IN THE MATTER OF

KINNEY DRUGS, INC.

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

Docket 9227. Complaint, April 19, 1989—Decision, July 1, 1991*

This consent order prohibits, among other things, a pharmaceutical firm from organizing or entering into any agreement among pharmacy firms to withdraw from or refuse to enter into a third-party payer prescription drug plan; for ten years, from stating or communicating to any pharmacy firm the intent to enter into or refuse to enter into any third-party payer prescription drug plan; and for eight years, from providing comments or advice to any pharmacist or pharmacy firm on the desirability or appropriateness of entering into or refusing to enter into any third-party prescription drug plan.

Appearances

For the Commission: *Karen G. Bokat* and *Michael D. McNeeley.*

For the respondent: *Robert J. Leader, Case & Leader,* Gouveneur, N.Y.

DECISION AND ORDER

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

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

The Secretary of the Commission having thereafter withdrawn this

*Complaint previously published at 114 FTC 327 (1991).

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

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

1. Respondent Kinney Drugs, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 29 Main Street, in the City of Gouverneur, State of New York.

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

Order

I.

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

A. "*Kinney*" means Kinney Drugs, Inc., its directors, officers, agents, employees, divisions, subsidiaries, successors and assigns;

B. "*Third-party payer*" means any person or entity that provides a program or plan pursuant to which such a person or entity agrees to pay for prescriptions dispensed by pharmacies to individuals described in such plan or program as eligible for such coverage ("Covered Persons"), and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Cross and Blue Shield plans; health maintenance organizations; preferred provider organizations; prescription service administrative organizations; and health benefit programs for government employees, retirees or dependents;

C. "*Participation agreement*" means any existing or proposed agreement, oral or written, in which a third-party payer agrees to reimburse a pharmacy for the dispensing of prescription drugs to Covered Persons, and the pharmacy agrees to such payment from the third-party payer for such prescriptions dispensed during the term of the agreement;

D. "*Pharmacy firm*" means any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, that owns, controls or operates one or more pharmacies, including the directors, officers, employees, and agents of such partnership, sole proprietorship or corporation as well as the directors, officers, employees, and agents of such partnership's, sole proprietorship's or corporation's subsidiaries, affiliates, divisions and joint ventures, but excludes any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, which own, are owned by, control or are under common control with Kinney. The words "subsidiary", "affiliate", and "joint venture" refer to any firm in which there is partial (10% or more) or total ownership or control between corporations.

II.

It is ordered, That Kinney, directly, indirectly, or through any corporate or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Agreeing or combining, attempting to agree or combine, or taking any action in furtherance of any agreement or combination, advocating an agreement, or organizing or cooperating with any pharmacy firm(s) to (1) boycott, refuse to enter into, withdraw from, or not participate in, any participation agreement or (2) threaten to boycott, threaten to refuse to enter into, threaten to withdraw from, or threaten not to participate in, any participation agreement;

B. For a period of ten (10) years after the date this order becomes final, stating or communicating in any way to any pharmacy firm the intention or decision of Kinney with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement into which Kinney and the other pharmacy firm have entered, could enter or are considering entering;

C. For a period of eight (8) years after the date this order becomes final, advising any pharmacy firm with respect to entering into, refusing to enter into, participating in, or withdrawing from any existing or proposed participation agreement into which Kinney and the other pharmacy firm have entered, could enter or are considering entering.

Provided that, nothing in this order shall prevent Kinney from:

(1) Exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body concerning legislation, rules or procedures, or to participate in any federal or state administrative or judicial proceeding;

(2) Subcontracting, preparing joint bids, or otherwise jointly undertaking with pharmacy firms to provide prescription drug services under a participation agreement if requested to do so in writing by the third-party payer; or

(3) Communicating to the public truthful, nondeceptive statements concerning any existing or proposed participation agreement.

III.

It is further ordered, That Kinney:

A. Provide a copy of this order within thirty (30) days after the date this order becomes final to each officer, director, employee pharmacist who is employed in New York state, and each employee whose responsibilities include recommending or deciding whether to enter into any participation agreement, and each employee who regularly attends meetings on Kinney's behalf that include representatives of other pharmacies; and

B. For a period of five (5) years after the date this order becomes final, provide each new director and each employee who enters a position described in paragraph A a copy of the order within ten (10) days of the date the employee or director assumes the new position.

IV.

It is further ordered, That Kinney:

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

B. For a period of five (5) years after the date this order becomes final, maintain and make available to Commission staff for inspection and copying upon reasonable notice all documents generated by Kinney or that come into Kinney's possession, custody, or control regardless of source, that embody, discuss or refer to the decision or upon which Kinney relies in deciding whether to enter into any participation agreement in which Kinney participates, has participated, or has considered participating; and

C. Notify the Commission at least thirty (30) days prior to any proposed change in Kinney such as, assignment or sale resulting in the emergence of a successor corporation or association, change of name, change of address, dissolution, the creation, sale or dissolution of a subsidiary, or any other change that may affect compliance with this order.

Commissioner Azcuenaga dissenting.

IN THE MATTER OF

JAMES E. KRAHULEC

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

Docket 9227. Complaint, April 19, 1989—Decision, July 1, 1991*

This consent order prohibits, among other things, Mr. Krahulec from organizing or entering into any agreement with any pharmacy firms to boycott, withdraw from or refuse to enter into a third-party payer prescription drug plan; for ten years, from organizing, sponsoring, or attending a meeting of pharmacy firms at which persons make any statements concerning the pharmacy firm's intent to enter into or refuse to enter into any third-party payer prescription drug plan; for ten years, from communicating to any pharmacy firm, other than Mr. Krahulec's employer, any information concerning any pharmacy firm's intention to enter into or refuse to enter into any third-party payer prescription drug plan; and for eight years, from providing comments or advice to any pharmacist or pharmacy firm on the desirability or appropriateness of entering into or refusing to enter into any third-party payer prescription drug plan.

Appearances

For the Commission: *Karen G. Bokat* and *Michael D. McNeely.*

For the respondent: *William J. Guzick, Skadden, Arps, Slate, Meagher & Flom,* Washington, D.C.

DECISION AND ORDER

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

The respondent, his attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such

*Complaint previously published at 114 FTC 327 (1991).

complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

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

1. Respondent Krahulec is an individual employed by Rite Aid Corporation in Rite Aid Corporation's principal offices at Railroad Ave. and Trindle Road, Shiremantown, Pennsylvania.

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

ORDER

I.

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

A. "*Mr. Krahulec*" means James E. Krahulec, his agents and employees;

B. "*Third-party payer*" means any person or entity that provides a program or plan pursuant to which such a person or entity agrees to pay for prescriptions dispensed by pharmacies to individuals described in such plan or program as eligible for such coverage ("Covered Persons"), and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Cross and Blue Shield plans; health maintenance organizations; preferred provider organizations; prescription service administrative organizations; and health benefit programs for government employees, retirees or dependents;

C. "*Participation agreement*" means any existing or proposed agreement, oral or written, in which a third-party payer agrees to reimburse a pharmacy for the dispensing of prescription drugs to Covered Persons, and the pharmacy agrees to accept such payment from the third-party payer for such prescriptions dispensed during the term of the agreement;

D. "*Pharmacy firm*" means any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, that owns, controls or operates one or more pharmacies, including the directors, officers, employees, and agents of such partnership, sole proprietorship or corporation as well as the directors, officers, employees, and agents of such partnership's, sole proprietorship's or corporation's subsidiaries, affiliates, divisions and joint ventures. The words "subsidiary", "affiliate", and "joint venture" refer to any firm in which there is partial (10% or more) or total ownership or control between corporations.

II.

It is ordered, That Mr. Krahulec, directly, indirectly, or through any device, in or in connection with his activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Agreeing or combining, attempting to agree or combine, or taking any action in furtherance of any agreement or combination, advocating an agreement, or organizing or cooperating with any pharmacy firm(s) to (1) boycott, refuse to enter into, withdraw from, or not participate in, any participation agreement or (2) threaten to boycott, threaten to refuse to enter into, threaten to withdraw from, or threaten not to participate in, any participation agreement;

B. For a period of ten (10) years after the date this order becomes final, organizing, sponsoring, facilitating, or attending a formal or informal meeting of representatives of pharmacy firms that Mr. Krahulec expects or reasonably should expect will facilitate communications, or continuing to conduct a formal or informal meeting of representatives of pharmacy firms at which two persons make any statement, concerning one or more firms' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement;

C. For a period of ten (10) years after the date this order becomes final, communicating in any way to or soliciting from any pharmacy firm other than Mr. Krahulec's employer any information concerning any pharmacy firm's intention or decision with respect to entering into, threatening to refuse to enter into, refusing to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement; and

D. For a period of eight (8) years after the date this order becomes final, advising any pharmacist not employed by Mr. Krahulec's employer or any pharmacy firm other than Mr. Krahulec's employer with respect to entering into, refusing to enter into, participating in, or withdrawing from any existing or proposed participation agreement into which Mr. Krahulec's employer and the other pharmacy firm have entered, could enter or are considering entering.

Provided that, nothing in this order shall prevent Mr. Krahulec from:

(1) Exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body concerning legislation, rules or procedures, or to participate in any federal or state administrative or judicial proceeding; or

(2) Communicating to the public truthful, nondeceptive statements concerning any existing or proposed participation agreement.

III.

It is further ordered, That Mr. Krahulec:

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

B. For a period of five (5) years after the date this order becomes final, maintain and make available to Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Part II of the order, including, but not limited to, all documents generated by Mr. Krahulec or that come into his possession, custody, or control regardless of source, that embody, discuss or refer to the terms or conditions of any participation agreement; and

C. Notify the Commission within thirty (30) days of any change in Mr. Krahulec's employer or of any other change that may affect compliance with the order.

Commissioner Azcuenaga dissenting.

IN THE MATTER OF

ZIPATONE, INC., ET AL.

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

Docket C-3336. Complaint, July 9, 1991—Decision, July 9, 1991

This consent order prohibits, among other things, a Hillside, Ill., based manufacturer of artists' materials from representing that any product containing a Class I ozone-depleting substance will not damage the environment, and from making any unsubstantiated claims that any product containing an ozone-depleting substance offers environmental benefits.

Appearances

For the Commission: *Michael Dershowitz.*

For the respondents: *Benjamin E. Beale, Jr., officer of Zipatone, Inc.*, Hillside, IL.

COMPLAINT

The Federal Trade Commission, having reason to believe that Zipatone, Inc., a corporation, and Benjamin E. Beale Jr., individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Zipatone, Inc. is an Illinois corporation, with its office and principal place of business located at 150 Fencl Lane, Hillside, Illinois.

Respondent Benjamin E. Beale Jr. is an officer of the corporate respondent named herein. He formulates, directs, and controls the acts and practices of the corporate respondent. His address is the same as that of the corporation.

PAR. 2. Respondents have advertised, offered for sale, sold and distributed certain spray products to the public, including Zipatone Spray Cement, a product which contains the chemical 1,1,1 - Trichloroethane.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for Zipatone Spray Cement. Typical examples of respondents' advertisements and product labeling, but not necessarily all inclusive thereof, are attached hereto as Exhibits A and B.

The aforesaid advertising (Exhibit A) includes the following statement:

"Zipatone's time saving spray products use only ecologically safe propellants. You get the job done quickly without damaging the environment."

The aforesaid product labeling (Exhibit B) includes the following statement:

ECOLOGICALLY-SAFE PROPELLANT

PAR. 5. Through the use of statements referred to in paragraph four in its advertising and product labeling, respondents have represented directly or by implication that:

1. Zipatone Spray Cement contains no ingredients that are damaging to the environment.

2. Use of Zipatone Spray Cement will not have a detrimental effect on the earth's ecology.

PAR. 6. In truth and in fact, Zipatone Spray Cement contains a harmful ozone depleting chemical, 1,1,1 - Trichloroethane, which will cause damage to the environment and the earth's ecology by contributing to the depletion of the earth's ozone layer. Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. Through the statements and representations referred to in paragraphs four and five, respondents have represented, directly or by implication, that at the time they made such representations, respondents possessed and relied upon a reasonable basis for such representations.

