in several respects. I agree that most of these changes are justified. However, I do not agree that the modification to paragraph II.L. of the EB order is justified. Therefore, I have voted against the majority's order.

STATEMENT OF COMMISSIONER MARY L. AZCUENAGA CONCURRING IN PART AND DISSENTING IN PART

I concur in the Commission's decision to deny Encyclopaedia Britannica's petition to set aside the order in Docket No. 8908 or "sunset" that order. I also concur in the Commission's decision that the requested modifications of Paragraphs II.C. and II.L. and the Preambles to Paragraphs I through IV are in the public interest.

I dissent only from the Commission's denial of the requested

orders requiring disclosure of the terms of a "free" offer every time the offer was repeated within a single ad and attached coupon. The Commission modified each order to eliminate the need to repeat the conditions on the coupon, as long as the coupon referred the reader to the text of the accompanying ad for a full disclosure of the conditions.

modification of Paragraph II.H., which requires both oral and written disclosures of all conditions and limitations on the use of Encyclopaedia Britannica's research service. I believe that the requested modification (which would require EB salespeople to disclose orally that conditions and limitations exist and are described fully in a written document that will be given to each prospective customer, and also would require that such a document actually be provided to the prospective customer) is in the public interest. The modified provision would give consumers sufficient information about the conditions and limitations on the research service, and would spare Encyclopaedia Britannica's salespeople and their prospective customers from a lengthy and perhaps unwanted oral recitation of those conditions and limitations.

IN THE MATTER OF

OCCIDENTAL PETROLEUM 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 9205. Complaint, April 11, 1986—Decision, July 19, 1988

This consent order requires, among other things, Tenneco, Inc., a Houston, Tx. corporation that manufactures and sells polyvinyl chloride (PVC), to abide by any divestiture order issued by the Commission against Occidental and to abide by the stipulations regarding the reacquisition of the Burlington, N.J. plant from Occidental. The order prohibits Tenneco from interferring with the relief ordered by the Commission and requires that they cooperate in the transfer of assets to a third party or business divested by Occidental pursuant to the order of the Commission.

Appearances

For the Commission: *Rhett R. Krulla.*

For the respondents: *Steven R. Hunsicker, Baker & Botts,* Washington, D.C.

COMPLAINT

The Federal Trade Commission having reason to believe that respondents, Occidental Petroleum Corporation, Occidental Chemical Corporation, Tenneco, Inc., and Tenneco Polymers, Inc., corporations subject to the jurisdiction of the Federal Trade Commission, have entered into an agreement, described in paragraph 12 herein, that, if consummated, would violate the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that said agreement and the actions of respondents to implement that agreement constitute violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, the Commission 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: **[2]**

I. DEFINITIONS

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

a. *"Polyvinyl chloride"* or *"PVC"* means any vinyl chloride homopolymer with the repeating unit CH_2=CHCl, and any copolymer of vinyl chloride with varying amounts of other chemicals, including vinyl acetate, ethylene, propylene, vinylidene chloride, or acrylates;

b. *"Mass and suspension PVC"* includes PVC produced by the mass or bulk process, in which vinyl chloride is polymerized without the addition of other liquids, and PVC produced by the suspension process, in which vinyl chloride monomer droplets are suspended in an aqueous system;

c. *"Suspension PVC copolymer"* means any copolymer of vinyl chloride and vinyl acetate, that is produced by the suspension process and contains over 50 percent by weight vinyl chloride;

d. *"Dispersion PVC"* means PVC produced by the emulsion or dispersion process.

II. OCCIDENTAL PETROLEUM CORPORATION

2. Respondent Occidental Petroleum Corporation ("Occidental") is a corporation organized and existing under the laws of the State of California, with its principal place of business in Los Angeles, California. **[3]**

3. For the year ending December 31, 1984, Occidental had net sales of $15.6 billion and assets of $12.3 billion.

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

III. OCCIDENTAL CHEMICAL CORPORATION

5. Respondent Occidental Chemical Corporation ("OxyChem") is a corporation organized and existing under the laws of the State of California. It is a wholly-owned subsidiary of Occidental and is responsible for the distribution of industrial chemicals and plastics. OxyChem is the proposed acquirer of the relevant assets of Tenneco Polymers.

6. OxyChem is, and at all times relevant herein has been, engaged

in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. **[4]**

IV. TENNECO, INC.

7. Respondent Tenneco, Inc. ("Tenneco") is a corporation organized and existing under the laws of the State of Delaware, with its principal executive offices and place of business in Houston, Texas.

8. In the fiscal year ending December 3, 1984, Tenneco's net income was $631 million on sales and operating revenues of $14.9 billion.

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

V. TENNECO POLYMERS, INC.

10. Respondent Tenneco Polymers, Inc. ("Tenneco Polymers") is a corporation organized and existing under the laws of the State of Delaware. It is wholly-owned subsidiary of Tenneco, and it owns and operates two plants that produce polyvinyl chloride ("PVC") resin in Pasadena, Texas and Burlington, New Jersey.

11. Tenneco Polymers is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. **[5]**

VI. THE ACQUISITIONS

12. Occidental has entered into an agreement with Tenneco pursuant to which Occidental, through its wholly-owned subsidiary, OxyChem, intends to purchase assets and obtain options on certain other assets of Tenneco Polymers associated with its PVC manufacturing business. The total value of the transaction is approximately $70 million. Through the proposed acquisition, OxyChem will effectively acquire the PVC business of Tenneco Polymers.

VII. TRADE AND COMMERCE

13. For purposes of this complaint, the relevant lines of commerce are:

a. mass and suspension PVC;

b. suspension PVC copolymer; and

c. dispersion PVC.

14. For purposes of this complaint, the relevant section of the country with respect to each of the relevant lines of commerce in the United States as a whole.

VIII. MARKET STRUCTURE

15. In 1985, approximately $6.21 billion pounds of mass and suspension PVC were produced in the United States. The mass and suspension PVC market is moderately concentrated whether measured by the Herfindahl-Hirschmann Index ("HHI") or by four-firm and eight-firm concentration ratios. **[6]**

16. In 1985, approximately 226 million pounds of suspension PVC copolymer were produced in the United States. The suspension PVC copolymer market is highly concentrated whether measured by the HHI or by four-firm and eight-firm concentration ratios.

17. In 1985, approximately 416 million pounds of dispersion PVC were produced in the United States. The dispersion PVC market is moderately to highly concentrated whether measured by the HHI or by four-firm and eight-firm concentration ratios.

IX. BARRIERS TO ENTRY

18. It is difficult to enter into the manufacture and sale of each relevant product.

X. ACTUAL COMPETITION

19. Occidental and Tenneco are actual competitors in the manufacture and sale of the relevant products.

XI. EFFECTS

20. The aforesaid acquisition, if consummated, will significantly increase the levels of concentration in the relevant markets. **[7]**

21. The effect of the aforesaid acquisition, if consummated, may be substantially to lessen competition in each of the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. it will eliminate actual competition between Occidental and Tenneco and between Tenneco and others in the relevant markets;

b. it will significantly enhance the possibility of collusion or interdependent coordination among the remaining firms in the relevant markets; and

c. it will significantly enhance the possibility of dominant firm behavior to increase price in the suspension PVC copolymer market.

XII. VIOLATIONS CHARGED

22. The proposed acquisition of the assets and business of Tenneco Polymers by Occidental and OxyChem would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

23. The Acquisition Agreement set forth in paragraph 12 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

24. The proposed acquisition of the assets and business of Tenneco Polymers by Occidental and OxyChem would, if consummated, violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Strenio did not participate.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging respondents Occidental Petroleum Corporation and Occidental Chemical Corporation (collectively "Occidental"), and Tenneco Inc. and Tenneco Polymers, Inc. (collectively "Tenneco"), with violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

Respondents Tenneco, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a **[2]** consent order, an admission by Tenneco 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 that the law had 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 as to respondents Tenneco 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. Respondents Tenneco Inc. and Tenneco Polymers, Inc. are corporations organized, existing, and doing business under and by virtue of the laws of Delaware with principal offices at 1010 Milam, Houston, Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents Tenneco **[3]** Inc. and Tenneco Polymers, Inc., and the proceeding is in the public interest.

ORDER

I.

Definitions

For purposes of this order the following definitions shall apply:

A. *"Tenneco"* means Tenneco Inc. and Tenneco Polymers, Inc., two corporations organized under the laws of Delaware with their principal places of business in Houston, Texas, and their directors, officers, agents, and employees, and their subsidiaries, divisions, affiliates, successors, and assigns.

B. *"Occidental"* means Occidental Petroleum Corporation and Occidental Chemical Corporation, two corporations organized under the laws of California with their principal places of business in Los Angeles, California, and their directors, officers, agents, and employees, and their subsidiaries, divisions, affiliates, successors, and assigns;

C. *"PVC"* means any vinyl chloride homopolymer with the repeating unit CH_2=CHCl, and any copolymer of vinyl chloride with varying amounts of other chemicals, including vinyl acetate, ethylene, propylene, vinylidene chloride, or acrylates; **[4]**

D. *"Suspension PVC copolymer"* means any copolymer of vinyl

chloride and vinyl acetate, that is produced by the suspension process and contains over 50 percent by weight vinyl chloride;

E. *"Dispersion PVC"* means PVC produced by the emulsion or dispersion process.

II.

It is ordered, That, in the event any divestiture order is entered by the Commission against Occidental in this proceeding, Tenneco shall consent to the assignment by Occidental, in a manner that has received the prior approval of the Federal Trade Commission and on conditions (other than consideration paid by Occidental to Tenneco) identical to those imposed on Occidental in the Sale Agreement, to the successor(s) or acquirer(s) of any PVC assets or business divested by Occidental pursuant to that order, of all benefits, rights and privileges extended to Occidental under the terms of the Sale Agreement and any attached exhibits (including, but not limited to the option rights, if any then exist, under Section 9.05 of that agreement), except for the option described in Exhibit V of the Sale Agreement which shall not be assigned. **[5]**

III.

It is further ordered, That Tenneco shall take no action that interferes with the accomplishment of any relief ordered by the Commission in this proceeding. Tenneco shall cooperate in the transfer to a third party of any PVC assets or business divested by Occidental pursuant to an order of the Commission.

IV.

Tenneco acknowledged that the final order of the Federal Trade Commission against Occidental in this proceeding may prohibit Occidental from exercising the option granted in Exhibit V of the Sale Agreement or may provide that Tenneco's reacquisition of the Burlington, New Jersey, PVC plant from Occidental pursuant Exhibit V of the Sale Agreement shall only be made in a manner that has received the prior approval of the Commission. Any reacquisition by Tenneco of the Burlington, New Jersey, PVC plant from Occidental pursuant to Exhibit V of the Sale Agreement shall only be made in a

manner that is consistent with the purposes of the Commission's final order against Occidental in this proceeding.

V.

It is further ordered, That for a period of ten years following the date of this order, for the purposes of determining compliance with this order, upon written request of the Federal Trade Commission or the Director or any Assistant Director of the Bureau of Competition of the Federal Trade Commission made to **[6]** Tenneco at its principal offices and subject to any legally recognized privilege, Tenneco shall permit duly authorized representatives of the Federal Trade Commission or of the Bureau of Competition:

A. Reasonable access during the office hours of Tenneco, which may have counsel present, to those books, ledgers, accounts, correspondence, memoranda, reports, and other records and documents in Tenneco's possession or control that relate to any matter contained in this order; and

B. An opportunity, subject to the reasonable convenience of Tenneco, to interview officers or employees of Tenneco, who may have counsel present, regarding such matters.

VI.