PAR. 8. In truth and in fact, at the time respondents made such representations, respondents did not possess and rely upon a reasonable basis for such representations. Therefore, the representations set forth in paragraph seven were, and are, false and misleading.

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

EXHIBIT A

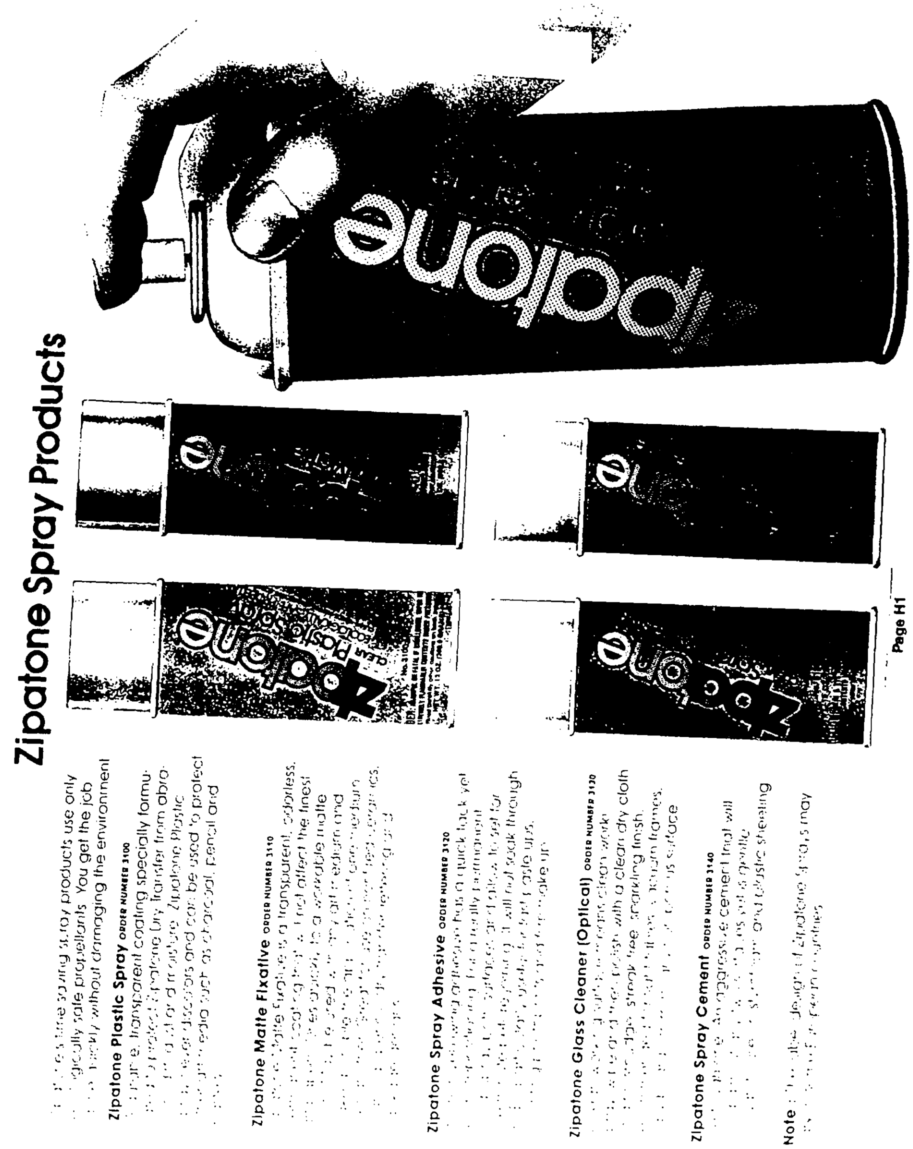
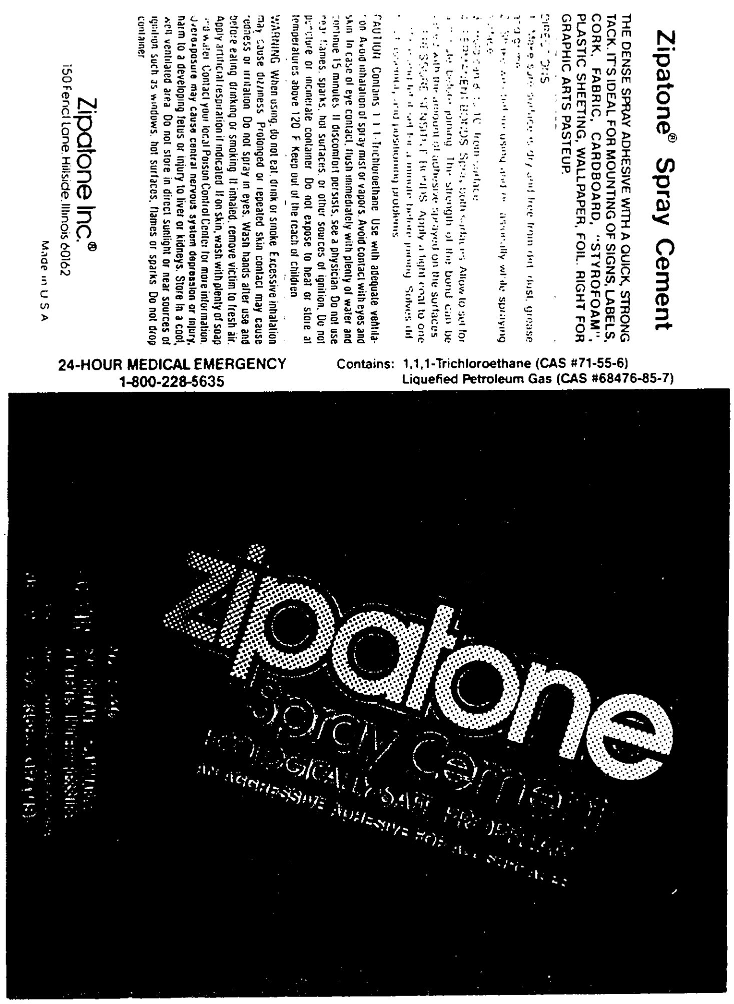

Zipatone Spray Products
You get the job without damaging the environment
Zipatone Plastic Spray ORDER NUMBER 3100
Zipatone Matte Fixative ORDER NUMBER 3110
Zipatone Spray Adhesive ORDER NUMBER 3120
Zipatone Glass Cleaner (Optical) ORDER NUMBER 3130
Zipatone Spray Cement ORDER NUMBER 3140
Note :
Page H1

EXHIBIT B


Zipatone® Spray Cement
THE DENSE SPRAY ADHESIVE WITH A QUICK, STRONG TACK. IT'S IDEAL FOR MOUNTING OF SIGNS, LABELS, CORK, FABRIC, CARDBOARD, "STYROFOAM", PLASTIC SHEETING, WALLPAPER, FOIL. RIGHT FOR GRAPHIC ARTS PASTEUP.
CAUTION Contains 1 1 1-Trichloroethane Use with adequate ventilation. Avoid inhalation of spray mist or vapors. Avoid contact with eyes and skin. In case of eye contact, flush immediately with plenty of water and continue 15 minutes. If discomfort persists, see a physician. Do not use near flames, sparks, hot surfaces, or other sources of ignition. Do not puncture or incinerate container. Do not expose to heat or store at temperatures above 120 F. Keep out of the reach of children.
WARNING When using, do not eat, drink or smoke. Excessive inhalation may cause dizziness. Prolonged or repeated skin contact may cause redness or irritation. Do not spray in eyes. Wash hands after use and before eating, drinking or smoking. If inhaled, remove victim to fresh air. Apply artificial respiration if indicated. If on skin, wash with plenty of soap and water. Contact your local Poison Control Center for more information. Overexposure may cause central nervous system depression or injury, harm to a developing fetus or injury to liver or kidneys. Store in a cool, well ventilated area. Do not store in direct sunlight or near sources of ignition such as windows, hot surfaces, flames or sparks. Do not drop container.
Zipatone Inc.®
150 Fencl Lane Hillside, Illinois 60162
Made in U S A
24-HOUR MEDICAL EMERGENCY
1-800-228-5635
Contains: 1,1,1-Trichloroethane (CAS #71-55-6)
Liquefied Petroleum Gas (CAS #68476-85-7)
zipatone
spray cement

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondents Zipatone, Inc., a corporation, and Benjamin E. Beale, Jr., individually and as an officer of said corporation, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

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

1. Respondent Zipatone, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois. Zipatone, Inc. has its offices and principal place of business at 150 Fencl Lane, Hillside, Illinois.

2. Respondent Benjamin E. Beale, Jr. is an officer of said corporation. He formulates directs, and controls the acts and practices of said corporation, and his address is the same as that of Zipatone, Inc.

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

ORDER

DEFINITIONS

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

"*Competent and reliable scientific evidence*" means such tests, analyses, research, studies, or other scientific evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession to yield accurate and reliable results.

"*Class I ozone depleting substance*" means a substance that harms the environment by destroying ozone in the upper atmosphere and is listed as such in Title 6 of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, and any other substance which may in the future be added to the list pursuant to Title 6 of the Act. Class I substances currently include chlorofluorocarbons, halons, carbon tetrachloride and 1,1,1 - Trichloroethane.

"*Class II ozone depleting substance*" means a substance that harms the environment by destroying ozone in the upper atmosphere and is listed as such in Title 6 of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, and any other substance which may in the future be added to the list pursuant to Title 6 of the Act. Class II substances currently include hydrochlorofluorocarbons.

I.

It is ordered, That respondents Zipatone, Inc. (hereinafter "Zipatone"), a corporation, its successors and assigns, and its officers, and Benjamin E. Beale, Jr., individually as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, by words, depictions, or symbols that any product containing any Class I ozone depleting substance, will not damage the environment, or is ecologically safe, or through the use of any substantially similar term or expression, including but not limited to "ozone friendly" or "ozone safe," that any such product will not damage the environment, or that any such product is ecologically safe, or that any such product will not deplete, destroy, or otherwise adversely affect ozone in the upper atmosphere.

II.

It is further ordered, That respondents Zipatone, a corporation, its successors and assigns, and its officers, and Benjamin E. Beale, Jr., individually as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, by words, depictions or symbols, that any product containing any Class I ozone depleting substance or any Class II ozone depleting substance, or any other ozone depleting substance, offers any environmental benefits, including but not limited to any environmental benefit claims concerning the ecology, atmosphere, upper atmosphere, stratosphere or the ozone layer, unless at the time of making such representation, respondents possess and rely upon a reasonable basis, consisting of competent and reliable scientific evidence that substantiates such representation.

III.

It is further ordered, That for three years from the date that the representations to which they pertain are last disseminated, respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

1. All materials that respondents relied upon in disseminating any representation covered by this order.
2. All tests, reports, studies or surveys in respondents' possession or control or of which they have knowledge that contradict any representation of respondents covered by this order.

IV.

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

V.

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

VI.

It is further ordered, That the individual respondent named herein shall promptly notify the Commission in the event of the discontinuance of his present business or employment and of each affiliation with a new business or employment. In addition, for a period of five (5) years from the date of service of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the sale, distribution and/or manufacturing of any cleaning or adhesive products or of his affiliation with a new business or employment in which his own duties and responsibilities involve the sale, distribution and/or manufacturing of any cleaning or adhesive products. Such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's 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.

VII.

It is further ordered, That respondents shall, within sixty (60) days after service of this order upon them, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

ALLEGHANY CORPORATION

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

Docket C-3335. Complaint, July 11, 1991—Decision, July 11, 1991

This consent order requires, among other things, Alleghany Corporation to divest, within twelve months of this order, all rights and interest in either its own title plants and back plants or those of Westwood Equities Corporation, to a Commission-approved acquirer.