It is further ordered, That, while paragraph V of this order is effective, Tenneco shall notify the Commission at least thirty (30) days prior to any proposed corporate change, such as dissolution, assignment of substantially all assets, sale, or acquisition resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries in the United States, or any other change in the corporation which may affect compliance with the obligations arising out of this order. **[7]**

VII.

It is further ordered, That, within sixty (60) days after service upon Tenneco of the Commission's final order against Occidental in this proceeding, Tenneco shall file with the Commission a written report setting forth in detail the manner and form in which Tenneco has complied with this order.

IN THE MATTER OF

PATRICK S. O'HALLORAN, M.D., ET AL.

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

Docket C-3232. Complaint, Aug. 26, 1988—Decision, Aug. 26, 1988

This consent order prohibits, among other things, Patrick S. O'Halloran, M.D., a Rhode Island obstetrician, from dealing with any government health care program on collectively determined terms or from collectively refusing to deal with any government health care program.

Appearances

For the Commission: *L. Barry Costilo.*

For the respondent: *Donato Andre D'Andrea,* Newport, R.I.

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 respondents, Dr. Patrick S. O'Halloran, Dr. Donald A. Guadagnoli, Dr. Nasser Chahmirzadi, Dr. Douglas G. Wilson and Dr. James C. Gedney ("respondents"), have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. The respondents are physicians practicing on Aquidneck Island, Rhode Island. They are engaged in the business of providing obstetrical services to patients for a fee.

PAR. 2. Respondents constitute all of the physicians who practice obstetrics on Aquidneck Island, and are the only source of obstetrical services on the Island. Residents of Aquidneck Island who are eligible for Medicaid rarely leave the Island to obtain obstetrical services.

PAR. 3. Except to the extent that competition has been restrained as alleged herein, respondents have been and are now in competition among themselves.

PAR. 4. Respondents' general business practices and the acts and

practices herein alleged are in commerce or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. Respondents purchase and use drugs, supplies and equipment manufactured outside of Rhode Island, and collect payments that, in substantial part, are paid directly or indirectly from funds that flow interstate from insurance companies, employers and other payers. Respondents also receive Medicaid payments, which are paid in part by federal funds that flow across state lines. The flow of all or part of these funds, and in particular Medicaid payments, is affected by the acts and practices of the respondents as herein alleged.

PAR. 5. In approximately November and December of 1986, respondents met on several occasions to discuss their dissatisfaction with the level of Medicaid payments for the delivery of obstetrical services and desire for higher Medicaid payments, and entered into a combination or conspiracy to force the State to raise the level of Medicaid payments for obstetrical services.

PAR. 6. In furtherance of the above combination or conspiracy, respondents, among other things, threatened the State with a boycott if it did not increase its Medicaid payments to obstetricians.

A. In a letter to the Governor of Rhode Island dated January 5, 1987, respondents O'Halloran, Chahmirzadi and Guadagnoli stated that unless prompt action was taken they would no longer accept new obstetrical Medicaid patients after February 15, 1987. They stated that their action meant "there will be little, if any, obstetrical care on Aquidneck Island for Medicaid patients," and they noted their understanding that the other two obstetricians on the Island were considering similar action.

B. In a letter to the Governor sent four days later, respondents Gedney and Wilson referred to the February 15 deadline set by the other three obstetricians and stated that they, too, would not accept new Medicaid patients.

PAR. 7. As a result of the combination, conspiracy, acts and practices herein described, the State announced, four days before the February 15, 1987, deadline set by respondents, that effective April 1, 1987, the Medicaid payment level for the package of services provided in a routine obstetrical delivery would be more than doubled.

PAR. 8. The purpose, effects, tendency or capacity of the acts and practices described in paragraphs five and six are and have been to restrain trade unreasonably and hinder competition in the provision of

obstetrical services on Aquidneck Island, and to deprive consumers of the benefits of competition in the following ways, among others:

A. By restraining competition among obstetricians on Aquidneck Island.

B. By fixing or increasing the prices that obstetricians on Aquidneck Island charged for providing obstetrical services to Medicaid patients.

C. By depriving the State of Rhode Island and the Medicaid-eligible people on Aquidneck Island of the benefits of competition among the obstetricians on Aquidneck Island.

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

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent, Patrick S. O'Halloran, M.D., and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondent has violated the said 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, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure

prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Patrick S. O'Halloran, M.D., is a physician licensed and doing business under and by virtue of the laws of the State of Rhode Island. Respondent's mailing address is 484 Broadway, Newport, Rhode Island.

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

ORDER

I.

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

"Respondent" means Patrick S. O'Halloran, M.D., his employees, agents and representatives.

"Governmental health care program" means any governmental program that reimburses for, purchases, or pays for health care services provided to any person.

"Integrated joint venture" means a joint arrangement to provide pre-paid health care services in which physicians who would otherwise be competitors pool their capital to finance the venture, by themselves or together with others, and share substantial risk of adverse financial results caused by unexpectedly high utilization or costs of health care services.

II.

It is ordered, That respondent, directly, indirectly or through any device, in connection with the provision of medical services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from agreeing, attempting or threatening to agree, or continuing any agreement or understanding, either express or implied, with any physician (1) to deal with any governmental health care program on collectively determined terms, or (2) to refuse or threaten to refuse to deal with, or otherwise coerce, any governmental health care program.

Provided, That nothing in this order shall prohibit respondent from:

(1) entering into any agreement with any physician with whom respondent practices medicine in partnership or in a professional corporation, or who is employed by the same person as respondent; or

(2) entering into any agreement with any physician as a participant in an integrated joint venture, as long as the physician participants in the joint venture remain free to deal with any governmental health care program other than through the joint venture.

III.

A. *It is further ordered,* That within thirty (30) days after service of this order, respondent shall mail a copy of this order and the accompanying complaint to the Governor of the State of Rhode Island and to the President of Newport Hospital.

B. *It is further ordered,* That respondent shall, within sixty (60) days after service of this order, and at any time the Commission, by written notice, may require, file with the Commission a report, in writing, setting forth in detail the manner and from in which he has complied and is complying with this order.

C. *It is further ordered,* That respondent shall promptly notify the Commission of any change in his business address.

CONCURRING STATEMENT OF CHAIRMAN DANIEL OLIVER

I have voted for final acceptance of the consent order in this matter. However, I would have preferred an order that included a provision for automatic termination after ten years. In my view, an antitrust conduct order should be preserved only so long as its benefits outweigh its costs. Maintaining an order such as this in perpetuity is not ordinarily appropriate. Its procompetitive remedial benefits can be expected to decline over time, and it may also begin to have adverse effects on certain procompetitive practices.

With respect to orders in merger cases, the Commission has already concluded that "order provisions requiring prior Commission approval of future acquisitions generally should not have terms exceeding ten years."[1] The Commission determined that such provisions will in most

[1] *Hercules, Inc.,* 100 FTC 531 (1982) (modifying order); *see also, e.g., MidCon Corp.,* 107 FTC 48, 58 (1986) (consent order) (ten years); *Hospital Corp. of America,* 106 FTC 361, 524 (1985) (ten years), *aff'd,*

(footnote cont'd)

cases have served their remedial purposes after ten years, and "the findings upon which such provisions are based should not be presumed to continue to exist for a longer period of time."[2] For similar reasons, I believe that the consent order at issue here should automatically terminate after ten years.

807 F.2d 1381 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1975 (1987); *Columbian Enterprises, Inc.*, 106 FTC 551, 554 (1985) (consent order) (five years).

[2] *Hercules, Inc.*, 100 FTC at 531.

IN THE MATTER OF

DONALD A. GUADAGNOLI, M.D.

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

Docket C-3234. Complaint, Aug. 26, 1988—Decision, Aug. 26, 1988*

This consent order prohibits, among other things, Donald A. Guadagnoli, M.D., a Rhode Island obstetrician, from dealing with any government health care program on collectively determined terms or from collectively refusing to deal with any government health care program.

Appearances

For the Commission: *L. Barry Costilo.*

For the respondent: *Michael Hagopian, Gelfuslo & Lochut,* Cranston, R.I.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondent has violated the said Act, and that complaint should issue stating its

*Complaint previously published at 111 FTC 35 (1988).

charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Donald A. Guadagnoli, M.D., is a physician licensed and doing business under and by virtue of the laws of the State of Rhode Island. Respondent's mailing address is 333 Valley Road, Middletown, Rhode Island.

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

ORDER

I.

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

"Respondent" means Donald A. Guadagnoli, M.D., his employees, agents and representatives.

"Governmental health care program" means any governmental program that reimburses for, purchases, or pays for health care services provided to any person.

"Integrated joint venture" means a joint arrangement to provide pre-paid health care services in which physicians who would otherwise be competitors pool their capital to finance the venture, by themselves or together with others, and share substantial risk of adverse financial results caused by unexpectedly high utilization or costs of health care services.

II.

It is ordered, That respondent, directly, indirectly or through any device, in connection with the provision of medical services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from agreeing, attempting or threatening to agree, or continuing any agreement or

understanding, either express or implied, with any physician (1) to deal with any governmental health care program on collectively determined terms, or (2) to refuse or threaten to refuse to deal with, or otherwise coerce, any governmental health care program.

Provided, That nothing in this order shall prohibit respondent from:

(1) entering into any agreement with any physician with whom respondent practices medicine in partnership or in a professional corporation, or who is employed by the same person as respondent; or

(2) entering into any agreement with any physician as a participant in an integrated joint venture, as long as the physician participants in the joint venture remain free to deal with any governmental health care program other than through the joint venture.

III.

A. *It is further ordered,* That within thirty (30) days after service of this order, respondent shall mail a copy of this order and the accompanying complaint to the Governor of the State of Rhode Island and to the President of Newport Hospital.

B. *It is further ordered,* That respondent shall, within sixty (60) days after service of this order, and at any time the Commission, by written notice, may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied and is complying with this order.

C. *It is further ordered,* That respondent shall promptly notify the Commission of any change in his business address.

CONCURRING STATEMENT OF CHAIRMAN DANIEL OLIVER

I have voted for final acceptance of the consent order in this matter. However, I would have preferred an order that included a provision for automatic termination after ten years. In my view, an antitrust conduct order should be preserved only so long as its benefits outweigh its costs. Maintaining an order such as this in perpetuity is not ordinarily appropriate. Its procompetitive remedial benefits can be expected to decline over time, and it may also begin to have adverse effects on certain procompetitive practices.

With respect to orders in merger cases, the Commission has already concluded that "order provisions requiring prior Commission approval of future acquisitions generally should not have terms exceeding ten

years."[1] The Commission determined that such provisions will in most cases have served their remedial purposes after ten years, and "the findings upon which such provisions are based should not be presumed to continue to exist for a longer period of time."[2] For similar reasons, I believe that the consent order at issue here should automatically terminate after ten years.

[1] *Hercules, Inc.*, 100 FTC 531 (1982) (modifying order); *see also, e.g., MidCon Corp.*, 107 FTC 48, 58 (1986) (consent order) (ten years); *Hospital Corp. of America*, 106 FTC 361, 524 (1985) (ten years), *aff'd*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1975 (1987); *Columbian Enterprises, Inc.* 106 FTC 551, 554 (1985) (consent order) (five years).

[2] *Hercules, Inc.*, 100 FTC at 531.

IN THE MATTER OF

NASSER CHAHMIRZADI, M.D.

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

Docket C-3235. Complaint, Aug. 26, 1988—Decision, Aug. 26, 1988*

This consent order prohibits, among other things, Nasser Chahmirzadi, M.D., a Rhode Island obstetrician, from dealing with any government health care program on collectively determined terms or from collectively refusing to deal with any government health care program.