Appearances

For the Commission: *Ann B. Malester.*

For the respondent: *John C. Christie, Jr., Bell, Boyd & Lloyd,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondent Alleghany Corporation ("Alleghany"), a corporation subject to the jurisdiction of the Commission, through one of its subsidiaries, has entered into an agreement that constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45); and that such acquisition, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18); 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:

I. DEFINITIONS

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

a. "*Alleghany*" means Alleghany Corporation, its directors, officers, employees and representatives, its successors and assigns, and its subsidiaries, divisions, groups and affiliates controlled by Alleghany, their respective directors, officers, employees and representatives, and their respective successors and assigns.

b. "*Title plant*" means a privately owned set of records regarding the ownership of and interests in real property that is maintained by obtaining information from the public records on a daily or regular basis, and is indexed, posted or otherwise organized to update data regarding specific land parcels.

c. "*Back plant*" means a privately owned set of records regarding the ownership of and interests in real property that is no longer being updated on a daily or regular basis.

d. "*Title plant information*" means information contained in or obtained from a title plant.

e. "*Back plant information*" means information contained in or obtained from a back plant.

II. ALLEGHANY CORPORATION

2. Alleghany is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its principle office at Park Avenue Plaza, New York, New York.

3. Alleghany is the sole owner of Chicago Title & Trust Company, which is the sole owner of Chicago Title Insurance Company ("Chicago Title").

4. Alleghany is, and at all times relevant herein has been, 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. THE ACQUISITION

5. On November 29, 1990, Chicago Title & Trust Company and Westwood Equities Corporation ("WEC"), a wholly owned subsidiary of New TC Holding Corporation, entered into an Acquisition Agreement by which Alleghany agreed to purchase most of the title insurance-related assets of WEC, including Ticor Title Insurance Company of California.

IV. TRADE AND COMMERCE

6. The relevant sections of the country are Imperial County,

California; Orange County, California; Riverside County, California; San Bernardino County, California; San Luis Obispo County, California; Santa Barbara County, California; Tulare County, California; Cook County, Illinois; Du Page County, Illinois; Lake County, Illinois; Will County, Illinois; Johnson County, Indiana; Lake County, Indiana; Marion County, Indiana; Porter County, Indiana; Davidson County, Tennessee; Benton County, Washington; and Franklin County, Washington.

7. The relevant lines of commerce are the production and/or sale of title plant information and the production and/or sale of back plant information.

8. There are no reasonable substitutes for access to title plant information in Imperial County, California; Du Page County, Illinois; Lake County, Illinois; Will County, Illinois; Johnson County, Indiana; Lake County, Indiana; Porter County, Indiana; Benton County, Washington; and Franklin County, Washington.

9. There are no reasonable substitutes for access to back plant information in Orange County, California; Riverside County, California; San Bernardino County, California; San Luis Obispo County, California; Santa Barbara County, California; Tulare County, California; Cook County, Illinois; Marion County, Indiana; and Davidson County, Tennessee.

10. There are substantial barriers to entry into the creation of title plants in Imperial County, California; Du Page County, Illinois; Lake County, Illinois; Will County, Illinois; Johnson County, Indiana; Lake County, Indiana; Porter County, Indiana; Benton County, Washington; and Franklin County, Washington.

11. There are substantial barriers to entry into the creation of back plants in Orange County, California; Riverside County, California; San Bernardino County, California; San Luis Obispo County, California; Santa Barbara County, California; Tulare County, California; Cook County, Illinois; Marion County, Indiana; and Davidson County, Tennessee.

12. Through their respective ownership interests, Chicago Title and WEC are significant competitors in the production and/or sale of title plant information in Imperial County, California; Du Page County, Illinois; Lake County, Illinois; Will County, Illinois; Johnson County, Indiana; Lake County, Indiana; Porter County, Indiana; Benton County, Washington; and Franklin County, Washington. The market for title plant information in each of these counties is highly concentrated.

13. Through their respective ownership interests, Chicago Title and WEC are significant competitors in the production and/or sale of back plant information in Orange County, California; Riverside County, California; San Bernardino County, California; San Luis Obispo County, California; Santa Barbara County, California; Tulare County, California; Cook County, Illinois; Marion County, Indiana; and Davidson County, Tennessee. The market for back plant information in each of these counties is highly concentrated.

V. EFFECTS

14. The effects of the acquisition may be substantially to lessen competition or tend to create a monopoly in the relevant lines of commerce in the following ways, among others:

(a) It will eliminate substantial actual competition between Chicago Title and WEC in the production and/or sale of title plant information in Imperial County, California; Du Page County, Illinois; Lake County, Illinois; Will County, Illinois; Johnson County, Indiana; Lake County, Indiana; Porter County, Indiana; Benton County, Washington; and Franklin County, Washington;

(b) It will eliminate substantial actual competition between Chicago Title and WEC in the production and/or sale of back plant information in Orange County, California; Riverside County, California; San Bernardino County, California; San Luis Obispo County, California; Santa Barbara County, California; Tulare County, California; Cook County, Illinois; Marion County, Indiana; and Davidson County, Tennessee; and

(c) It will deny customers of title plant information or back plant information the benefits of free and open competition in Imperial County, California; Orange County, California; Riverside County, California; San Bernardino County, California; San Luis Obispo County, California; Santa Barbara County, California; Tulare County, California; Cook County, Illinois; Du Page County, Illinois; Lake County, Illinois; Will County, Illinois; Johnson County, Indiana; Lake County, Indiana; Marion County, Indiana; Porter County, Indiana; Davidson County, Tennessee; Benton County, Washington; and Franklin County, Washington.

VI. VIOLATIONS CHARGED

15. The acquisition agreement described in paragraph 5 constitutes a violation of Section 5 of the Federal Trade Commission Act, as

amended, (15 U.S.C. 45), and the proposed acquisition, if consummated, would constitute a 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).

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof relating to the acquisition of certain stock or voting securities of Westwood Equities Corporation, and 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 Clayton Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the 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. Alleghany Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office at Park Avenue Plaza, New York, New York.

2. Chicago Title and Trust Company, a wholly owned subsidiary of

Alleghany, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office at 111 West Washington Street, Chicago, Illinois.

3. Westwood Equities Corporation, ("Westwood"), a subsidiary of New TC Holding Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office at 6300 Wilshire Boulevard, Los Angeles, California.

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

Order

I.

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

A. "*Alleghany*" means Alleghany Corporation, its directors, officers, employees and representatives, its successors and assigns, and its subsidiaries, divisions, groups and affiliates controlled by Alleghany, their respective directors, officers, employees and representatives, and their respective successors and assigns.

B. "*Chicago Title and Trust*" means Chicago Title and Trust Company, its directors, officers, employees and representatives, its successors and assigns, and its subsidiaries, divisions, groups and affiliates controlled by Chicago Title and Trust, their respective directors, officers, employees and representatives, and their respective successors and assigns.

C. "*New TC*" means New TC Holding Corporation, its directors, officers, employees and representatives, its successors and assigns, and its subsidiaries, divisions, groups and affiliates controlled by New TC, their respective directors, officers, employees and representatives, and their respective successors and assigns.

D. "*Title plant*" means a privately owned set of records regarding the ownership of and interests in real property that is maintained by obtaining information from the public records on a daily or regular basis, and is indexed, posted or otherwise organized to update data regarding specific land parcels.

E. "*Back plant*" means a privately owned set of records regarding the ownership of and interests in real property that is no longer being updated on a daily or regular basis.

F. "*Remaining Properties*" means all of the rights, title and interest in the properties required to be divested in paragraphs IIA and IIB that have not yet been divested by Alleghany.

II.

It is further ordered, That within twelve months from the date this order becomes final Alleghany shall divest or shall cause to be divested, absolutely and in good faith, all of its rights, title and interest in the properties described in paragraphs IIA and IIB. Divestiture shall be made only to a buyer or buyers that receive the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture is to ensure the continuation of the assets as ongoing, viable title plants and back plants engaged in the production and/or sale of title plant information, and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint in this matter.

A. For each of the following counties, at the option of Alleghany, either New TC's title plant or Alleghany's title plant serving such county: Imperial County, California; Du Page County, Illinois; Lake County, Illinois; Will County, Illinois; Johnson County, Indiana; Lake County, Indiana; Porter County, Indiana; Benton County, Washington; and Franklin County, Washington. All user or access agreements pertaining to each divested title plant shall also be divested. At the buyer's option at the time of purchase, and at a commercially reasonable price, Alleghany shall continue to provide computer and other services provided for each divested plant by either New TC or Alleghany, for a period of up to three years from the date such title plant is divested and shall assist the buyer in transferring the computer and other services to any other provider of such services.

B. For each of the following counties, at the option of Alleghany, either New TC's back plant or Alleghany's back plant serving such county: Orange County, California; Riverside County, California; San Bernardino County, California; San Luis Obispo County, California; Santa Barbara County, California; Tulare County, California; Cook County, Illinois; Marion County, Indiana; and Davidson County, Tennessee. All user or access agreements pertaining to each divested back plant shall also be divested. At the buyer's option at the time of purchase, and at a commercially reasonable price, Alleghany shall continue to provide services provided for each divested back plant by either New TC or Alleghany, for a period of up to three years from the date such back plant is divested and shall assist the buyer in transferring the services to any other provider of such services.

III.

It is further ordered, That:

A. If Alleghany has not divested all of its rights, title and interest in the properties required to be divested in paragraphs IIA and IIB within the twelve month period, Alleghany shall consent to the appointment by the Commission of a trustee to divest all of the Remaining Properties. In the event the Commission or the Attorney General 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, Alleghany shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Alleghany to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph IIIA of the order, Alleghany shall consent to the following terms and conditions regarding the trustee's powers, authorities, duties and responsibilities:

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

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Remaining Properties.

3. The trustee shall have twelve months from the date of appointment to accomplish the divestiture of the Remaining Properties.

4. If at the end of the trustee's twelve 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.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities relating to the Remaining Properties, or any other information, as the trustee may reasonably request. Alleghany shall develop such financial or other information relevant to the Remaining Properties as the trustee may reasonably request. Alleghany shall cooperate with the trustee and shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by Alleghany shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or by the court for a court-appointed trustee.

6. Subject to Alleghany's absolute and unconditional obligation to divest at no minimum price and the purposes of the divestitures as stated in paragraph II of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each acquiring entity for the divestiture of the Remaining Properties. The divestitures shall be made in the manner set out in paragraph II; *provided, however,* that if the trustee receives bona fide offers from more than one acquiring entity or entities, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Alleghany from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of Alleghany on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of Alleghany, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestitures and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Alleghany and the

trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement (percentage of price) that is contingent on the trustee divesting the Remaining Properties.

8. Alleghany shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order, except for cases of misfeasance, willful or wanton acts, or bad faith.

9. Within thirty days after appointment of the trustee, Alleghany shall, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, and consistent with 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 divestitures required by this order.

10. If the trustee ceases to act or fails to act diligently, the Commission may, on its own or by the request of Alleghany, appoint a substitute trustee in the same manner as provided in paragraph IIIA of this order.

11. The Commission and, in the case of a court-appointed trustee, the court may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this order.

12. The trustee shall have no obligation or authority to operate or maintain the Remaining Properties.

13. The trustee shall report in writing to Alleghany and to the Commission every sixty days concerning the trustee's efforts to accomplish the divestitures.

IV.

It is further ordered, That Alleghany shall not cause or permit the wasting or deterioration of the assets and operations to be divested in accordance with paragraphs IIA and IIB of this order in any manner that impairs the marketability of such assets and operations or impairs in any manner the viability of the assets and operations as going concerns engaged in the production and/or sale of title plant or back plant information. In this regard:

A. Alleghany shall maintain the title plants and back plants listed in paragraphs IIA and IIB to the extent and in the manner maintained by New TC and Alleghany prior to this acquisition, including but not limited to updating the records contained in the title plants on a daily or regular basis such that the title plants are as current as possible at all times.

B. Alleghany shall maintain in good faith all contracts for access to New TC's title plants and back plants and to Alleghany's title plants and back plants listed in paragraphs IIA and IIB subject to the terms, conditions and stipulations of those contracts, and will refrain from taking any action toward terminating those contracts other than that which would be commercially reasonable to New TC and Alleghany under the terms of those agreements.

C. For each county listed in paragraph IIA, Alleghany shall, at the option of the accessors, automatically continue to maintain in good faith on identical terms, conditions and stipulations all contracts for access to New TC's title plant and all contracts for access to Alleghany's title plant in such county that expire by their terms prior to divestiture of either New TC's or Alleghany's title plant for a period lasting until the closing date upon which such divestiture is completed, at which time Alleghany's obligations under such contracts shall cease.

D. For each county listed in paragraph IIB, Alleghany shall, at the option of the accessors, automatically continue to maintain in good faith on identical terms, conditions and stipulations all contracts for access to New TC's back plant and all contracts for access to Alleghany's back plant in such county that expire by their terms prior to divestiture of either New TC's or Alleghany's back plant for a period lasting until the closing date upon which such divestiture is completed, at which time Alleghany's obligations under such contracts shall cease.

V.

It is further ordered, That for a period of ten years from the date this order becomes final, Alleghany shall not acquire, directly or indirectly, any stock, share capital, equity interest, or assets in First American Title Insurance Company, Lawyers Title Insurance Corporation, Stewart Title Guaranty Company, Commonwealth Land Title Insurance Company, Title Insurance Company of Minnesota, TRW, Inc. or any of their successors or assigns, or in any concern, corporate or non-corporate, that has any direct or indirect ownership interest in a title plant that services any county listed in paragraph IIA or in a back plant that services any county listed in paragraph IIB, or acquire from any concern, corporate or non-corporate, any assets (other than in the ordinary course of business) of, or ownership interest in, an existing title plant that services any county listed in paragraph IIA or a back plant that services any county listed in paragraph IIB, without the prior approval of the Federal Trade Commission.

VI.

It is further ordered, That for a period of ten years from the date this order becomes final, Alleghany shall not, directly or indirectly, acquire any stock, share capital, or equity interest in any concern, corporate or non-corporate, that in turn has any direct or indirect ownership interest in a title plant or back plant servicing any geographic area for which Alleghany at that time has any direct or indirect ownership interest in a title plant or back plant servicing the same area, or acquire from any concern, corporate or non-corporate, any assets (other than in the ordinary course of business) of, or ownership interest in, any existing title plant or back plant servicing any geographic area for which Alleghany at that time has any direct or indirect ownership interest in a title plant or back plant servicing the same area, without providing advance written notification to the Federal Trade Commission. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), except that for purposes of the Notification, Chicago Title and Trust, with the addition of any other subsidiary, division, group and affiliate of Alleghany engaged in, or having an interest in any other entity engaged in, the production and sale of title plant information or back plant information, shall be considered the ultimate parent entity as that term is defined in 16 CFR 801.1(a)(3). Alleghany shall provide to the Federal Trade Commission, at least thirty days prior to acquiring any such interest (hereinafter referred to as the "first waiting period"), both the Notification and supplemental information either in Alleghany's possession or reasonably available to Alleghany. Such supplemental information shall include a copy of the proposed acquisition agreement; the names of the principal representatives of Alleghany and of the firm Alleghany desires to acquire who negotiated the acquisition agreement; any management or strategic plans discussing the proposed acquisition; and all documents relating to competition for the provision of title plant or back plant services in that particular county. If, within the first waiting period, representatives of the Federal Trade Commission make a written request for additional information, Alleghany shall not consummate the acquisition until twenty days after submitting such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. 18A).

VII.

It is further ordered, That acquisitions resulting in an interest of not more than 3% of the outstanding voting securities of publicly traded companies, solely for the purpose of investment, are not subject to paragraphs V and VI of this order; acquisitions of voting securities of a publicly traded company shall not be subject to paragraphs V and VI of this order solely by reason of the ownership, directly or indirectly, by such publicly traded company of less than 5% of the outstanding voting securities of one of the companies named in paragraph V.

VIII.

It is further ordered, That:

A. Within sixty days after the order becomes final, and every sixty days thereafter until Alleghany has fully complied with paragraphs II, III and IV of this order, Alleghany shall file with 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 this order. Such compliance reports shall include, in addition to any other information that the staff of the Federal Trade Commission may reasonably request, a full description of all contacts and negotiations with potential acquirers of the title plants and back plants to be divested under this order, the identity and address of all such potential acquirers, copies of all written communications to and from such potential acquirers, and all internal memoranda, reports and recommendations concerning divestiture.

B. On or before September 21, 1991, and annually for the next ten years, Alleghany 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 this order.

IX.

It is further ordered, That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to Alleghany made to its principal office, Alleghany shall permit any duly authorized representatives of the Federal Trade 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 Alleghany relating to any matters contained in this order; and

B. Upon five days notice to Alleghany and without restraint or interference from Alleghany, to interview officers or employees of Alleghany, who may have counsel present, regarding such matters.

X.

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

IN THE MATTER OF

TELELINE, INC.

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

Docket C-3337. Complaint, July 24, 1991—Decision, July 24, 1991

This consent order prohibits, among other things, a California corporation, that markets "900" number information services to children, from making misrepresentations regarding free gifts or the number of calls required to receive a premium; requires a clear statement, or preamble, at the beginning of each children's message giving the child a chance to hang up without charge; and requires the company to provide a means for parents to prevent, or not be charged for, unauthorized calls by their children.

Appearances

For the Commission: *Toby M. Levin* and *Joel Winston.*

For the respondent: *Stephen Durchslag, Winston & Strawn,* Chicago, IL.

COMPLAINT

The Federal Trade Commission, having reason to believe that Teleline, Inc., a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Teleline, Inc. is a California corporation with its office and principal place of business located at 9777 Wilshire Boulevard, Suite 918, Beverly Hills, California.

PAR. 2. Respondent has advertised, offered for sale and has sold information services to consumers, including children. Accessed by the telephone through a "900" number exchange, respondent's information services for children have consisted of recorded stories or games featuring animated or fictional characters (such as Freddy Pumpkin and the Easter Bunny) along with recorded promotional messages. Advertisements designed to induce consumers to purchase these services have been broadcast on television across state lines.

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

PAR. 4. Respondent has disseminated, or has caused to be disseminated, advertisements and telephone messages for various information services for children. Typical of respondent's advertisements, but not necessarily all-inclusive thereof, are the advertisements attached hereto as Exhibits A through C. Specifically, the aforesaid advertisements contain the following statements or depictions:

1. "Plus I'll tell you how you can get these monstrous creatures Free with the cost of your 2-minute, $2.45 call." (Audio, Complaint Exhibit B)

2. "And, remember, it's $2.45 for a two-minute message!" (Audio, Complaint Exhibit A)

3. "Call us at 1-900-909-1122, we'll tell you how to get these super gifts...We'll also tell you how to get an action figure or this colorful poster." (Audio, Complaint Exhibit C)

PAR. 5. Through the use of the statements and depictions contained in the attached advertisements, and in others not specifically set forth herein, respondent has represented, directly or by implication, that:

1. The total cost for hearing one complete information service recorded message is two dollars and forty-five cents ($2.45);

2. Children who complete a call to respondent's information service will readily and easily obtain the premium(s) specified in the advertisement;

3. Callers will receive the premium(s) specified in the advertisement by making a single call to respondent's information service.

PAR. 6. In truth and in fact:

1. In many cases the total cost for hearing one complete information service recorded message exceeds two dollars and forty-five cents ($2.45). Respondent charges $2 for the first minute and $ .45 for each additional minute for its recorded message. Because respondent's entire message announcement often exceeds two minutes in duration and the point at which the caller enters the message does not coincide with the beginning of the story, consumers who listen to the entire recorded message will be charged a minimum amount of $2.90 for each call.

2. Children who complete a call to respondent's information service will not readily and easily obtain the premium(s) specified in the

advertisement because the child must: (1) complete one or more calls to the information service; (2) record an address, given during the course of the recorded message announcement, to which a request must be sent to obtain the item; (3) obtain a copy of the telephone bill which contains the call(s) to the information service; (4) circle the appropriate call(s) on the bill; (5) write his or her name, address, and age on the bill or elsewhere as specified in the recorded message; and (6) send a copy of the bill to the respondent at the proper address. This ordering information is given in a rapid and difficult to follow manner during the course of the recorded message.

3. In many cases callers will not receive the premium(s) specified in the advertisement by making a single call to respondent's information service.

Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. In its advertising for its information services for children, respondent has represented, directly or by implication, that children could easily obtain a premium by making a call to the information service. These advertisements failed to disclose that there are material terms and conditions for obtaining the premium, including but not limited to, the need for a writing implement to transcribe the ordering information. These terms and conditions would be material to the caller in deciding whether to purchase the service. In addition, although the terms and conditions were included in the recorded message, the message did not provide sufficient notice or time for the caller to obtain a writing implement and transcribe the necessary information. These practices were, and are, deceptive practices.

PAR. 8. In the course of advertising, promoting, and selling its information services for children, respondent has induced children to call its story service and thereby incur charges, without providing any reasonable means for persons responsible for payment of these charges to exercise control over the transaction. This practice has caused such persons to pay these charges. The admonition in respondent's advertisements that children should seek parental permission before calling did not provide reasonable means for persons responsible for payment of these charges to exercise control over the transaction. Respondent's conduct as set forth above has caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. This conduct was, and is, an unfair act or practice.

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

Commissioner Yao not participating.

EXHIBIT A

VMS OF AMERICA, INC.
A BURRELLE'S [illegible]

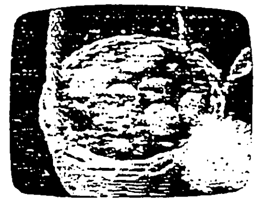
MARKET: NEW YORK
DATE: 03/24/89
PROGRAM: GONG SHOW
CODE #: 0389-3223

TIME: 4:55 PM

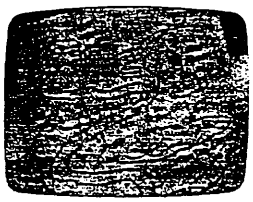
[illegible] Exhibit A

(SFX: BELLS)

HARRY THE EASTER BUNNY: I'm Harry the Easter Bunny.



I have your Easter basket.



But I'm lost, and I need your help!

Call me, at 1-900-909-2345, and I'll give you a secret code

so you can play a free push-button computer adventure game

to help me find your house!

You'll also hear an Easter story

and find out how you can get these Wuppie friends!

So c[illegible] 1-900-909-2345

And remember, it's $2.45 for a two minute message. So get your parents' permission.

But hurry! Easter's just a hop away!

EXHIBIT B

Complaint
Exhibit B
Ad Transcript

"FREDDY PUMPKIN"
Teleline, Inc.

AUDIO	VIDEO
Boo! It's Freddy Pumpkin. You can find out how to get this monstrous creature when you call me at 1-900-909-5678.	Children ask your parents if it's okay before you call. 1-900-909-5678
I'll tell you a horrifying tale. A different scary story every day. Plus I'll tell you	1-900-909-5678
how you can get these monstrous creatures FREE with	Free with 1 call. Free with 3 calls.
the cost of your 2 minute,	1-900-909-5678
$2.45 call. So ask you parents if it's OK before you call 1-900-909-5678. Not	$2.45 for a 2 minute message. $2.00 for the first minute. .45 for additional minute.
scared, are you?	Copyright 1989. all rights reserved. You're Operated by Teleline, B.A., C.A. Charges billed by AT&T as agreed for Teleline.

EXHIBIT C

Complaint
Exhibit C
Ad Transcript

"HE-MAN MASTERS OF THE UNIVERSE"
Teleline, Inc.