Appearances

For the Commission: *Jane R. Seymour.*

For the respondent: *Brian G. Bardorf,* Newport, R.I.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed

*Complaint previously published at 111 FTC 35 (1988).

consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Nasser Chahmirzadi, M.D., is a physician licensed and doing business under and by virtue of the laws of the State of Rhode Island. Respondent's mailing address is 333 Valley Road, Middletown, Rhode Island.

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

ORDER

I.

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

"Respondent" means Nasser Chahmirzadi, M.D., his employees, agents and representatives.

"Governmental health care program" means any governmental program that reimburses for, purchases, or pays for health care services provided to any person.

"Integrated joint venture" means a joint arrangement to provide pre-paid health care services in which physicians who would otherwise be competitors pool their capital to finance the venture, by themselves or together with others, and share substantial risk of adverse financial results caused by unexpectedly high utilization or costs of health care services.

II.

It is ordered, That respondent, directly, indirectly or through any device, in connection with the provision of medical services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from agreeing, attempting or threatening to agree, or continuing any agreement or understanding, either express or implied, with any physician (1) to

deal with any governmental health care program on collectively determined terms, or (2) to refuse or threaten to refuse to deal with, or otherwise coerce, any governmental health care program.

Provided, That nothing in this order shall prohibit respondent from:

(1) entering into any agreement with any physician with whom respondent practices medicine in partnership or in a professional corporation, or who is employed by the same person as respondent; or

(2) entering into any agreement with any physician as a participant in an integrated joint venture, as long as the physician participants in the joint venture remain free to deal with any governmental health care program other than through the joint venture.

III.

A. *It is further ordered,* That within thirty (30) days after service of this order, respondent shall mail a copy of this order and the accompanying complaint to the Governor of the State of Rhode Island and to the President of Newport Hospital.

B. *It is further ordered,* That respondent shall, within sixty (60) days after service of this order, and at any time the Commission, by written notice, may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied and is complying with this order.

C. *It is further ordered,* That respondent shall promptly notify the Commission of any change in his business address.

CONCURRING STATEMENT OF CHAIRMAN DANIEL OLIVER

I have voted for final acceptance of the consent order in this matter. However, I would have preferred an order that included a provision for automatic termination after ten years. In my view, an antitrust conduct order should be preserved only so long as its benefits outweigh its costs. Maintaining an order such as this in perpetuity is not ordinarily appropriate. Its procompetitive remedial benefits can be expected to decline over time, and it may also begin to have adverse effects on certain procompetitive practices.

With respect to orders in merger cases, the Commission has already concluded that "order provisions requiring prior Commission approval of future acquisitions generally should not have terms exceeding ten

years."[1] The Commission determined that such provisions will in most cases have served their remedial purposes after ten years, and "the findings upon which such provisions are based should not be presumed to continue to exist for a longer period of time."[2] For similar reasons, I believe that the consent order at issue here should automatically terminate after ten years.

[1] *Hercules, Inc.*, 100 FTC 531 (1982) (modifying order); *see also, e.g., MidCon Corp.*, 107 FTC 48, 58 (1986) (consent order) (ten years); *Hospital Corp. of America*, 106 FTC 361, 524 (1985) (ten years), *aff'd*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1975 (1987); *Columbian Enterprises, Inc.* 106 FTC 551, 554 (1985) (consent order) (five years).

[2] *Hercules, Inc.*, 100 FTC at 531.

IN THE MATTER OF

JAMES C. GEDNEY, M.D.

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

Docket C-3236. Complaint, Aug. 26, 1988—Decision, Aug. 26, 1988*

This consent order prohibits, among other things, James C. Gedney, M.D., a Rhode Island obstetrician, from dealing with any government health care program on collectively determined terms or from collectively refusing to deal with any government health care program.

Appearances

For the Commission: *Jane R. Seymour.*

For the respondent: *William R. Landry,* Providence, R.I.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed

*Complaint previously published at 111 FTC 35 (1988).

consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent James C. Gedney, M.D., is a physician licensed and doing business under and by virtue of the laws of the State of Rhode Island. Respondent's mailing address is Aquidneck Medical Center, Memorial Boulevard, Newport, Rhode Island.

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

ORDER

I.

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

"Respondent" means James C. Gedney, M.D., his employees, agents and representatives.

"Governmental health care program" means any governmental program that reimburses for, purchases, or pays for health care services provided to any person.

"Integrated joint venture" means a joint arrangement to provide pre-paid health care services in which physicians who would otherwise be competitors pool their capital to finance the venture, by themselves or together with others, and share substantial risk of adverse financial results caused by unexpectedly high utilization or costs of health care services.

II.

It is ordered, That respondent, directly, indirectly or through any device, in connection with the provision of medical services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from agreeing, attempting or threatening to agree, or continuing any agreement or understanding, either express or implied, with any physician (1) to

deal with any governmental health care program on collectively determined terms, or (2) to refuse or threaten to refuse to deal with, or otherwise coerce, any governmental health care program.

Provided, That nothing in this order shall prohibit respondent from:

(1) entering into any agreement with any physician with whom respondent practices medicine in partnership or in a professional corporation, or who is employed by the same person as respondent; or

(2) entering into any agreement with any physician as a participant in an integrated joint venture, as long as the physician participants in the joint venture remain free to deal with any governmental health care program other than through the joint venture.

III.

A. *It is further ordered,* That within thirty (30) days after service of this order, respondent shall mail a copy of this order and the accompanying complaint to the Governor of the State of Rhode Island and to the President of Newport Hospital.

B. *It is further ordered,* That respondent shall, within sixty (60) days after service of this order, and at any time the Commission, by written notice, may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied and is complying with this order.

C. *It is further ordered,* That respondent shall promptly notify the Commission of any change in his business address.

CONCURRING STATEMENT OF CHAIRMAN DANIEL OLIVER

I have voted for final acceptance of the consent order in this matter. However, I would have preferred an order that included a provision for automatic termination after ten years. In my view, an antitrust conduct order should be preserved only so long as its benefits outweigh its costs. Maintaining an order such as this in perpetuity is not ordinarily appropriate. Its procompetitive remedial benefits can be expected to decline over time, and it may also begin to have adverse effects on certain procompetitive practices.

With respect to orders in merger cases, the Commission has already concluded that "order provisions requiring prior Commission approval of future acquisitions generally should not have terms exceeding ten

years."[1] The Commission determined that such provisions will in most cases have served their remedial purposes after ten years, and "the findings upon which such provisions are based should not be presumed to continue to exist for a longer period of time."[2] For similar reasons, I believe that the consent order at issue here should automatically terminate after ten years.

[1] *Hercules, Inc.*, 100 FTC 531 (1982) (modifying order); *see also, e.g., MidCon Corp.*, 107 FTC 48, 58 (1986) (consent order) (ten years); *Hospital Corp. of America*, 106 FTC 361, 524 (1985) (ten years), *aff'd*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1975 (1987); *Columbian Enterprises, Inc.* 106 FTC 551, 554 (1985) (consent order) (five years).

[2] *Hercules. Inc.*. 100 FTC at 531.

IN THE MATTER OF

DOUGLAS G. WILSON, M.D.

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

Docket C-3237. Complaint, Aug. 26, 1988—Decision, Aug. 26, 1988*

This consent order prohibits, among other things, Douglas G. Wilson, M.D., a Rhode Island obstetrician, from dealing with any government health care program on collectively determined terms or from collectively refusing to deal with any government health care program.

Appearances

For the Commission: *L. Barry Costilo.*

For the respondent: *William R. Landry,* Providence, R.I.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed

*Complaint previously published at 111 FTC 35 (1988).

consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Douglas G. Wilson, M.D., is a physician licensed and doing business under and by virtue of the laws of the State of Rhode Island. Respondent's mailing address is Aquidneck Medical Center, Memorial Boulevard, Newport, Rhode Island.

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

ORDER

I.

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

"Respondent" means Douglas G. Wilson, M.D., his employees, agents and representatives.

"Governmental health care program" means any governmental program that reimburses for, purchases, or pays for health care services provided to any person.

"Integrated joint venture" means a joint arrangement to provide pre-paid health care services in which physicians who would otherwise be competitors pool their capital to finance the venture, by themselves or together with others, and share substantial risk of adverse financial results caused by unexpectedly high utilization or costs of health care services.

II.

It is ordered, That respondent, directly, indirectly or through any device, in connection with the provision of medical services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from agreeing, attempting or threatening to agree, or continuing any agreement or understanding, either express or implied, with any physician (1) to

deal with any governmental health care program on collectively determined terms, or (2) to refuse or threaten to refuse to deal with, or otherwise coerce, any governmental health care program.

Provided, That nothing in this order shall prohibit respondent from:

(1) entering into any agreement with any physician with whom respondent practices medicine in partnership or in a professional corporation, or who is employed by the same person as respondent; or

(2) entering into any agreement with any physician as a participant in an integrated joint venture, as long as the physician participants in the joint venture remain free to deal with any governmental health care program other than through the joint venture.

III.

A. *It is further ordered,* That within thirty (30) days after service of this order, respondent shall mail a copy of this order and the accompanying complaint to the Governor of the State of Rhode Island and to the President of Newport Hospital.

B. *It is further ordered,* That respondent shall, within sixty (60) days after service of this order, and at any time the Commission, by written notice, may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied and is complying with this order.

C. *It is further ordered,* That respondent shall promptly notify the Commission of any change in his business address.

CONCURRING STATEMENT OF CHAIRMAN DANIEL OLIVER

I have voted for final acceptance of the consent order in this matter. However, I would have preferred an order that included a provision for automatic termination after ten years. In my view, an antitrust conduct order should be preserved only so long as its benefits outweigh its costs. Maintaining an order such as this in perpetuity is not ordinarily appropriate. Its procompetitive remedial benefits can be expected to decline over time, and it may also begin to have adverse effects on certain procompetitive practices.

With respect to orders in merger cases, the Commission has already concluded that "order provisions requiring prior Commission approval of future acquisitions generally should not have terms exceeding ten

years."[1] The Commission determined that such provisions will in most cases have served their remedial purposes after ten years, and "the findings upon which such provisions are based should not be presumed to continue to exist for a longer period of time."[2] For similar reasons, I believe that the consent order at issue here should automatically terminate after ten years.

[1] *Hercules, Inc.*, 100 FTC 531 (1982) (modifying order); *see also, e.g., MidCon Corp.*, 107 FTC 48, 58 (1986) (consent order) (ten years); *Hospital Corp. of America*, 106 FTC 361, 524 (1985) (ten years), *aff'd*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1975 (1987); *Columbian Enterprises, Inc.* 106 FTC 551, 554 (1985) (consent order) (five years).

[2] *Hercules, Inc.*, 100 FTC at 531.

IN THE MATTER OF

ROBERT E. HARVEY, M.D., P.A., ET AL.

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

Docket C-3239. Complaint, Aug. 26, 1988—Decision, Aug. 26, 1988

This consent order prohibits, among other things, a group of Victoria, Tx. allergists from impeding the use of any allergy testing product by any physician, clinic, hospital, ambulatory care center or other health facility in order to restrict competition from physicians who are not allergists. Respondents are also prohibited from boycotting the manufacturers that produce allergy testing devices used by physicians who are not allergy specialists.

Appearances

For the Commission: *Erika R. Wodinsky.*

For the respondents: *R. Owen Ricker, Jr., Woody, Gumm, Villafranca, Villafranca & Ricker,* Victoria, Tx.