Audio	Video
I am He-Man. Call us at 1-900-909-1122, we'll tell you how to get these super gifts plus we'll journey the distant	(visual shows a series of super hero action figures) 1-900-909-1122
worlds, explore the Universe and probably battle Skeletor along the way, Uh! I don't	Children be sure to get your parents permission before calling. 1-900-909-1122
know _____, there's a new adventure everyday. We'll	1-900-909-1122
also tell you how to get an action figure or this colorful poster. Each message costs $2.00 for the first minute and .45 for each additional	(visual shows an action figure) Action figures may vary from the ones shown. (visual shows a poster) 1-900-909-1122
minute. Get your parents permission and call 1-900-909-1122. I have the power.	$2.00 for the first minute, .45 each additional minute. 1-900-909-1122

Decision and Order

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

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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.

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

1. Respondent Teleline, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 9777 Wilshire Boulevard, Suite 918, in the City of Beverly Hills, State of California;

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

Order

Definitions

For purposes of this order, the term "*children*" or "*child*" shall mean a person of age twelve or under.

For purposes of this order, the term *"information service for children"* shall mean a telephone message accessed through a numbered exchange (*e.g.*,"900") for which a fee is charged, consisting of recorded statements promoted or sold primarily to children in any of the following ways: (a) in advertisements appearing in publications primarily directed to children including, but not limited to, children's magazines and comic books; (b) in advertisements during or adjacent to television or radio programs primarily directed to children including, but not limited to, children's animated programs, children's game shows, and children's after-school specials; (c) in advertisements appearing on product packaging primarily directed to children including, but not limited to, children's cereals, toys and beverages; or (d) in any advertisement, regardless of when or where it appears, that is primarily directed to children in light of its subject matter, visual content, language, characters, tone, message, or the like.

For purposes of this order, the term *"premium"* shall mean any item respondent offers to send to those who call its information service for children.

For purposes of this order, the term *"information service message"* shall mean any live or recorded story, program or other communication transmitted to callers of respondent's information service for children.

For purposes of this order, the term *"video advertisement"* shall mean any advertisement intended for dissemination on television broadcast, cablecast, home video, or theatrical release.

This order shall not apply to respondent's service bureau functions with regard to information service messages for children that are limited to either or both of the following:

(1) Distribution or dissemination of any information service for children; or

(2) Creation or production of the non-promotional story content of such information service messages.

I.

It is ordered, That respondent Teleline, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or transmission of any information service for children in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication:

A. The total cost for hearing one complete information service message;

B. The number of calls required to receive a premium; and

C. The ease with which a premium is obtainable.

II.

It is further ordered, That respondent Teleline, Inc., its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or transmission of any information service for children in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to disclose, clearly and prominently, whenever an offer of any premium is made, all the material terms, conditions and obligations upon which receipt and retention of the premium is contingent. Such terms, conditions, and obligations shall include, but not be limited to, the number of calls necessary to receive the premium, if more than one, and the need to have a writing implement and paper available to record the necessary information given during the information service message.

The disclosure shall be made in the manner understandable to children, and shall be made in the same medium in which the offer of the premium is made and, in addition, in any information service message. The material terms, conditions and obligations to be disclosed in media other than the information service message shall include the number of calls necessary to receive the premium, if greater than one, and the need to have a writing implement and paper available to record the necessary information, and any other information material to (1) the decision to attempt to obtain the premium, or (2) the ability to take advantage of the premium offer by calling the information service. The name and address to which the premium request must be sent need not be disclosed in any medium other than the information service message.

In a video advertisement, the premium disclosure shall be displayed as a legible superscript with a simultaneous voice-over recitation of the disclosure in a manner designed to ensure clarity and prominence.

In a print advertisement, the premium disclosure shall be printed in a typeface and color that are clear and prominent. In multipage documents, the premium disclosure shall appear on the cover or first page.

In a radio advertisement, the premium disclosure shall be included in a manner designed to ensure clarity and prominence.

In an information service message, the premium disclosure shall be included in a manner designed to ensure clarity and prominence with sufficient time for the child to record all information needed to obtain the premium upon the first hearing of the message, including, but not limited to, the address where a request must be sent.

III.

It is further ordered, That respondent do forthwith cease and desist from disseminating or causing to be disseminated any advertisement in any medium for an information service for children that does not include the following statement:

"KIDS, YOU MUST ASK YOUR MOM OR DAD AND GET THEIR PERMISSION BEFORE YOU CALL. THIS CALL COSTS MONEY."

The above-required disclosure shall be presented in a manner designed to ensure clarity and prominence, as follows:

A. In any video advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The disclosure shall appear immediately following the first video presentation of the "900" telephone number, but in any event shall begin within the first fifteen (15) seconds of the advertisement. The audio portion shall be presented in a slow and deliberate manner. Each line of the video portion shall be at least as large as one-half of the size of the largest presentation of the "900" number that appears on the screen during the advertisement, shall be of a color or shade that readily contrasts with the background, and shall appear on the screen for the duration of the audio disclosure.

B. In any print advertisement, the disclosure shall be parallel with the base of the advertisement and shall be placed in close proximity to the 900 number. All lines of the disclosure when taken together shall be at least as large as one-half the size of the largest presentation of the 900 number, but in any event the type size of each line of the disclosure shall be no less than 12 point, bold-face type.

C. In any radio advertisement, the disclosure shall be presented in a slow and deliberate manner and shall appear immediately following the first presentation of the "900" telephone number, but in any event it shall begin within the first fifteen (15) seconds of the advertisement.

Nothing contrary to, inconsistent with, or in mitigation of the above-required statement shall be used in any advertisement in any medium.

IV.

It is further ordered, That respondent do forthwith cease and desist from disseminating or causing to be disseminated any advertisement in any medium for any information service for children that does not include a disclosure of the cost of a call to the information service. This disclosure shall be presented in a manner designed to ensure clarity and prominence. In any video advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement.

V.

It is further ordered, That respondent do forthwith cease and desist from disseminating or causing to be disseminated any information service message for children that does not include, at the beginning of the message, an introductory preamble that states in a slow, deliberate and clear manner the following:

"THIS TELEPHONE CALL COSTS MONEY. IF YOU DO NOT HAVE YOUR MOM OR DAD'S PERMISSION, HANG UP NOW AND THERE WILL BE NO CHARGE FOR THIS CALL."

VI.

It is further ordered, That respondent do forthwith cease and desist from billing or causing to be billed, or collecting any funds or causing any funds to be collected, for any call to any information service for children terminated within no less than five (5) seconds of the end of the introductory preamble, as required by paragraph V of this order.

VII.

It is further ordered, That respondent do forthwith cease and desist from inducing children to call its information service for children and thereby incur charges, without providing any reasonable means for the person responsible for payment of such charges to exercise control over the transaction. For purposes of this paragraph, if the respondent does not provide, prior to placement of any call by a child, a reasonable means for the person responsible for payment to avoid unauthorized calls, the provision of a reasonable means to exercise control over the transaction shall be the use of the respondent's best efforts to ensure that one-time refunds or credits are provided upon request for unauthorized calls made by children, as specified below. Best efforts shall include at least the following:

A. Contracting with the appropriate interstate common carrier or local exchange carrier to:

(1) Identify in all telephone bills containing charges for calls to respondent's information service for children each telephone call to such service by the characters "CHILD CALL;"

(2) Place in all telephone bills containing charges for calls to respondent's information service for children, clearly and prominently in close proximity to the itemization of those charges, a toll-free or local telephone number specified to be used for consumer inquiries concerning charges on the telephone bill; *provided,* that a general billing inquiry telephone number for customer inquiries concerning charges on the telephone bill shall satisfy this requirement;

(3) Refer all customers who call the toll-free number inquiring about the charges for respondent's information service for children to their local exchange carrier for information regarding the availability of blocking in their jurisdiction; and

(4) Provide a one-time prompt and full credit or refund at the customer's request for all such calls, whether such request is made to the toll-free or local telephone number specified herein or in any other manner; *provided,* that respondent must contract with the carrier to provide a second prompt and full credit or refund to any customer who requests the first credit or refund during a period of the billing cycle where unauthorized calls have been made, but do not yet appear on the customer's bill, and subsequently requests a second credit or refund for any additional unauthorized calls made before the date of the first request for a credit or refund;

provided, that if the interstate common carrier utilized by respondent employs local exchange carriers to provide billing inquiry services, respondent shall be in compliance with subparagraphs A(3) and (4) of this paragraph if its contract with the interstate common carrier provides that the interstate common carrier notify each local exchange carrier of the interstate common carrier's policies to:

(i) Provide the customer with information regarding the availability of blocking of 900 number calls; and

(ii) Provide upon request one-time refunds or credits for unauthorized calls by children, as provided in subparagraph A(4) of this paragraph.

B. In the event that respondent receives any information that the interstate common carrier has failed to fulfill its obligations under the contract required by subparagraph A of this paragraph, immediately notifying the interstate common carrier:

(1) Of the existence of the alleged failure(s);

(2) Of the interstate common carrier's responsibility to fulfill its obligations under the contract;

(3) Of the need to investigate and correct all past failures; and

(4) That if a pattern or practice of failures continues, respondent will terminate the use of said interstate common carrier for any information service for children; and

C. Terminating the use of said interstate common carrier for any information service for children, in the event that the interstate common carrier does not correct all past failures of which it is aware or continues to fail to fulfill its obligations under said contract.

D. Compliance with the requirements set forth in subparagraphs A - C of this paragraph is deemed to be satisfactory compliance with this paragraph.

Provided, that for purposes of this paragraph, the mere inclusion of any audio or video disclosure relating to parental authorization in advertisements or information service messages is expressly deemed not to be a reasonable means, prior to placement of any call by a child, for the person responsible for payment to avoid unauthorized calls.

VIII.

It is further ordered, That for three (3) years from the date of service of this order, respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying: (1) all advertisements for information services for children and all corresponding information service messages; (2) a record of all credit or refund requests made for charges billed for respondent's information services for children; (3) all documents relating to compliance with paragraph VII of this order; and (4) all consumer complaints and dispositions thereof relating to respondent's information services for children.

IX.

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

X.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions and any carrier(s) or other entities providing billing and/or collection service for its information services for children.

XI.

It is further ordered, That respondent shall, within sixty (60) days after service of this order and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Yao not participating.

IN THE MATTER OF

AUDIO COMMUNICATIONS INCORPORATED

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

Docket C-3338. Complaint, July 24, 1991—Decision, July 24, 1991

This consent order prohibits, among other things, a Nevada corporation, that markets "900" number information services to children, from making misrepresentations regarding free gifts or the number of calls required to receive a premium; requires a clear statement, or preamble, at the beginning of each children's message giving the child a chance to hang up without charge; and requires the company to provide a means for parents to prevent, or not be charged for, unauthorized calls by their children.

Appearances

For the Commission: *Toby M. Levin* and *Joel Winston.*

For the respondent: *James M. Johnstone, Wiley, Rein & Fielding,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Audio Communications Incorporated, a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Audio Communications Incorporated is a Nevada corporation with its office and principal place of business located at 3140 Polaris Avenue, Suite 27, Las Vegas, Nevada.

PAR. 2. Respondent has advertised, offered for sale and has sold information services to consumers, including children. Accessed by the telephone through a "900" number exchange, respondent's information services for children have consisted of recorded stories or games featuring animated or fictional characters (such as Santa Claus and the Easter Bunny) along with recorded promotional messages. Advertisements designed to induce consumers to purchase these services have been broadcast on television across state lines.

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

PAR. 4. Respondent has disseminated, or has caused to be disseminated, advertisements and telephone messages for various information services for children. Typical of respondent's advertisements, but not necessarily all-inclusive thereof, are the advertisements attached hereto as Exhibits A and B. Specifically, the aforesaid advertisements contain the following statements or depictions:

1. "Call me now to get a free Easter Bunny gift, and help my favorite charity." (Audio, Complaint Exhibit A)

2. "There's a new story everyday, and I'll tell you how to get a free Christmas gift." (Audio, Complaint Exhibit B)

PAR. 5. Through the use of the statements and depictions contained in the attached advertisements, and in others not specifically set forth herein, respondent has represented, directly or by implication, that:

1. Children who complete a call to respondent's information service will readily and easily obtain the premium specified in the advertisement; and

2. Callers will receive the premium specified in the advertisement by making a single call to respondent's information service.

PAR. 6. In truth and in fact:

1. Children who complete a call to respondent's information service will not readily and easily obtain the premium specified in the advertisement because the child must: (1) complete one or more calls to the information service; (2) record an address, given during the course of the recorded message announcement, to which a request must be sent to obtain the item; (3) obtain a copy of the telephone bill which contains the call(s) to the information service; (4) enclose a stamped self-addressed envelope; and (5) send a copy of the bill to the respondent at the proper address. This ordering information is given in a rapid and difficult to follow manner during the course of the recorded message.

2. In many cases callers will not receive the premium specified in the advertisement by making a single call to respondent's information service.

Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. In its advertising for its information services for children, respondent has represented, directly or by implication, that children could easily obtain a premium by making a call to the information service. These advertisements failed to disclose that there are material terms and conditions for obtaining the premium, including but not limited to, the need for a writing implement to transcribe the ordering information. These terms and conditions would be material to the caller in deciding whether to purchase the service. In addition, although the terms and conditions were included in the recorded message, the message did not provide sufficient notice or time for the caller to obtain a writing implement and transcribe the necessary information. These practices were, and are, deceptive practices.

PAR. 8. In the course of advertising, promoting, and selling its information services for children, respondent has induced children to call its story service and thereby incur charges, without providing any reasonable means for persons responsible for payment of these charges to exercise control over the transaction. This practice has caused such persons to pay these charges. The admonition in respondent's advertisements that children should seek parental permission before calling did not provide reasonable means for persons responsible for payment of these charges to exercise control over the transaction. Respondent's conduct as set forth above has caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. This conduct was, and is, an unfair act or practice.

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

Commissioner Yao not participating.

EXHIBIT A

VIDEO MONITORING SERVICES OF AMERICA, INC.
330 WEST 42ND STREET, NEW YORK, NEW YORK 10036
(212) 736-2010
A BURRELLE'S Affiliate

PRODUCT: EASTER BUNNY TALES PHONE LINE
LENGTH: :30 STATION: WNYW
MARKET: NEW YORK
DATE: 03/23/89 TIME: 4:53 PM
PROGRAM: DUCK TALES
CODE #: 0389-3222

Exhibit A

(BKG MUSIC)
EASTER BUNNY: Hey, kids! I'm the Easter Bunny!

Get a pencil

and write down my secret phone number!

Then call me for great stories filled with fun, magic, and monsters!

Ready? 1-900-909-2000.

Got that? Good!

Call me now to get a free Easter Bunny gift, and help my favorite charity. *

It's $2.00 first minute, 45 cents each minute more,

so ask your parents' permission before calling me,

to hear hopping good Easter Bunny tales.

Oh, I'm waiting to hear from you!

'Bye!

* Video Superscript: Three calls for surprise toy
Five calls for super T-shirt

NEW YORK • LOS ANGELES • CHICAGO • PHILADELPHIA • SAN FRANCISCO • BOSTON • DALLAS • WASHINGTON • HOUSTON • MIAMI • DENVER • HARTFORD • SAN DIEGO

EXHIBIT B

Radio TV Reports

41 East 42nd Street, New York, N.Y. 10017
(212) 309-1400

PRODUCT SANTA CLAUS PHONE LINE
PROGRAM BEVERLY HILLS TEENS 30 SEC.
WWOR-TV (NEW YORK)

Exhibit B

1. (MUSIC) SANTA: The elves have been telling me about, the good boys, and girls

2. who have been calling my special telephone number.

3. To hear terrific Christmas stories,

4. about the adventures of Wilbur the Reindeer.

5. There's a new story everyday, and I'll tell you how to get a free Christmas gift.

6. So call now.

7. ANNCR: Call 1-900-909-4141.

8. Each call is $2 for the first minute,

9. and 45¢ for each extra minute.

10. Be sure that your parent's give you permission.

11. SANTA: Wilbur the Reindeer,

12. it's a Christmas adventur (MUSIC OUT)

Decision and Order

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

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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.

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

1. Respondent Audio Communications, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of business located at 3140 Polaris Avenue, Suite 27, of the City of Las Vegas, State of Nevada;

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

Order

DEFINITIONS

For purposes of this order, the term "*children*" or "*child*" shall mean a person of age twelve or under.

For purposes of this order, the term "*information service for children*" shall mean a telephone message accessed through a number exchange (*e.g.*, "900") for which a fee is charged, consisting of recorded statements promoted or sold primarily to children in any of the following ways: (a) in advertisements appearing in publications primarily directed to children including, but not limited to, children's magazines and comic books; (b) in advertisements during or adjacent to television or radio programs primarily directed to children including, but not limited to, children's animated programs, children's game shows, and children's after-school specials; (c) in advertisements appearing on product packaging primarily directed to children including, but not limited to, children's cereals, toys and beverages; or (d) in any advertisement, regardless of when or where it appears, that is primarily directed to children in light of its subject matter, visual content, language, characters, tone, message, or the like.

For purposes of this order, the term "*premium*" shall mean any item respondent offers to send to those who call its information service for children.

For purposes of this order, the term "*information service message*" shall mean any live or recorded story, program or other communication transmitted to callers of respondent's information service for children.

For purposes of this order, the term "*video advertisement*" shall mean any advertisement intended for dissemination on television broadcast, cablecast, home video, or theatrical release.

This order shall not apply to respondent's service bureau functions with regard to information service messages for children that are limited to either or both of the following:

(1) distribution or dissemination of any information service for children; or

(2) creation or production of the non-promotional story content of such information service messages.

I.

It is ordered, That respondent Audio Communications Incorporated, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or transmission of any information service for children in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication:

A. The number of calls required to receive a premium; and
B. The ease with which a premium is obtainable.

II.

It is further ordered, That Audio Communications Incorporated, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or transmission of any information service for children in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to disclose, clearly and prominently, whenever an offer of any premium is made, all the material terms, conditions and obligations upon which receipt and retention of the premium is contingent. Such terms, conditions, and obligations shall include, but not be limited to, the number of calls necessary to receive the premium, if more than one, and the need to have a writing implement and paper available to record the necessary information given during the information service message.

The disclosure shall be made in a manner understandable to children, and shall be made in the same medium in which the offer of the premium is made and, in addition, in any information service message. The material terms, conditions and obligations to be disclosed in media other than the information service message shall include the number of calls necessary to receive the premium, if greater than one, and the need to have a writing implement and paper available to record the necessary information, and any other information material to (1) the decision to attempt to obtain the premium, or (2) the ability to take advantage of the premium offer by calling the information service. The name and address to which the premium request must be sent need not be disclosed in any medium other than the information service message.

In a video advertisement, the premium disclosure shall be displayed as a legible superscript with a simultaneous voice-over recitation of the disclosure in a manner designed to ensure clarity and prominence.

In a print advertisement, the premium disclosure shall be printed in a typeface and color that are clear and prominent. In multipage documents, the premium disclosure shall appear on the cover or first page.

In a radio advertisement, the premium disclosure shall be included in a manner designed to ensure clarity and prominence.

In an information service message, the premium disclosure shall be included in a manner designed to ensure clarity and prominence with sufficient time for the child to record all information needed to obtain the premium upon the first hearing of the message, including, but not limited to, the address where a request must be sent.

III.

It is further ordered, That respondent do forthwith cease and desist from disseminating or causing to be disseminated any advertisement in any medium for an information service for children that does not include the following statement:

"KIDS, YOU MUST ASK YOUR MOM OR DAD AND GET THEIR PERMISSION BEFORE YOU CALL. THIS CALL COSTS MONEY."

The above-required disclosure shall be presented in a manner designed to ensure clarity and prominence, as follows:

A. In any video advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The disclosure shall appear immediately following the first video presentation of the "900" telephone number, but in any event shall begin within the first fifteen (15) seconds of the advertisement. The audio portion shall be presented in a slow and deliberate manner. Each line of the video portion shall be at least as large as one-half of the size of the largest presentation of the "900" number that appears on the screen during the advertisement, shall be of a color or shade that readily contrasts with the background, and shall appear on the screen for the duration of the audio disclosure.

B. In any print advertisement, the disclosure shall be parallel with the base of the advertisement and shall be placed in close proximity to the 900 number. All lines of the disclosure when taken together shall be at least as large as one-half the size of the largest presentation of the 900 number, but in any event the type size of each line of the disclosure shall be no less than 12 point, bold-face type.

C. In any radio advertisement, the disclosure shall be presented in a slow and deliberate manner and shall appear immediately following the first presentation of the "900" telephone number, but in any event it shall begin within the first fifteen (15) seconds of the advertisement.

Nothing contrary to, inconsistent with, or in mitigation of the above-required statement shall be used in any advertisement in any medium.

IV.

It is further ordered, That respondent do forthwith cease and desist from disseminating or causing to be disseminated any advertisement in any medium for any information service for children that does not include a disclosure of the cost of a call to the information service. This disclosure shall be presented in a manner designed to ensure clarity and prominence. In any video advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement.

V.

It is further ordered, That respondent do forthwith cease and desist from disseminating or causing to be disseminated any information service message for children that does not include, at the beginning of the message, an introductory preamble that states in a slow, deliberate and clear manner the following:

"THIS TELEPHONE CALL COSTS MONEY. IF YOU DO NOT HAVE YOUR MOM OR DAD'S PERMISSION, HANG UP NOW AND THERE WILL BE NO CHARGE FOR THIS CALL."

VI.

It is further ordered, That respondent do forthwith cease and desist from billing or causing to be billed, or collecting any funds or causing any funds to be collected, for any call to any information service for children terminated within no less than five (5) seconds of the end of the introductory preamble, as required by paragraph V of this order.

VII.

It is further ordered, That respondent do forthwith cease and desist from inducing children to call its information service for children and thereby incur charges, without providing any reasonable means for the person responsible for payment of such charges to exercise control over the transaction. For purposes of this paragraph, if the respondent does not provide, prior to placement of any call by a child, a reasonable means for the person responsible for payment to avoid unauthorized calls, the provision of a reasonable means to exercise control over the transaction shall be the use of the respondent's best efforts to ensure that one-time refunds or credits are provided upon request for unauthorized calls made by children, as specified below. Best efforts shall include at least the following:

A. Contracting with the appropriate interstate common carrier or local exchange carrier to:

(1) Identify in all telephone bills containing charges for calls to respondent's information service for children each telephone call to such service by the characters "CHILD CALL;"

(2) Place in all telephone bills containing charges for calls to respondent's information service for children, clearly and prominently in close proximity to the itemization of those charges, a toll-free or local telephone number specified to be used for consumer inquiries concerning charges on the telephone bill; *provided,* that a general billing inquiry telephone number for customer inquiries concerning charges on the telephone bill shall satisfy this requirement;

(3) Refer all customers who call the toll-free number inquiring about the charges for respondent's information service for children to their local exchange carrier for information regarding the availability of blocking in their jurisdiction; and

(4) Provide a one-time prompt and full credit or refund at the customer's request for all such calls, whether such request is made to the toll-free or local telephone number specified herein or in any other manner; *provided,* that respondent must contract with the carrier to provide a second prompt and full credit or refund to any customer who requests the first credit or refund during a period of the billing cycle where unauthorized calls have been made, but do not yet appear on the customer's bill, and subsequently requests a second credit or refund for any additional unauthorized calls made before the date of the first request for a credit or refund;

provided, that if the interstate common carrier utilized by respondent employs local exchange carriers to provide billing inquiry services, respondent shall be in compliance with subparagraphs A(3) and (4) of this paragraph if its contract with the interstate common carrier provides that the interstate common carrier notify each local exchange carrier of the interstate common carrier's policies to:

(i) Provide the customer with information regarding the availability of blocking of 900 number calls; and

(ii) Provide upon request one-time refunds or credits for unauthorized calls by children, as provided in subparagraph A(4) of this paragraph.