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 Robert E. Harvey, M.D., a professional association, doing business as Victoria Allergy and Asthma Clinic ("Harvey, P.A."), and Robert E. Harvey, M.D. ("Harvey") and Gullapali K. Rao, M.D. ("Rao"), individually, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Harvey and Rao are physicians licensed by the State of Texas who devote a substantial portion of their practice to the diagnosis and treatment of allergic disease. Respondent Harvey directs and controls the business practices of Harvey, P.A., which does business under the name Victoria Allergy and Asthma Clinic. The principal place of business of each of the respondents is located at 3901 North Navarro, Victoria, Texas.

PAR. 2. Respondents are engaged in the business of providing medical services for a fee. Except to the extent that competition has been restrained as alleged herein, respondents have been and are now in competition with other physicians in the State of Texas who engage in the diagnosis and treatment of allergic disease.

PAR. 3. The acts and practices of respondents, including the acts and practices alleged herein, have been in or are affecting commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 4. An allergist is a physician, a substantial portion of whose practice is the diagnosis and treatment of allergic disease. Some physicians who are not allergists also diagnose and treat allergic disease. Except to the extent that competition has been restrained as alleged herein, allergists compete among themselves and with non-allergist physicians in the diagnosis and treatment of allergic disease.

PAR. 5. The methods used to diagnose allergic disease include, but are not limited to, *in vivo* allergy tests (interdermal or skin tests) and *in vitro* allergy tests (tests identifying allergen specific Immunoglobulin E antibodies in blood serum). *In vivo* allergy tests involve the introduction of a series of allergenic extracts under or on a patient's skin. A physician trained in the use of this test may then diagnose whether the patient is allergic to particular substances by, *inter alia*, observing the reaction on the skin where allergenic extracts have been introduced. *In vitro* allergy tests involve taking a blood sample from a patient and using a laboratory test to determine whether the patient is allergic to particular substances.

PAR. 6. Substantial technical training and experience are required to administer and make the subjective judgments necessary to interpret *in vivo* allergy tests. *In vitro* allergy tests require less technical training and experience to administer and interpret because the results of such tests are objective. For this reason, the development of *in vitro* allergy tests expanded the number and types of physicians who could diagnose allergic disease. Prior to the development of *in vitro* allergy tests, allergists largely competed only among themselves, and faced limited competition from physicians who were not allergists. After *in vitro* allergy tests were developed, allergists began to face the prospect of substantial competition from physicians who are not allergists.

PAR. 7. Pharmacia, Inc. ("Pharmacia") is a diversified manufacturer of medical diagnostic products, including materials used in testing

for allergic disease. Pharmacia markets products for use in *in vivo* and *in vitro* allergy tests to physicians throughout the United States.

PAR. 8. Beginning no later than March 1984, Pharmacia, which had been marketing its allergy testing products primarily to allergists, began to market its *in vitro* allergy testing products to physicians in Texas who were not allergists.

PAR. 9. Beginning in April 1984, Harvey, Rao and other allergists in Texas, acting in combination or conspiracy, joined in a common plan to coerce and boycott Pharmacia in order to force it to stop marketing and selling *in vitro* allergy testing products to physicians in Texas who were not allergists.

PAR. 10. MAST Immunosystems, Inc. ("MAST") is a manufacturer of *in vitro* allergy testing products. MAST markets its allergy testing products to physicians, hospitals, clinics and ambulatory care centers throughout the United States.

PAR. 11. MAST first began to market its *in vitro* allergy testing products in Texas no later than January 1985. From the outset, MAST marketed these products to physicians (both allergists and non-allergists), hospitals, clinics and ambulatory care centers.

PAR. 12. Beginning in April 1985, Harvey, Rao and other allergists in Texas, acting in combination or conspiracy, joined in a common plan to coerce and boycott MAST in order to force it to stop marketing and selling *in vitro* allergy testing products in Texas to anyone but allergists.

PAR. 13. In furtherance of the aforesaid combinations or conspiracies, respondents and other allergists in Texas engaged in the following actions, among others:

(a) On or about April 16, 1984, respondents sent letters to all or nearly all allergists in Texas, urging them to "join forces" against the marketing of *in vitro* allergy testing products to physicians who were not allergists. In particular, the letter urged these allergists to refuse to deal with Pharmacia because Pharmacia marketed its allergy testing products to physicians who were not allergists. The letter also urged these allergists to act to prevent Pharmacia from being permitted to buy advertising in the *Journal of Allergy and Clinical Immunology* (the journal published by the American Academy of Allergy and Immunology ("AAAI")), and from being permitted to exhibit and promote its products at AAAI meetings.

(b) On or about April 30, 1984, respondents sent a second letter to all or nearly all allergists in Texas, again asking them to join in

refusing to deal with Pharmacia, and to act to prevent Pharmacia from advertising in AAAI publications or exhibiting at AAAI meetings. This letter urged recipients to contact "every allergist in the country" concerning Pharmacia's marketing practices.

(c) In response to these two letters, some allergists in Texas joined respondents in attempting to coerce Pharmacia to discontinue marketing its allergy testing products to physicians who were not allergists by, *inter alia,* threatening to terminate or terminating their purchases from Pharmacia. According to respondents, their "united efforts" with other allergists in Texas "successfully thwarted" Pharmacia's marketing efforts in Texas.

(d) On or about April 11, 1985, respondents sent a third letter to allergists in Texas, urging them to take concerted action to deter MAST from marketing its allergy testing products to anyone but allergists.

(e) In response to this letter, some allergists in Texas joined respondents in attempting to coerce MAST to discontinue marketing it allergy testing products to non-allergists by, *inter alia,* threatening to terminate or terminating their purchases from MAST, and urging the AAAI not to permit MAST to exhibit and promote its products at AAAI meetings.

PAR. 14. The purposes, effects, tendency or capacity of the combination or conspiracy and the acts and practices described above are and have been to restrain trade unreasonably and hinder competition in the provision of allergy diagnostic and treatment services in Texas, and to deprive consumers of the benefits of competition in the following ways, among others:

(a) By limiting the ability of patients to choose among a variety of alternative providers of diagnosis and treatment for allergic disease, competing on the bases of price, service, quality or other factors of significance to patients;

(b) By deterring manufacturers of *in vitro* allergy testing products from marketing or selling their products to anyone but allergists, thereby preventing other physicians, hospitals, clinics and ambulatory care centers from competing with allergists in the diagnosis and treatment of allergic disease; and

(c) By hindering the development and use of competitive, convenient, cost-effective and innovative forms of allergy testing.

PAR. 15. The combination or conspiracy described above constitutes an unfair method of competition in or affecting commerce in violation

of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended. Such combination or conspiracy, or the effects thereof, is continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

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

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

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

1. Respondent Robert E. Harvey, M.D., P.A., is a professional association, existing and doing business under the laws of the State of Texas as Victoria Allergy and Asthma Clinic. Respondents Robert E. Harvey, M.D. and Gullapali K. Rao, M.D. are physicians licensed and doing business under the laws of the state of Texas. Respondents' principal place of business is located at 3901 North Navarro, City of Victoria, State of Texas.

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

ORDER

I.

It is ordered, That for purposes of this order, the following definitions apply:

A. *"Respondents"* means Robert E. Harvey, M.D., a professional association doing business as Victoria Allergy and Asthma Clinic, and Robert E. Harvey, M.D. and Gullapali K. Rao, M.D., individually or under any other name or names, and their representatives, agents and employees.

B. *"Allergy testing product"* means any product or device that has been approved by the Food and Drug Administration of the United States Department of Health and Human Services ("FDA") for the use in the diagnosis or treatment of allergic disease in human patients. This definition includes but is not limited to, products or devices used for *in vitro* allergy tests, as hereinafter defined.

C. "*In vitro* allergy test" means any test, approved by the FDA, that is conducted on blood or blood serum samples to diagnose or treat allergic disease. This definition includes, but is not limited to, tests that are known by the trade names "Radioallergosorbent tests," "Multiple Antigen Simultaneous tests," "Fluoroallergosorbent tests," and "Immunoperoxidase tests."

II.

It is ordered, That respondents, their successors and assigns shall cease and desist from, directly or through any device, entering into, threatening or attempting to enter into, organizing, continuing or participating in any agreement or combination to refuse or threaten to refuse to deal with, or otherwise coerce, any person or entity for the purpose or with the effect of impeding the use of any allergy testing product by any physician, clinic, hospital, ambulatory care center or other health care facility. This includes but is not limited to any agreement or combination to refuse or threaten to refuse to deal with any manufacturer or distributor of any allergy testing product

because that manufacturer or distributor offers to sell or sells allergy testing products to any physician who is not certified or eligible for certification by the American Board of Allergists, or to any clinic, hospital, ambulatory care center or other health care facility.

Provided, That nothing in this order shall prohibit a respondent from entering into any agreement with any physician with whom that respondent practices medicine in partnership or as a professional corporation or association, or who is employed by the same person as that respondent or whom that respondent employs.

III.

It is further ordered, That respondents shall:

A. Within thirty (30) days after this order becomes final, mail a copy of this order and of the complaint in this proceeding to each and every physician or facility to whom respondents sent correspondence referred to in paragraphs 13(a), 13(b), and 13(d) of the Commission's complaint in this matter.

B. Within sixty (60) days after this order becomes final, and at such other times as the Commission may by written notice to respondents require, file or cause to be filed with the Office of the Secretary of the Commission, Washington, D.C. 20580, or such other office as the Commission shall designate in writing, a verified written report setting forth in detail the manner and form in which they have complied with this order.

IV.

It is further ordered, That the respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. In addition, for a period of ten (10) years from the date of service of this order, the respondents shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondents' new business address and a statement of the nature of the business or employment in which the respondents are newly engaged as well as a description of respondents' duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

IN THE MATTER OF

THE VONS COMPANIES, INC., ET AL.

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

Docket C-3233. Complaint, Aug. 29, 1988—Decision, Aug. 29, 1988

This consent order requires, among other things, that The Vons Companies, an El Monte, Ca. corporation, divest certain Safeway stores in the California area.

Appearances

For the Commission: *Joan S. Greenbaum.*

For the respondents: *Joseph A. DeFrancis, Latham & Watkins,* Washington, D.C. and *Gregg Stone, Manger, Tolles & Olson,* Los Angeles, Ca.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the respondents, The Vons Companies, Inc., SSI Associates, L.P., and Safeway Stores, Incorporated, entities subject to the jurisdiction of the Commission, have entered into an agreement, described in paragraph 9 herein, that, if consummated, would violate the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; that said agreement, and the actions of the respondents to implement that agreement, constitute violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

DEFINITIONS

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

a. *"Retail grocery store"* means any full-line retail food store of 10,000 or more square feet, and which sells primarily a wide variety of canned or frozen foods; dry groceries; non-edible grocery items; fresh meat, poultry and produce (vegetables and fruits), and which often sells delicatessen items, bakery items, fresh fish or other specialty items. **[2]**

b. *"Vons"* means The Vons Companies, Inc., its subsidiaries, divisions, and groups controlled by Vons and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

c. *"Safeway"* means SSI Associates, L.P., and Safeway Stores, Incorporated, their respective subsidiaries, divisions, and groups controlled by Safeway and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

THE PARTIES

2. Respondent Vons is a corporation organized and existing under the laws of the State of Michigan with its principal place of business located at 10150 Lower Azusa Road, El Monte, California.

3. In 1987, Vons had sales of $3.4 billion.

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

5. Respondent SSI Associates, L.P., which owns 96.4 percent of the voting securities of Safeway Stores, Incorporated and controls it, is a limited partnership organized and existing under the laws of the State of Delaware with its executive offices located c/o Kohlberg Kravis Roberts & Company, 101 California Street, San Francisco, California.

6. Respondent Safeway Stores, Incorporated is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at 201 Fourth Street, Oakland, California.

7. For the year ending January 3, 1988, Safeway had sales of $ 18 billion.

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

affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. **[3]**

THE ACQUISITION

9. On or about December 10, 1987, Vons entered into an agreement with Safeway whereby it proposes to purchase the capital stock of the following subsidiaries of Safeway: Safeway Stores 23, Inc., Safeway Stores 27, Inc., Safeway Stores 29, Inc., and Safeway Stores 30, Inc. The acquisition of these subsidiaries includes 172 retail grocery stores and related assets currently operated as Safeway's Southern California Division. Both Vons and Safeway operate retail grocery stores in various cities and towns in California and Nevada. In 1986, Safeway's Southern California Division had grocery sales of $1.8 billion.

TRADE AND COMMERCE

Relevant Line of Commerce

10. A relevant line of commerce in which to analyze Vons's acquisition of Safeway is the retail sale and distribution of food and grocery items in retail grocery stores.

Relevant Sections of the Country

11. Relevant sections of the country are the following areas in California:

a. Barstow;

b. Yucca Valley;

c. Camarillo;

d. South San Diego County (an area including the cities and towns of Imperial Beach, Coronado, Chula Vista, San Diego, Lakeside, La Mesa, Lemon Grove, Pacific Beach, Point Loma, San Ysidro, Santee, Bonita Hills, El Cajon, National City, Spring Valley, Rancho San Diego, La Jolla, Mission Valley, and Tierra Santa);

e. Santa Clarita Valley (an area including the cities and towns of Canyon Country, Valencia, Newhall and Saugus);

f. Coachella Valley (an area including the cities and towns of Palm Springs, Palm Desert, Indian Wells, Indio, Cathedral City, Rancho Mirage, La Quinta, and Coachella); and

g. Santa Barbara, Montecito, and Goleta. **[4]**

MARKET STRUCTURE

12. Retail sale and distribution of food and grocery items in retail

grocery stores in each of the relevant sections of the country is highly concentrated, whether measured by the Herfindahl-Hirschmann Indices ("HHI") or by two-firm and four-firm concentration ratios.

ENTRY CONDITIONS

13. Entry into the retail sale and distribution of food and grocery items in retail grocery stores in each of the relevant sections of the country is difficult or unlikely.

ACTUAL COMPETITION

14. Vons and Safeway are actual competitors in the relevant sections of the country located in California.

EFFECTS

15. The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant line of commerce in the relevant sections of the country in violation of 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, in the following ways, among others:

a. by eliminating direct competition between Vons and Safeway;
b. by increasing the likelihood that Vons will unilaterally exercise market power; or
c. by increasing the likelihood of, or facilitating, collusion where the acquisition would significantly increase already high levels of concentration;

all of which increases the likelihood that firms will increase prices and restrict output of food and groceries both in the near future and for a longer period of time.

VIOLATIONS CHARGED

16. The proposed acquisition of Safeway by Vons violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and would, if consummated, violate Section 7 of the Clayton Act, 15 U.S.C. 18 and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the acquisition by The Vons Companies, Inc. (hereinafter "Vons") of certain assets of Safeway Stores, Incorporated, a subsidiary of SSI

Associates, L.P. (hereinafter collectively "Safeway") and Vons and Safeway, having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge Vons and Safeway with violations of the Clayton Act and Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, 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 forty-five (45) days, and having duly considered the comments thereafter filed by interested persons pursuant to Section 2.34 of its Rules, now in further conformity **[2]** 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:

Vons is a corporation organized and existing under the laws of the State of Michigan with its principal place of business located at 10150 Lower Azusa Road, El Monte, California.

Safeway Stores, Incorporated is a corporation organized and existing under the laws of the State of Delaware with executive offices located at Fourth and Jackson Streets, Oakland, California.

SSI Associates, L.P., which owns 96.4 percent of the voting securities of Safeway Stores, Incorporated and controls it, is a limited partnership organized and existing under the laws of the State of Delaware with executive offices located c/o Kohlberg Kravis Roberts & Company, 101 California Street, San Francisco, California.

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

ORDER

I.

As used in this order, the following definitions shall apply:

(A) *"Vons"* means The Vons Companies, Inc., its subsidiaries, divisions and groups controlled by Vons, and their respective directors, officers, employees, agents and representatives and their respective successors and assigns.

(B) *"Safeway"* means Safeway Stores, Incorporated, its subsidiaries, divisions and groups controlled by Safeway, and their respective directors, officers, employees, agents and representatives and their respective successors and assigns. "Safeway" also means SSI Associates, L.P., its subsidiaries, divisions and groups controlled by SSI Associates, L.P., and their respective directors, officers, employees, agents and representatives and their respective successors and assigns.

(C) *"Acquisition"* means Vons' acquisition of the outstanding shares of the capital stock of certain subsidiaries of Safeway, specifically, Safeway Stores 23, Inc., Safeway Stores 27, Inc., Safeway Stores 29, Inc., and Safeway Stores 30, Inc. (hereinafter referred to collectively as the "Safeway Subsidiaries"). **[3]**

(D) *"Assets to be divested"* means the assets described in Paragraph II(A) of the Order, also known as the 'II(A) properties."

(E) *"To be acquired store"* means any retail grocery store in the Safeway Subsidiaries.

(F) *"Eligible Person"* means Federated Department Stores, Inc., dba Ralphs Grocery Company ("Ralphs"), Albertson's, Inc., Hughes Markets, Inc. ("Hughes"), Certified Grocers of California, Ltd., Big Bear Super Markets #3, and Stater Bros. Inc. ("Stater Bros.") and their respective successors, assigns, subsidiaries, divisions and groups.

(G) *"Retail grocery store"* means any full-line retail food store of 10,000 or more square feet, and which sells primarily a wide variety of canned or frozen foods; dry groceries; non-edible grocery items; fresh meat, poultry and produce (vegetables and fruits), and which often sells delicatessen items, bakery items, fresh fish or other specialty items.

(H) *"Commission"* means the Federal Trade Commission.

II.

It is ordered, That:

(A) Vons or Safeway, as the case may be, shall divest, absolutely and in good faith, prior to consummating the acquisition, the number of retail grocery stores (either any of the to be acquired stores, retail grocery stores presently operated by Vons, or any combination thereof) set forth below, and the grocery businesses operated therein, in each of the following locations:

(1) One store in Barstow, California;
(2) One store in Yucca Valley, California;
(3) One store in Santa Clarita, California;
(4) One store in Camarillo, California;
(5) One store in Palm Springs, California;
(6) Two stores in Santa Barbara, California (including Goleta and Montecito), but not to include Safeway Store No. 384;
(7) One store in Clairemont, California;
(8) One store in Ocean Beach, California; **[4]**
(9) One store in the La Presa-Paradise Hills area of San Diego, California;
(10) One store in Chula Vista, California; and
(11) One store in the North Park area of San Diego, California.

Such divestitures shall be (i) to an acquirer or acquirers and only in such a manner that receives the prior approval of the Commission, or (ii) to an eligible person.

Notwithstanding the definition of eligible person, Ralphs shall not be considered an eligible person for the store to be divested in Camarillo, Hughes shall not be considered an eligible person for the store to be divested in Santa Clarita and Stater Bros. shall not be considered an eligible person for the stores to be divested in Barstow and Yucca Valley.

(B) The Agreement to Hold Separate is attached hereto as Appendix A and made a part hereof.

(C) In effecting the divestitures, Vons and/or Safeway, as the case may be, shall divest all rights to occupy the premises being divested and to operate a retail grocery business therein and shall retain no control or influence over the retail grocery business to be conducted after the divestiture. The purpose of the divestiture of such stores and this order (including the Agreement To Hold Separate) is to ensure

the continuation of the assets as ongoing, viable enterprises engaged in the retail sale of groceries and to remedy the lessening of competition alleged in the Commission's draft of complaint.

(D) The divestitures required by paragraph II(A) may take place at any time after this order becomes final, but in no event shall Vons consummate the acquisition before such divestitures have been made.

(E) In the event that the Commission brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*), or any other statute enforced by the Commission, for any violation of this order, Vons shall consent to the appointment of a trustee by the Commission to divest the II(A) properties. If the Commission seeks appointment of a trustee by the court in such action, Vons shall consent to the appointment of a trustee by the court. The appointment of a trustee shall not preclude the Commission from seeking civil penalties and other relief available to it for any failure by Vons to comply with paragraphs II(A) through VI of this order.

If a trustee is appointed by the Commission or a court pursuant to paragraph II(E) of this order, Vons consents to the **[5]** following terms and conditions regarding the trustee's duties and responsibilities:

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

(2) The trustee shall have the power and authority to divest any properties listed in paragraph II(A) and such other properties as are identified in paragraph II(E)(3) below in any location listed therein in which a store has not been divested as required in paragraph II(A). The trustee shall have six (6) months from the date the trust agreement is executed to accomplish the divestiture, which shall be subject to the prior approval of the Commission, and subject also to the prior approval of the court if the trustee is appointed by a court.

(3) If, at the end of the six (6) month period, the trustee has not secured approval of the Commission or of the court of divestiture as required by paragraph II(A), the trustee may, if the Commission determines in order to accomplish the divestiture, add such other assets as are required to effectuate the remedial purposes of this order.

(4) The trustee shall have full and complete access to the personnel, books, records and facilities of any retail grocery store that the trustee has the duty to divest, and Vons shall develop such financial or other

information relevant to the assets to be divested as such trustee may reasonably request. Vons shall cooperate with the trustee, and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

(5) The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Vons' absolute and unconditional obligation to divest at no minimum price and the purposes of the divestiture as stated in paragraph II.

(6) The trustee shall serve without bond or other security at the cost and expense of Vons on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to retain at the cost and expense of **[6]** Vons such consultants, accountants, attorneys, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to assist in the divestiture. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission or court, as the case may be, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to Vons and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee divesting the II(A) properties and any other assets to be divested in accordance with paragraph II(E)(3) of this order.

(7) Within twenty (20) days of the appointment of the trustee, Vons shall, subject to the prior approval of the Commission, and subject to the approval of the court if the trustee was appointed by the court, and consistent with the provisions of this order, execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture.

(8) If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as in paragraph II of this order.

(9) The trustee shall report in writing to the Commission and Vons every sixty (60) days, from the date the trust agreement is executed, concerning the trustee's efforts to accomplish divestiture.

III.

It is further ordered, That, within sixty (60) days after this order

becomes final, and every sixty (60) days thereafter until Vons and Safeway have fully complied with the provisions of paragraph II of this order, Vons and Safeway shall each submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply with, or have complied with paragraph II of the order. Vons and Safeway shall include in their respective compliance reports, among other things that may be required from time to time, a full description of contracts or negotiations for the divestiture of the II(A) properties, including the identity of all parties contacted. Vons and Safeway also shall include in their respective compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning the mandated divestitures. **[7]**

IV.

It is further ordered, That:

(A) For a period commencing on the date this order becomes final and continuing for ten (10) years thereafter, Vons shall cease and desist from acquiring, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise, any retail grocery store, including any facility that has been operated as a retail grocery store within six (6) months of the date of the offer by Vons to purchase the facility, or any interest in a retail grocery store, or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates a retail grocery store, in the following cities or towns:

Las Vegas, Nevada
Bakersfield, California
Santa Clarita, California
Camarillo, California
Ventura, California
Thousand Oaks, California
Victorville, California
Barstow, California
Coachella Valley, California (an area including the cities and town of Palm Springs, Palm Desert, Indian Wells, Indio, Cathedral City, Rancho Mirage, La Quinta, and Coachella)
Yucca Valley, California

Solana Beach, California
Carlsbad, California
Vista, California
Escondido, California
Poway, California
Rancho Bernardo, California **[8]**
South San Diego County, California (that portion of San Diego County, California that is south of the Miramar Naval Air Station)
Santa Barbara, Montecito and Goleta, California
Palmdale, California
Lancaster, California
Simi Valley, California
Moreno Valley, California

Provided, however, That this paragraph IV(A) shall not be deemed to require prior approval of the Federal Trade Commission of the construction of new facilities by Vons or the purchase or lease by Vons of a facility that has not been operated as a retail grocery store at any time during the six (6) month period immediately prior to the purchase or lease by Vons in those locations.