B. In the event that respondent receives any information that the interstate common carrier has failed to fulfill its obligations under the contract required by subparagraph A of this paragraph, immediately notifying the interstate common carrier:

(1) Of the existence of the alleged failure(s);

(2) Of the interstate common carrier's responsibility to fulfill its obligations under the contract;

(3) Of the need to investigate and correct all past failures; and

(4) That if a pattern or practice of failures continues, respondent will terminate the use of said interstate common carrier for any information service for children; and

C. Terminating the use of said interstate common carrier for any information service for children, in the event that the interstate common carrier does not correct all past failures of which it is aware or continues to fail to fulfill its obligations under said contract.

D. Compliance with the requirements set forth in subparagraphs A - C of this paragraph is deemed to be satisfactory compliance with this paragraph.

Provided, that for purposes of this paragraph, the mere inclusion of any audio or video disclosure relating to parental authorization in advertisements or information service messages is expressly deemed not to be a reasonable means, prior to placement of any call by a child, for the person responsible for payment to avoid unauthorized calls.

VIII.

It is further ordered, That for three (3) years from the date of service of this order, respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying: (1) all advertisements for information services for children and all corresponding information service messages; (2) a record of all credit or refund requests made for charges billed for respondent's information services for children; (3) all documents relating to compliance with paragraph VII of this order; and (4) all consumer complaints and dispositions thereof relating to respondent's information services for children.

IX.

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

X.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions and any carrier(s) or other entities providing billing and/or collection service for its information services for children.

XI.

It is further ordered, That respondent shall, within sixty (60) days after service of this order and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Yao not participating.

IN THE MATTER OF

HAROLD HONICKMAN, ET AL.

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

Docket 9233. Complaint, Nov. 2, 1989—Decision, July 25, 1991

This consent order requires, among other things, a major Pepsi bottler for the New York metropolitan area and his beverage corporation, for a ten year period, to seek prior Commission approval before making certain soft drink acquisitions in the New York metropolitan area; or else hold the newly acquired assets separate and apart from ongoing bottling operations. However, the addendum to the agreement would allow Mr. Honickman to distribute and sell the products of Seven-Up Brooklyn to another bottler for a limited time period.

Appearances

For the Commission: *Constance M. Salemi* and *Ronald B. Rowe.*

For the respondents: *Andrew L. Sandler, Skadden, Arps, Slate, Meagher & Flom,* Washington, D.C. and *Peter E. Greene, Skadden, Arps, Slate, Meagher & Flom,* New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the respondent, Harold Honickman, individually or by or through the Long Island Acquisition Company, a partnership, or its partners, the Brooklyn Beverage Acquisition Corporation, a corporation, MGGR Corporation, a corporation, Taunton Corporation, a corporation, LTF Brooklyn, Inc., a corporation; Melville Beverage Partners Limited Partnership, a limited partnership; and the Berriman Cozine Corporation, a corporation; subject to the jurisdiction of the Commission, has acquired the assets of the Seven-Up Brooklyn Bottling Company, Inc., from the Seven-Up Brooklyn Bottling Company, Inc., and that said acquisition may be in violation of 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; and that said acquisition constitutes a violation 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:

I. DEFINITIONS

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

a. "*Honickman*" means Harold Honickman.

b. "*BBAC*" means the Brooklyn Beverage Acquisition Corporation, and its subsidiaries, divisions and groups controlled by BBAC and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

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

d. "*Taunton*" means Taunton Corporation, and its subsidiaries, divisions and groups controlled by Taunton and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

e. "*LTF Brooklyn*" means LTF Brooklyn, Inc., and its subsidiaries, divisions and groups controlled by Taunton and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

f. "*LIA*" means the L.I. Acquisition Company, its subsidiaries, divisions, and groups controlled by LIA and their respective partners, officers, employees, agents or representatives, and their successors and assigns.

g. "*Melville*" means the Melville Beverage Partners Limited Partnership, its subsidiaries, divisions, and groups controlled by Melville and their respective partners, officers, employees, agents or representatives and their successors and assigns.

h. "*Berriman*" means the Berriman Cozine Corporation and its subsidiaries, divisions and groups controlled by Berriman and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

i. The "*acquiring entities*" means LIA or its partners, BBAC, MGGR, Taunton, and LTF Brooklyn; Melville; and Berriman.

j. "*Seven-Up Brooklyn*" means the Seven-Up Brooklyn Bottling Company (the post-acquisition firm), and its subsidiaries, divisions, and groups, controlled by Seven-Up Brooklyn and their respective directors, partners, officers, employees, agents or representatives, and their successors and assigns.

k. "*Seven-Up Brooklyn, Inc.,*" means the Seven-Up Brooklyn Bottling Company, Inc. (the seller), and its subsidiaries, divisions and groups controlled by Seven-Up Brooklyn, Inc., and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

l. "*Pepsi New York*" means the Pepsi-Cola Bottling Company of New York, Inc., and its subsidiaries, divisions and groups controlled by Pepsi New York, and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

m. "*Canada Dry New York*" means the Canada Dry Bottling Company of New York and its subsidiaries, divisions, and groups controlled by Canada Dry New York and their respective partners, officers, employees, agents or representatives, and their successors and assigns.

n. "*Soft drink*" means a carbonated soft drink or "CSD," as classified under the four-digit Standard Industrial Classification industry code 2086.

o. "*Branded*" soft drink or CSD means the trademarked name of any type of soft drink product commonly delivered by a store-door or bottler distribution system, such as Coca Cola™, Pepsi-Cola™, Seven-Up™, Dr Pepper™, and Royal Crown™ products.

p. "*Bottler*" refers to a person that is engaged in bottling soft drinks or that has been granted an exclusive bottling appointment or distribution agreement by any manufacturer of soft drink syrup or concentrate.

q. "*Bottles*", "*bottling*" or "*bottled*" means the process of putting syrup or concentrate and other ingredients together as a soft drink in a bottle or can, regardless of the sources of the syrup or concentrate.

r. "*Territory*" means an area for which a bottler has been granted an exclusive bottling appointment or distribution agreement.

s. "*Store-door delivery*" means the delivery of soft drinks by a bottler to all types and sizes of outlets, including, but not limited to, supermarkets, mom and pop stores, vending machines and fountain accounts. Store-door delivery does not include delivery of CSD through a warehouse system serving only stores, with high CSD volumes, but not mom and pop stores, vending and fountain.

II. THE PARTIES

2. Honickman is an individual with a place of residence at 951 Frazier Road, Rydal, PA. Honickman owns, controls, or guaranteed most of the financing for each of the acquiring entities.

3. BBAC is a Honickman-controlled corporation organized and existing under the laws of the State of Pennsylvania with a principal place of business at 1500 The Fidelity Building, Philadelphia, PA.

4. MGGR is a corporation organized and existing under the laws of the State of Pennsylvania with a principal place of business at 1500 The Fidelity Building, Philadelphia, PA.

5. Taunton is a corporation organized and existing under the laws of the State of Pennsylvania with a principal place of business at 1500 The Fidelity Building, Philadelphia, PA.

6. LTF Brooklyn is a corporation organized and existing under the laws of the State of Delaware with a principal place of business at 1520 Locust Street, Philadelphia, PA.

7. LIA was a Honickman-controlled partnership, organized and existing under the laws of the State of New York with a principal place of business at 112-02 Fifteenth Avenue, College Point, New York.

8. Melville is a Honickman-controlled limited partnership organized and existing under the laws of the State of New York with its principal place of business located at 135 Baylis Road, Melville, New York.

9. Berriman is a Honickman-guaranteed corporation organized and existing under the laws of the State of New York with its principal place of business located at c/o CT Corporation System, 1633 Broadway, New York, New York.

10. Seven-Up Brooklyn was a Honickman-controlled partnership organized and existing under the laws of the State of New York with its principal place of business located at 112-02 Fifteenth Avenue, College Point, New York.

11. In 1986, before its acquisition by Honickman and his controlled entities in 1987, Seven-Up Brooklyn Inc's gross sales totaled approximately $28 million and its sales volume was in excess of eight million cases of soft drinks.

12. The acquiring entities and Honickman individually or by or through the acquiring entities and at all times relevant herein have been engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and have businesses 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. THE ACQUISITION

13. On or about August 3, 1987, Honickman individually or by or through the acquiring entities acquired most of the assets of Seven-Up Brooklyn, Inc., paying approximately $18 million. These assets included the following franchises: the Seven-Up, the A&W Root Beer, the Perrier, the Hawaiian Punch, the Brownie, the Canfield's and the Lipton Tea franchises. Honickman, individually or by or through the acquiring entities, also acquired other assets. These assets included production, equipment; food service, merchandising and post-mix dispensing equipment related to the franchises; vending machines and visi-coolers; office furnishings; office equipment and real estate. After the acquisition, the acquiring entities continued to bottle, distribute and sell soft drinks under the name of Seven-Up Brooklyn.

14. At the time of the acquisition, Seven-Up Brooklyn, Inc., bottled, distributed and sold soft drinks in the New York City area. At the time of the acquisition, Honickman owned and controlled Pepsi New York and Canada Dry New York. At the time of the acquisition Pepsi New York and Canada Dry New York bottled, distributed and sold soft drinks in the New York metropolitan area. After the acquisition, Honickman individually or by or through the acquiring entities also owned or controlled Seven-Up Brooklyn.

15. On or about December 13, 1988, LTF Brooklyn purchased the rights of BBAC, MGGR and Taunton in the LIA partnership in order to lessen the likelihood of a Commission enforcement action; and the LIA partnership was dissolved.

IV. OTHER ACQUISITIONS

16. On or about December 1986, Honickman individually or by or through Canada Dry New York, acquired the assets of Galler Seven-Up Bottling Company ("Seven-Up Galler") holding franchises in New Jersey counties. These counties include, but are not limited to, Bergen, Hudson and Passaic. On or about September 1987, Honickman individually or by or through Canada Dry New York acquired the

Seven-Up Bottling Company of Essex, Inc. ("Seven-Up Essex"). Seven-Up Essex holds franchises in at least the New Jersey county of Essex. These acquisitions and the acquisition of Seven-Up Brooklyn are located in the New York metropolitan area and may be part of a Honickman plan to acquire the bottlers holding Seven-Up franchises in that area.

V. TRADE AND COMMERCE

Relevant Line of Commerce

17. A relevant line of commerce in which to analyze the acquisition of most of the assets of Seven-Up Brooklyn, Inc., is branded soft drinks. Another relevant line of commerce in which to analyze the acquisition is no broader than all soft drinks.

Relevant Sections of the Country

18. A relevant section of the country is the New York metropolitan area. The metropolitan area encompasses territories where Pepsi New York, Canada Dry New York and Seven-Up Brooklyn and other Pepsi and Seven-Up bottlers do business. Another relevant section of the country may be a three-county area of Richmond (Staten Island), Kings (Brooklyn) and Queens in the State of New York. The three-county area encompasses only territories where Pepsi New York, Canada Dry New York and Brooklyn Seven-Up do business.

VI. MARKET STRUCTURE

19. The production, distribution and sale of soft drinks in each relevant section of the country is highly concentrated, whether measured by the Herfindahl-Hirschmann indices or two-firm and four-firm concentration ratios.

VII. ENTRY CONDITIONS

20. Entry into the relevant sections of the country is difficult or unlikely.

VIII. COMPETITION

21. Seven-Up Brooklyn, Inc., and Honickman individually or by or through Pepsi New York and Canada Dry New York were actual competitors in the production, distribution and sale of soft drinks in the metropolitan and the three-county area.