(B) For a period commencing on the date this order becomes final and continuing for ten (10) years thereafter, Vons shall cease and desist from acquiring, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise, any retail grocery store, including any facility that has been operated as a retail grocery store within six (6) months of the date of the offer to purchase the facility, or any interest in a retail grocery store, or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates any retail grocery store in: (1) the city of San Bernardino, California; or (2) the city of Riverside, California; or (3) the counties of Los Angeles and Orange, California; *provided, however,* that upon thirty (30) days prior written notice to the Commission, Vons may acquire, directly or indirectly, through subsidiaries or otherwise, any such retail grocery stores, so long as, in any twelve (12) month period, commencing on the date this order becomes final and continuing thereafter for ten (10) years, the number of such retail grocery stores acquired, directly or indirectly, does not exceed: (1) two in the city of San Bernardino, California; (2) two in the city of Riverside, California; and (3) ten in the counties of Los Angeles and Orange, California. *Provided further, however,* That these prohibitions shall not relate to the construction of

new facilities by Vons or the purchase or lease by Vons of a facility that was not operated as a retail grocery store at any time during the six (6) month period immediately prior to the purchase or lease by Vons in those locations.

(C) One year from the date this order becomes final and for each of the nine (9) years thereafter, Vons shall file with the **[9]** Commission a verified written report of its compliance with this paragraph. Such reports shall include a listing of all acquisitions of retail grocery stores made by Vons without prior approval of the Commission in any area listed in this paragraph IV.

V.

It is further ordered, That, for the purposes of determining or securing compliance with this order, subject to any legally recognized privilege, and upon written request with reasonable notice to Vons or Safeway made to their principal offices, Vons and Safeway shall permit any duly authorized representatives of the Commission:

(A) Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Vons or Safeway relating to compliance with this order; and

(B) Upon five (5) days' notice to Vons or Safeway and without restraint or interference from them, to interview directors, agents, representatives, officers or employees of Vons or Safeway, who may have counsel present, regarding such matters. **[10]**

VI.

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

Commissioner Azcuenaga dissenting.

APPENDIX A

AGREEMENT TO HOLD SEPARATE

Agreement dated as of May ___ , 1988 (the "agreement"), by and among SSI Associates, L.P., a limited partnership organized and existing under the laws of the State of Delaware with executive offices located c/o Kohlberg Kravis Roberts & Company, 101 California Street, San Francisco, California; Safeway Stores, Incorporated, a corporation organized and existing under the laws of the State of Delaware, with executive offices located at 201 Fourth Street, Oakland, California (collectively "Safeway"); The Vons Companies, Inc. ("Vons"), a corporation organized and existing under the laws of the State of Michigan, with executive offices located at 10150 Lower Azusa Road, El Monte, California; and the Federal Trade Commission ("the Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "parties").

PREMISES

Whereas, Vons, pursuant to an agreement dated December 3, 1987, agreed to purchase all the outstanding capital stock of certain subsidiaries of Safeway, specifically, Safeway Stores 23, Inc., Safeway Stores 27, Inc., Safeway Stores 29, Inc., and Safeway Stores 30, Inc. (hereinafter collectively the "Safeway Subsidiaries"), ("the acquisition"); and

Whereas, the Commission has reason to believe that the acquisition would violate the statutes enforced by the Commission; and

Whereas, if the Commission accepts the attached Agreement Containing Consent Order ("consent order") the Commission must place it on the public record for a period of public comment and may **[2]** subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commissions Rules; and

Whereas, the Commission is concerned that if an understanding is not reached preserving the status quo ante of the Safeway Subsidiaries during the period prior to the divestiture of the properties to be divested pursuant to paragraph II(A) of the consent order ("II(A) properties") divestiture resulting from any proceeding challenging the legality of the acquisition might not be possible or might be a less than effective remedy; and

Whereas, the Commission is concerned that prior to the acquisition being consummated it may be necessary to preserve the Commission's ability to require the divestiture of the II(A) properties and the Commission's ability to preserve the Safeway Subsidiaries as a viable competitor; and

Whereas, the purpose of this agreement and the consent order is to preserve the Safeway Subsidiaries as a viable operation pending the divestiture of the II(A) properties as viable, ongoing enterprises in order to remedy any anticompetitive effects of the acquisition, and to preserve the Safeway Subsidiaries as a viable operation in the event that divestiture of the II(A) properties is not achieved; and

Whereas, Vons' and Safeway's entering into this agreement shall in no way be construed as an admission by Vons or Safeway that the acquisition is illegal; and

Whereas, Vons and Safeway understand that no act or transaction contemplated by this agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this agreement,

Now, therefore, in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will not seek further relief from the parties with respect to the acquisition, except that the Commission may exercise any and all rights to enforce this agreement and the consent order annexed hereto and made a part thereof, the parties agree as follows:

1. Vons and Safeway agree to execute and, upon its issuance, to be bound by the attached consent order.

2. Vons and Safeway agree that they shall not close the acquisition either **[3]**

(a) until three (3) business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's rules; or

(b) if the Commission issues the consent order, until such time as all of the II(A) properties have been divested in accordance with the terms and conditions of the consent order.

3. In the event the consent order is not finally approved and issued by the Commission within ninety (90) days of the date on which it first is placed on the public record, Vons and Safeway, or either of them, may, at their sole option, terminate this agreement by delivering written notice of termination to the Commission, which termination

shall be effective ten (10) days after the Commission's receipt of such notices, and this agreement shall thereafter be of no further force and effect. If this agreement is so terminated the Commission may take such action as it deems appropriate, including but not limited to an action pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b).

4. Until the II(A) properties are divested, neither Safeway nor Vons shall cause or permit the wasting or deterioration of the II(A) properties in any manner that impairs the marketability of any of the II(A) properties or impairs in any manner the viability of such properties or the operation thereof as retail grocery stores.

5. So long as this agreement remains in effect, if the Commission seeks in any proceeding to prevent the acquisition from being consummated, or seeks any other injunctive or equitable relief, neither Vons nor Safeway shall raise an objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting periods. Vons and Safeway also waive all rights to contest the validity of this agreement.

6. For the purpose of determining or securing compliance with this agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to Vons or Safeway made to their principal offices, Vons and Safeway shall permit any duly authorized representative or representatives of the Commission:

(a) Access during the office hours of Vons or Safeway, in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the **[4]** control of Vons or Safeway relating to compliance with this agreement; and

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

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

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I dissent from the decision of the Commission majority to accept this consent order from Vons Companies, Inc. ("Vons") because the order is not sufficiently broad to resolve the potential anticompetitive effects

of Vons' acquisition of the southern California stores of SSI Associates, L.P. ("Safeway"). The levels of concentration, conditions of entry, and other facts that bear on the state of competition in the supermarket industry in discrete southern California markets indicate that the Commission should require the divestiture of a greater number of stores to protect competition in markets in which Vons and Safeway now compete.

CONCURRING STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

I would prefer to secure additional consumer safeguards in this matter either by renegotiating the proposed consent agreement or by rejecting the consent and pursuing a preliminary injunction. In particular, an increase in the number of stores to be divested would be in the public interest. However, lacking a Commission majority in favor of that approach, the alternative to the proposed consent agreement is not a stronger set of safeguards but rather no safeguards at all. Under these circumstances, and in light of the non-trivial nature of the relief obtained, I have voted to make final the proposed consent agreement.

IN THE MATTER OF

AMERICAN STORES COMPANY, ET AL.

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

Docket C-3238. Complaint, Aug. 31, 1988—Decision, Aug. 31, 1988

This consent order allows, among other things, American Stores Company, a Dublin Ca. corporation, to acquire Lucky Stores, Inc. Respondents are required to divest between 31 and 37 grocery stores in California and also required to obtain FTC approval before making certain grocery store acquisitions.

Appearances

For the Commission: *Joan S. Greenbaum* and *Marimichael Skubel.*

For the respondents: *C. Loring Jetton, Wilmer, Cutler & Pickering,* Washington, D.C. and *Steven M. Axinn, Skadden & Arps,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the respondents, American Stores Company and Alpha Beta Acquisition Corporation, corporations subject to the jurisdiction of the Commission, have commenced a tender offer for the shares of Lucky Stores, Inc., that, if completed, would violate the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; that said offer, and the actions of the respondents to implement that offer, constitute violations of Section 5 of the FTC Act, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

DEFINITIONS

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

a. *"Retail grocery store"* means any full-line retail food store of 10,000 or more square feet, and which sells primarily a wide variety of canned or frozen foods; dry groceries; non-edible grocery items; fresh meat, poultry and produce (vegetables and fruits), and which often sells delicatessen items, bakery items, fresh fish or other specialty items. **[2]**

b. *"American"* means American Stores Company and its wholly-owned subsidiary, Alpha Beta Acquisition Corporation, their subsidiaries, divisions, and groups controlled by American and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

c. *"Lucky"* means Lucky Stores, Inc., its subsidiaries, divisions, and groups controlled by Lucky and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

THE PARTIES

2. Respondent American Stores Company, which owns 100 percent of the voting securities and controls Alpha Beta Acquisition Corporation, is a corporation organized and existing under the laws of the State of Delaware with its principal place of business located at 444 East 100 South, Salt Lake City, Utah.

3. Respondent Alpha Beta Acquisition Corporation is a corporation organized and existing under the laws of the State of Delaware with its executive offices located at 19100 Von Karman, Irvine, California.

4. In 1987, American had sales of $14.3 billion.

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

THE ACQUISITION

6. On or about March 28, 1988, American commenced a cash tender offer for the issued and outstanding shares of Lucky common stock. American and Lucky both operate retail grocery stores in California and Nevada. American also operates retail grocery stores in Illinois, Indiana, and Iowa and Lucky holds a limited partnership interest in Eagle Food Centers, L.P., a Delaware limited partnership which operates retail grocery stores in Illinois, Indiana, and Iowa. If the

acquisition is consummated as currently proposed by American, the total value of the transaction will be approximately $2.5 billion. Through this proposed stock [3] acquisition, American will acquire the grocery store assets of Lucky and a partnership interest in Eagle Food Centers, L.P.

TRADE AND COMMERCE

Relevant Line of Commerce

7. A relevant line of commerce in which to analyze American's acquisition of Lucky is the retail sale and distribution of food and grocery items in retail grocery stores.

Relevant Sections of the Country

8. Relevant sections of the country are areas in Illinois, Indiana, and Iowa, and the following areas in California:

a. Fallbrook;

b. Santa Barbara, Montecito, and Goleta;

c. Camarillo;

d. South San Diego County (an area including the cities and towns of Imperial Beach, Coronado, Chula Vista, San Diego, Lakeside, La Mesa, Lemon Grove, Pacific Beach, Point Loma, San Ysidro, Santee, Bonita Hills, El Cajon, National City, Spring Valley, Rancho San Diego, La Jolla, Mission Valley, and Tierra Santa);

e. Santa Clarita Valley (an area including the cities and towns of Canyon Country, Valencia, Newhall and Saugus);

f. Coachella Valley (an area including the cities and towns of Palm Springs, Palm Desert, Indian Wells, Indio, Cathedral City, Rancho Mirage, La Quinta, and Coachella);

g. Novato;

h. Petaluma;

i. the San Francisco Bay Area (an area including the cities and towns of Alameda, Albany, Belmont, Benicia, Berkeley, Burlingame, Campbell, Castro Valley, Cupertino, Daly City, El Cerrito, El Sobrante, Emeryville, Foster City, Fremont, Hayward, Hercules, Los Altos, Los Gatos, Menlo Park, Millbrae, Milpitas, Mountain View, Newark, Oakland, Pacifica, Palo Alto, Pinole, Redwood City, Richmond, San Bruno, San Carlos, San Francisco, San Jose, San Leandro, San Lorenzo, San [4] Mateo, San Pablo, Santa Clara, Saratoga, South San Francisco, Sunnyvale, Union City, and Vallejo); and

j. the southern portion of Marin County (an area including the cities

and towns of San Rafael, Mill Valley, Fairfax, Greenbrae, Larkspur, San Anselmo, Sausilito, and Tiburon).

MARKET STRUCTURE

9. Retail sale and distribution of food and grocery items in retail grocery stores in each of the relevant sections of the country is highly concentrated, whether measured by the Herfindahl-Hirschmann Indices ("HHI") or by two-firm and four-firm concentration ratios.

ENTRY CONDITIONS

10. Entry into the retail sale and distribution of food and grocery items in retail grocery stores in each of the relevant sections of the country is difficult or unlikely.

ACTUAL COMPETITION

11. American and Lucky are actual competitors in the relevant sections of the country located in California, and Eagle Food Centers, L.P., and American are direct competitors in the relevant sections of the country located in Illinois, Indiana, and Iowa.

EFFECTS

12. The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant line of commerce in the relevant sections of the country in violation of 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, in the following ways, among others:

a. by eliminating direct competition between American and Lucky;

b. by increasing the likelihood that American will unilaterally exercise market power; or

c. by increasing the likelihood of, of facilitating, collusion where the acquisition would significantly increase already high levels of concentration; **[5]** all of which increases the likelihood that firms will increase prices and restrict output of food and groceries both in the near future and for a longer period of time.

VIOLATIONS CHARGED

13. The proposed acquisition of Lucky by American violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and would, if consummated, violate Section 7 of the Clayton Act, 15 U.S.C. 18 and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

Commissioner Azcuenaga dissenting.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the acquisition by Alpha Beta Acquisition Corporation, a wholly owned subsidiary of American Stores Company (hereinafter collectively "American") of all of the issued and outstanding stock of Lucky Stores, Inc., and American, having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge American with violations of the Clayton Act and Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement **[2]** on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

American is a corporation organized and existing under the laws of the State of Delaware with its principal place of business located at 444 East 100 South, Salt Lake City, Utah.

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

ORDER

I.

As used in this order, the following definitions shall apply:

(a) *"American"* means American Stores Company, its parents, subsidiaries (including Alpha Beta Acquisition Corporation), divisions, and groups controlled by American and their respective directors, officers, employees, agents and representatives and their respective successors and assigns.

(b) *"Lucky"* means Lucky Stores, Inc., its parents, subsidiaries, divisions and groups controlled by Lucky and their respective directors, officers, employees, agents and representatives and their respective successors and assigns.

(c) *"Acquisition"* means American's acquisition of the issued and outstanding common stock of Lucky.

(d) *"California Operation"* means the 362 grocery stores of Lucky located in California or Nevada, inventory, trademarks and trade names, warehouse distribution and manufacturing facilities and all related property and facilities.

(e) *"Retail grocery store"* means any full-line retail food store of 10,000 or more square feet and which sells primarily a wide variety of canned or frozen foods; dry groceries; non-edible grocery items; fresh meat, poultry and produce (vegetables and fruits) and which often sells delicatessen items, bakery items, fresh fish or other specialty items. **[3]**

(f) *"Assets to be divested"* means the assets described in paragraph II(A), also known as "II(A) properties."

(g) *"To be acquired store"* means any retail grocery store in the California Operation.

(h) *"Commission"* means the Federal Trade Commission.

(i) *"Eagle Food Centers, L.P."* means Eagle Food Centers, L.P., a Delaware limited partnership.

(j) *"Odyssey Partners"* means Odyssey Partners, a New York limited partnership.

II.

It is ordered, That:

(A) If American acquires a majority (more than 50%) of the

outstanding voting shares of Lucky, American shall, within six (6) months from the date this order becomes final, divest, absolutely and in good faith,

(1) either a to be acquired store or a grocery store presently operated by American in each of Camarillo, California; Cathedral City, California; Fallbrook, California; Indio or Coachella, California; La Mesa, California; Lemon Grove, California; Mill Valley or San Rafael, California; Novato, California; Petaluma, California; Point Loma, California; Santa Barbara, Montecito or Goleta, California; Santee, California; Spring Valley, California; and in the area south of Chula Vista, California and north of the Mexican border; and

(2) two grocery stores, either or both of which may be a to be acquired store or a grocery store presently operated by American, in the area that includes the cities and towns of Canyon Country, Newhall, Saugus and Valencia, California; and

(3) three stores, any or all of which may be a to be acquired store or a grocery store presently operated by American, in the area of San Mateo County, California from and including San Mateo to Menlo Park; and

(4) six stores, any or all of which may be a to be acquired store or a grocery store presently operated by American, in Alameda County, California north of the Santa Clara County line up to and including San Leandro, California;

(5) grocery stores with aggregate average weekly sales in 1987 of $1.8 million, any or all of which may be a to be acquired **[4]** store or a grocery store presently operated by American, in Santa Clara County, California

(such stores are hereinafter referred to as the II(A) properties). The II(A) properties are to be divested only to an acquiror or acquirors, and only in such manner, that receives the prior approval of the Commission.

The Agreement to Hold Separate, attached hereto as Appendix A and made a part hereof, shall continue in effect until such time as such stores have been divested, and American shall comply with all terms of said agreement. The purpose of the divestiture of such stores is to ensure their continuation as ongoing, viable enterprises engaged in the same business in which they are presently engaged and to remedy the lessening of competition alleged in the Commission's complaint.

Within ten (10) days of obtaining control of Lucky's board of

directors, American also shall cause Lucky to sell to Odyssey Partners Lucky's entire common limited partnership interest in Eagle Food Centers, L.P.

(B) If American acquires less than a majority (50% or less) of the outstanding voting shares of Lucky, American shall divest on the New York Stock Exchange or in privately negotiated transactions absolutely and in good faith all its interest in such shares within six (6) months from the date this order becomes final. Pending such divestiture, American shall not, directly or indirectly, (i) exercise dominion or control over, or otherwise seek to influence, the management, direction, or supervision of the business of Lucky, (ii) seek or obtain representation on the Board of Directors of Lucky, (iii) exercise any voting rights attached to the shares, (iv) seek or obtain access to any confidential or proprietary information of Lucky, or (v) take any action or omit to take any action in a manner that would be incompatible with the status of American as a passive investor in Lucky. If American acquires less than a majority (50% or less) of the outstanding voting shares of Lucky, American shall be bound by only parts II(B), VII and IX of this order. **[5]**

III.

It is further ordered, That within ten (10) days of obtaining control of Lucky's board of directors American will appoint Arthur Andersen & Co. ("A.A."), or such other person as the Commission may approve, who will receive, in the place and stead of Lucky, any information which might otherwise be given by Eagle Food Centers, L.P. ("EFCLP") and said person shall provide to American only that information necessary to prepare public filings or tax returns, or evaluate the terms of the sale of such interest. In no event will such information be other than historical in nature and in no event will such information relate to EFCLP's pricing or marketing practices or expansion plans.

Within ten (10) days of obtaining control of Lucky's board of directors American will cause Lucky to waive any right to serve on any advisory board of EFCLP or otherwise have access to the books and records of EFCLP. Nothing herein contained shall prevent A.A., or such other person, from providing to American such information as may be necessary to inform American as to the value of its interest in EFCLP, nor shall anything contained herein prevent A.A., or such

other person, from providing requested information to third party purchasers of Lucky's interest in EFCLP. In no event will such information be other than historical in nature and in no event will such information relate to EFCLP's pricing or marketing practices or expansion plans.

Within ten (10) days of obtaining control of Lucky's board of directors American will also cause Lucky to notify EFCLP of Lucky's intention to terminate Lucky's obligations under the Management Information Services Agreement (the "MIS Agreement") entered into between Lucky and EFCLP on November 10, 1987.

Pending termination of the MIS Agreement, no information delivered by EFCLP to Lucky for processing pursuant to the terms of the MIS Agreement shall be disclosed or otherwise made available except to those employees of Lucky as shall be necessary for Lucky to perform its obligations under the MIS Agreement. No information delivered by EFCLP to Lucky under the MIS Agreement shall be disclosed or otherwise made available to officers or employees of American or any of its affiliates (other than to employees of Lucky in accordance with the first sentence of this paragraph). American shall provide written notice to the Lucky employees who will receive or have access to the information provided to Lucky by EFCLP pursuant to the MIS Agreement that such information may not be disclosed or made available to any person except in accordance with the terms of this order. **[6]**

IV.

It is further ordered, That, pending divestiture, American shall maintain the viability and marketability of the II(A) properties and shall not cause or permit the destruction, removal or impairment of any assets or business of the II(A) properties except in the ordinary course of business and except for ordinary wear and tear.

V.

It is further ordered, That the II(A) properties shall not be divested, directly or indirectly, to anyone who is at the time of the divestiture an officer, director, employee or agent of, or under the control, direction or influence of American.

VI.

It is further ordered, That:

(A) If American has not divested the II(A) properties within the six month period from the date the order becomes final, American shall consent to the appointment of a trustee by the Commission to divest the II(A) properties. In the event that the Commission brings an action pursuant to Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), or any other statute enforced by the Commission, American shall consent to the appointment of a trustee to divest the II(A) properties. The appointment of a trustee shall not constitute a waiver by the Commission of its right to seek civil penalties and other relief available to it for any violation of this order.

(B) If a trustee is appointed by a court or the Commission pursuant to part VI(A) of this order, American shall consent to the following terms and conditions regarding the trustee's duties and responsibilities:

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

2. The trustee shall have the power and authority to divest the II(A) properties that have not been divested by American within the time period for divestiture in part II. The trustee shall have nine (9) months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission and, if the trustee is appointed by a court, subject also to the prior approval of the court. If, however, at the end **[7]** of the nine-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission or by the court for a court-appointed trustee; provided, however, that the Commission, or the court for a court-appointed trustee, may only extend the divestiture period two (2) times.

3. If, at the end of the divestiture period as extended pursuant to paragraph VI(B)(2) above, the trustee has not secured approval of divestiture as required by paragraph II(A), the trustee may, if the Commission determines in order to accomplish the divestiture, add such other assets as are required to effectuate the divestiture of the II(A) properties.

4. The trustee shall have full and complete access to the personnel, books, records and facilities of American and Lucky. American shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. American shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

5. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to American's absolute and unconditional obligation to divest at no minimum price and the purposes of the divestiture as stated in part II.

6. The trustee shall serve without bond or other security at the cost and expense of American on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to retain at the cost and expense of American such consultants, accountants, attorneys, business brokers, appraisers and other representatives and assistants as are reasonably necessary to assist in the divestiture. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission or the court of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to American and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the II(A) properties. Nothing herein shall be construed to limit the trustee's compensation to an amount not in excess of monies derived from the sale.

7. Within fifteen (15) days after appointment of the trustee and subject to the approval of the Commission and, if the trustee was appointed by a court, subject also to the prior approval of the court, American shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture of the II(A) properties. **[8]**

8. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as in part VI.

9. The trustee shall report in writing to American and the Commission every sixty (60) days from the date the trust agreement is executed concerning the trustee's efforts to accomplish divestiture.

VII.

It is further ordered, That, within sixty (60) days from the date this order becomes final and every sixty (60) days thereafter until it has fully complied with part II of this order, American shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying or has complied with that provision. American shall include in compliance reports, among other things that are required from time to time, a full description of contacts or negotiations for the divestiture of the II(A) properties, including the identity of all parties contacted. American also shall include in compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning divestiture.

VIII.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, American shall cease and desist from acquiring, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise, (i) five or more retail grocery stores, within any one year period from the date this order becomes final, including any facilities that have been operated as a retail grocery store(s) within six months of the date of the offer to purchase the facilities, or any interest in five or more retail grocery stores or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates five or more retail grocery stores, in Los Angeles and Orange Counties, California (excluding those cities and towns identified in subsection (iii) of this part VIII), or (ii) two or more retail grocery stores, within any one year period from the date this order becomes final, including any facilities that have been operated as a retail grocery store(s) within six months of the date of the offer to purchase the facilities, or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates two or **[9]** more retail grocery stores, in the Bay Area comprised of the following cities or towns:

Alameda, California
Albany, California
Belmont, California
Benicia, California

Berkeley, California
Burlingame, California
Campbell, California
Castro Valley, California
Cupertino, California
Daly City, California
El Cerrito, California
El Sobrante, California
Emeryville, California
Foster City, California
Fremont, California
Hayward, California
Hercules, California
Los Altos, California
Los Gatos, California
Menlo Park, California
Millbrae, California
Milpitas, California
Mountain View, California
Newark, California
Oakland, California
Pacifica, California
Palo Alto, California
Pinole, California
Redwood City, California
Richmond, California
San Bruno, California
San Carlos, California
San Francisco, California
San Jose, California
San Leandro, California
San Lorenzo, California
San Mateo, California
San Pablo, California
Santa Clara, California
Saratoga, California
South San Francisco, California
Sunnyvale, California
Union City, California
Vallejo, California

or (iii) any retail grocery store, including any facility that has been operated as a retail grocery store within six months of the date of the offer to purchase the facility, or any interest in a **[10]** retail grocery store or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates a retail grocery store, in the following cities or towns:

Bakersfield, California
Camarillo, California
Canyon Country, Newhall, Saugus or Valencia, California
Capitola, California
Cathedral City, Coachella, Indio, Palm Desert, Palm Springs or Rancho Mirage, California
Concord, California
Danville, California
Encinitas, California
Escondido, California
Fallbrook, California
Fontana, California

Las Vegas, Nevada
Napa, California
Novato, California
Ontario, California
Oxnard, California
Palmdale or Lancaster, California
Petaluma, California
Pleasanton, California
Redlands, California
Rialto, California
Riverside, California
Salinas, California
San Bernardino, California
San Diego County, California South of the Miramar Naval Air Station
San Juan Capistrano or San Clemente, California
San Marcos, California
San Rafael, Mill Valley, Fairfax, Greenbrae, Larkspur, San Anselmo, or Sausilito, Tiburon, California
San Ramon, California
Santa Barbara, Montecito or Goleta, California
Santa Maria, California
Santa Rosa, California
Simi Valley, California
Thousand Oaks, California
Upland, California **[11]**
Vacaville, California
Vista, California
Walnut Creek, California

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

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

IX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, subject to any legally recognized privilege, and upon written request with reasonable notice to American made to its principal office, American shall permit any duly authorized representative or representatives of the Commission:

(A) Access during the office hours of American and Lucky, in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of American or Lucky relating to compliance with this order;

(B) Upon five (5) days' notice to American and without restraint or interference from them, to interview officers or employees of American or Lucky, who may have counsel present, regarding any such matters. **[12]**

X.

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

Commissioner Azcuenaga dissenting.

APPENDIX A

AGREEMENT TO HOLD SEPARATE

Agreement dated as of May ___ , 1988 (the "agreement"), by and between American Stores Company, a corporation organized and existing under the laws of the State of Delaware, with executive offices located at 444 East 100 South, Salt Lake City, Utah; Alpha Beta Acquisition Corporation, a corporation organized and existing under the laws of the State of Delaware, with executive offices located at 19100 Von Karman, Irvine, California (collectively, "American"); and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established

under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, et seq. (collectively, the "parties").

PREMISES

Whereas, American commenced a tender offer on March 28, 1988 (the "acquisition") for all of the issued and outstanding common stock of Lucky Stores, Inc. ("Lucky"); and

Whereas, the Commission having reason to believe that the acquisition would violate the statutes enforced by the Commission; and

Whereas, if the Commission accepts the attached Agreement Containing Consent Order ("consent order"), the Commission must place it on the public record for a period of at least **[2]** sixty days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's rules; and

Whereas, the Commission is concerned that if an understanding is not reached preserving the status quo ante of Lucky's California Operation (as hereinafter defined) during the period prior to the divestiture of the properties to be divested pursuant to paragraph II(A) of the consent order (the "II(A) properties") or the acquisition is not preliminarily enjoined, divestiture resulting from any proceeding challenging the legality of the acquisition might not be possible or might be a less than effective remedy; and

Whereas, the Commission is concerned that if the acquisition is consummated, it may be necessary to preserve the Commission's ability to require the divestiture of the II(A) properties and the Commission's rights to seek to restore Lucky's California Operation as a viable competitor; and

Whereas, the purpose of this agreement and the consent order is to preserve Lucky's California Operation as a viable operation pending the divestiture of the II(A) properties as viable, ongoing enterprises, in order to remedy any anticompetitive effects of the acquisition and to preserve Lucky's California Operation as a viable operation in the event that divestiture of the II(A) properties is not achieved; and

Whereas, American's entering into this agreement shall in no way be construed as an admission by American that the acquisition violates the statutes as alleged in the draft complaint attached hereto; and

Whereas, American understands that no act or transaction contemplated by this agreement shall be deemed immune or exempt from

the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this agreement.

Now therefore, upon the understanding that the Commission has determined that the acquisition would be challenged, and in consideration of the Commission's agreement that, unless it determines to reject the consent order, it will not seek further relief from the parties with respect to the acquisition, except that the Commission may exercise any and all rights to enforce this agreement and the consent order to which it is annexed and made a part thereof, the parties agree as follows: **[3]**

1. American agrees to execute and be bound by the attached consent order.

2. American agrees that from the date the Commission accepts this agreement:

(a) until three business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's rules; or

(b) until such time as all of the II(A) properties have been divested or until the expiration of the time period during which a trustee may attempt to divest the II(A) properties as provided in paragraph VI of the consent order,

American shall hold separate, in accordance with the terms and conditions set forth below in subparagraphs (a)—(f) of paragraph 3, the Lucky California Operation which consists of 362 grocery stores, inventory, trademarks and trade names, warehouses, distribution and manufacturing facilities and all related property and facilities (the assets and businesses to be held separately are collectively referred to hereinafter as the "California Operation").

3. The following subparagraphs (a)—(f) apply to any business that American is required to hold separate pursuant to paragraph 2:

(a) American shall not cause or permit the wasting or deterioration of the California Operation in any manner that impairs the marketability of any such assets and operations or impairs in any manner the viability of the assets and operations as a going concern engaged in the retail grocery business until such time as the divestiture as required by the consent order has been accomplished;

(b) American shall assure that the California Operation shall maintain separate financial and operating books and records, shall

prepare separate financial statements for the California Operation and shall, within 10 days after they become available to American, provide the Commission's Bureau of Competition with quarterly and annual financial statements for the California Operation, which annual financial statements shall be audited and certified by independent certified public accountants; **[4]**

(c) American will not replace any executive of the California Operation or Lucky's Store Manager, Produce Manager or Meat Manager in any California Operation store (except to fill a vacancy) but may replace any other employees of the California Operation, however nothing in this paragraph 3(c) will prevent Lucky management that existed prior to the acquisition from making changes in store level personnel for reasons and in accordance with Lucky practices that existed prior to the acquisition;

(d) Consistent with the California Operation's use of its warehouse, distribution and manufacturing facilities in such a way as to assure the maintenance of the California Operation as a viable competitor, the California Operation warehouse, distribution and manufacturing facilities may supply stores operated by American during the pendency of this agreement, provided that American will pay the California Operation for such services or products in accordance with the California Operation's current established procedures for Lucky's own stores;

(e) American will not sell or otherwise dispose of the warehouse, distribution or manufacturing facility or any retail grocery stores of the California Operation (except the stores that may be sold pursuant to paragraph II(A) of the consent order or such additional stores as may be necessary to sell the II(A) properties) during the pendency of the hold separate agreement. American shall not mortgage, pledge or incur liens against the California Operation assets or a portion thereof as security for any indebtedness of American or pursuant to any loan transaction unless the proceeds are utilized entirely for operation of the California Operation assets;

(f) Purchasing for the American and the California Operation shall be done by each entity for its retail grocery operations.

4. If the Commission seeks in any proceeding with respect to the acquisition to compel American to divest itself of the California Operation assets it may acquire, or to compel American to divest itself of any assets it may hold, or to seek any other injunctive or equitable relief, American shall not raise an objection based upon the expiration

of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting periods or the fact that the Commission has permitted the California Operation assets to be acquired and a formal merger concluded pursuant to the terms of this agreement. American also waives all rights to contest the validity of this agreement. **[5]**

5. For the purpose of determining or securing compliance with this agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to American made to its principal office, American shall permit any duly authorized representative or representatives of the Commission:

(a) Access during the office hours of American or Lucky, in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of American or Lucky relating to compliance with the agreement;

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

6. The agreement shall not be binding until approved by the Commission.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I dissent from the decision of the Commission majority to accept this consent order from American Stores Company ("American"), because the order is not sufficiently broad to resolve the potential anticompetitive effects of American's acquisition of Lucky Stores, Inc. ("Lucky"). The levels of concentration, conditions of entry, and other facts that bear on the state of competition in the supermarket industry in discrete California markets indicate that the Commission should require the divestiture of a greater number of stores to protect competition in markets in which American and Lucky now compete.

I also oppose the highly unusual and curious provision in the order in which the Commission at once takes from and returns to American its ability to reduce competition by acquiring stores in the Bay Area. Simply explained, the order requires American to divest from 15 to 21 stores in the Bay Area (with the exact number depending on the sales volume of the divested stores) within six months, but allows American to acquire one store per year (without reference to sales volume) in the

same area without prior Commission review or approval. If, as the divestiture provision implies, the majority has determined that divestiture of at least 15 stores is needed to preserve competition in the Bay Area, then the acquisition of another store in the same area or, as permitted under the order, the reacquisition of one of the same stores required to be divested may equally pose a competitive danger. If, however, the majority is permitting the acquisition of one store per year without prior approval because of doubts about the long-term need for this level of divestiture, then it would be simpler and more efficient simply to lower the number of stores to be divested. The Commission should not require divestiture unless it is certain that the remedy is necessary, but once a particular remedy is found to be necessary, it should not be diluted. The Commission's mechanism for prior approval of future acquisitions that are competitively unobjectionable is the appropriate way to deal with future changes in circumstance.

CONCURRING STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

I would prefer to secure additional consumer safeguards in this matter either by renegotiating the proposed consent agreement or by rejecting the consent and pursuing a preliminary injunction. In particular, an increase in the number of stores to be divested and a reduction of the exceptions embodied here to the Commission's prior approval authority would be in the public interest. However, lacking a Commission majority in favor of that approach, the alternative to the proposed consent agreement is not a stronger set of safeguards but rather no safeguards at all. Under these circumstances, and in light of the non-trivial nature of the relief obtained, I have voted to make final the proposed consent agreement.