IX. EFFECTS

22. The effect of the acquisition may be substantially to lessen competition in the relevant lines of commerce and the relevant sections of the country in the following ways, among others:

a. By eliminating direct competition from Seven-Up Brooklyn, Inc.;

b. By reducing competition among soft drink brands produced, distributed and sold by the remaining bottlers;

c. By increasing the likelihood of, or facilitating, actual or tacit collusion; and

d. By increasing the difficulty of entering the market.

23. Any or all of the above increase the likelihood that firms will increase prices and restrict output both in the near future and in the long term.

24. The acquisition by Honickman individually or by or through the acquiring entities of the assets of Seven-Up Brooklyn, Inc., violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18.

Commissioner Azcuenaga recused and Commissioner Owen not participating.

DECISION AND ORDER

The Commission having theretofore issued its complaint charging Harold A. Honickman and Brooklyn Beverage Acquisition Corporation with violation of Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, and respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

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

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25 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:

ORDER

I.

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

A. "*Honickman*" means Harold A. Honickman, individually, and all entities controlled by Honickman, including but not limited to, Brooklyn Beverage Acquisition Corporation, their predecessors, subsidiaries, divisions, groups and affiliates controlled by Honickman, and their respective directors, officers, employees, agents, representatives, successors and assigns.

B. "*BBAC*" means Brooklyn Beverage Acquisition Corporation, its predecessors, subsidiaries, divisions, groups and affiliates controlled by BBAC, and their respective directors, officers, employees, agents, representatives, successors and assigns.

C. "*Commission*" means the Federal Trade Commission.

D. "*Person*" means any natural person or any corporate entity, partnership, association, joint venture, governmental entity, trust or other organization or entity.

E. "*CSDs*" means carbonated soft drinks that are produced by adding carbonated water to a syrup consisting of a concentrate flavoring and a sweetener and are classified under the four-digit Standard Industrial Classification industry code 2086. For purposes of this order, CSDs shall not include non-carbonated products, carbonated or still water, iced tea, lemonade, products containing in finished form more than ten (10) percent fruit juice, or isotonic or sport drinks.

F. "*Bottling Operation*" means any business, person, or other entity that distributes and sells CSDs directly using company-owned or equity distribution to supermarkets pursuant to a franchise, license, distribution contract, or other similar agreement; provided, however, a Bottling Operation shall not include any business, person or other entity that distributes and sells CSDs only by warehouse delivery or through a beer distributor that does not hold a CSD franchise, license or similar distribution agreement.

G. "*Warehouse delivery*" means the distribution and sales of soft drinks by any business, person or entity other than a Bottling Operation.

H. "*Existing Honickman Bottling Operation*" means all or any part of the stock, share capital, equity interest or assets of any Bottling Operation owned or controlled by Honickman.

I. "*New York Metropolitan Area*" means, for purposes of this order, the counties of Westchester, New York, Bronx, Richmond (Staten Island), Kings (Brooklyn), Queens, Nassau, Suffolk, Rockland, Orange, Putnam and Dutchess in the State of New York; and Bergen, Hudson, Passaic, Essex, Union, Morris, Somerset and Sussex in the State of New Jersey.

J. "*Equity distributor*" means an independent contractor that distributes and sells CSDs on behalf of a Bottling Operation in a specified geographic territory that is within the exclusive licensed territory of that Bottling Operation for such CSD.

II.

It is further ordered, That for a period of ten (10) years after the date this order becomes final, respondents shall not, without the prior approval of the Commission, acquire directly or indirectly all or any part of the stock of, share capital of, equity interest in, assets of or rights related to any Bottling Operation in any county in the New York Metropolitan Area where at the time of such acquisition any Existing Honickman Bottling Operation distributes CSDs directly using company-owned or equity distributors to supermarkets; provided, however, that such prior approval shall not be required if respondents satisfy the conditions set forth in paragraph III of this order; and provided further that nothing contained in the foregoing provisions shall prohibit respondents from (i) acquiring stock or share capital for investment purposes only that does not exceed five (5) percent of the outstanding stock or share capital of any Bottling Operation, (ii) acquiring rights to equity territories ("equity distributor routes") for any territory in which Honickman holds the right to bottle or distribute CSDs distributed through such equity distributor rights, (iii) acquiring production or distribution equipment, or (iv) acquiring business supplies or raw materials in the ordinary course of business.

III.

It is further ordered, That:

A. Prior approval of the Commission under paragraph II of this order shall not be required if respondents satisfy the conditions of this paragraph III. In order to make such an acquisition without paragraph II prior approval, respondents shall:

1. Notify the Commission at least thirty (30) days prior to such acquisition. Such notification shall follow the format for filings under Section 7A of the Clayton Act, 15 U.S.C. 18a, and the Commission's Premerger Reporting Rules promulgated thereunder, 16 CFR 801 *et seq.* Such notification shall be in addition to any reporting requirements applicable to the transaction under said statute and rules; and

2. Divest, absolutely and in good faith within six (6) months after the date of any such acquisition, its business of bottling, distributing and selling CSDs and non-carbonated drinks, except for carbonated and non-carbonated waters, that it then conducts through any Existing Honickman Bottling Operation in those counties in the New York Metropolitan Area in which such newly-acquired Bottling Operation also operates (such Existing Honickman Bottling Operation is hereinafter referred to as "Paragraph III Operation"). Such divestiture may be accomplished by sale, full and complete and irrevocable sublicense agreement, full and complete assignment of rights or otherwise; provided it shall include a transfer of all rights held by such Paragraph III Operation to bottle, distribute and sell CSDs and non-carbonated drinks, except for carbonated and non-carbonated waters, in those New York Metropolitan Area counties in which the Newly-Acquired Bottling Operation also operates (hereinafter the "Geographic Area of Competition"), including without limitation and to the extent such rights pertain to the Geographic Area of Competition, all rights to bottle, distribute and sell CSDs and non-carbonated drinks, except for carbonated and non-carbonated waters, in the Geographic Area of Competition held pursuant to franchises, licenses, bottling appointments, distribution or other agreements; together with all assets that are dedicated to or necessary for such Paragraph III Operation's business of bottling, distributing and selling CSDs and non-carbonated drinks, except for carbonated and non-carbonated waters, in the Geographic Area of Competition, including without limitation, vehicles, vending machines,

visi-coolers, fountain equipment, funded employee benefit plans, if any, full-goods inventory, point of sale marketing equipment, supply agreements, customer lists, customer agreements or understandings (whether formal or informal), all customer records and files and all other assets, interests, rights and privileges owned by, dedicated to, or necessary for such Paragraph III Operation.

B. Respondents shall comply with all of the terms of the Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I. If respondents shall be required to make any divestiture pursuant to paragraph III.A.2 of this order, said Agreement to Hold Separate shall become effective as of the date of the acquisition that gave rise to the paragraph III.A.2 divestiture obligations and shall continue in effect until such time as respondents' divestiture obligations under paragraph III of this order are satisfied or until such other time as the Agreement to Hold Separate provides.

C. Respondents shall divest all Paragraph III Operations only to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of paragraphs III-A through III-B of this order is to ensure that respondents' acquisition of any Bottling Operation in the New York Metropolitan Area is not likely to result in any lessening of competition.

D. Pending divestiture respondents shall take such action as is necessary to maintain the viability and marketability of all Paragraph III Operations and shall not cause or permit the destruction, removal or impairment of any Paragraph III Operation or any part thereof, except in the ordinary course of business and except for ordinary wear and tear.

IV.

It is further ordered, That:

A. If respondents have not divested, as required by paragraph III, all Paragraph III Operations within six months from the date of the acquisition that gave rise to the paragraph III.A.2 divestiture obligations, respondents shall consent to the appointment of a trustee by the Commission to divest the Paragraph III Operations. In the event the Commission or the Attorney General brings an action pursuant to Section 5(*1*) of the Federal Trade Commission Act, 15 U.S.C. 45(*1*), or any other statute enforced by the Commission or the

Department of Justice for violation of this order, respondents shall similarly consent to the appointment of a trustee in such action to divest the Paragraph III Operation, if any. Neither the appointment of a trustee nor a decision not to appoint a trustee shall preclude the Commission or the Attorney General from seeking civil penalties and any other relief available, including a court-appointed trustee, pursuant to Section 5(*1*) of the Federal Trade Commission Act, 15 U.S.C. 45(*1*), or any other statute enforced by the Commission or the Department of Justice, for any failure by respondents to comply with this order.

B. If a trustee ("trustee") is appointed by the Commission or a court pursuant to this paragraph IV, the following terms and conditions shall apply:

(1) The Commission or a court shall select the trustee, subject to the consent of respondents, which consent 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 exclusive power and authority, subject to the prior approval of the Commission, to divest the Paragraph III Operations. The trustee shall have eighteen (18) months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the eighteen-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended for another eighteen-month period by the Commission, and, in the case of a court-appointed trustee, by the court; *provided, however,* that the Commission or court may only extend the divestiture period for one additional eighteen-month period.

(3) Respondents shall make available to the trustee, and the trustee shall have full and complete access to, the personnel, books, records and facilities relating to the Paragraph III Operations that the trustee has the duty to divest. Respondents shall develop such financial or other information as the trustee may reasonably request, and respondents shall cooperate with the trustee and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondents shall extend the time for divestiture under this paragraph IV in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

(4) Subject to respondents' absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in paragraph III-C of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each acquiring entity for the divestiture of the Paragraph III Operations. If the trustee receives bona fide offers from more than one prospective acquirer, and if the Commission approves more than one such acquirer, the trustee shall divest to the acquirer selected by respondents from among those approved by the Commission.

(5) The trustee shall serve, without bond or other security, at the cost and expense of respondents, 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 respondents, such consultants, accountants, attorneys, investment bankers, business brokers, accountants, appraisers and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture(s) and for all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondents, 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 Paragraph III Operation(s).

(6) Except for cases of misfeasance, negligence, wilful or wanton acts or bad faith by the trustee, the trustee shall not be liable to respondents for any action taken or not taken in the performance of the trusteeship. Respondents shall, consistent with the provisions of this order, indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order.

(7) Within sixty (60) days after appointment of the trustee, and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, respondents shall execute a trust agreement consistent with the provisions of this order that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture(s) required by this order.

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

(9) The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

(10) The trustee shall have no obligation or authority to operate or maintain the Paragraph III Operations.

(11) The trustee shall report in writing to respondents and to the Commission every sixty (60) days after the date of appointment concerning the trustee's efforts to accomplish the divestiture(s).

V.

It is further ordered, That

A. Within ninety (90) days after the date this order becomes final, and every ninety (90) days thereafter until respondents have fully complied with the provisions of paragraph II of this order—and if respondents elect to follow the provisions of paragraph III of this order, within ninety (90) days after the notification required by paragraph III-A(1) of this order, and every ninety (90) days thereafter until respondents have fully complied with the provisions of paragraph III of this order—respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, or have complied with those provisions. Respondents shall include in any report concerning compliance with paragraph III of this order, among other things that are required from time to time, a full description of all contacts or negotiations with prospective acquirers for the divestiture(s) of the Paragraph III Operations, including the identity of all parties contacted. Respondents shall also include in such compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning divestiture(s).

B. One year after the date this order becomes final and annually thereafter for nine (9) years, respondents shall file with the Commission a verified written report of their compliance with paragraph II of this order.

VI.

It is further ordered, That:

A. For a period of ten (10) years after the date this order becomes final, respondents shall notify the Commission at least thirty (30) days prior to any proposed corporate change, such as dissolution, assignment or sale resulting in the emergence of a successor entity, the creation or dissolution of subsidiaries or any other change in respondents or in any entity controlled by Honickman that may affect compliance with the obligations arising out of this order.

B. Respondents shall promptly notify the Commission of the name and address of any successor to Peter E. Greene, Skadden, Arps, Slate, Meagher & Flom, 919 Third Avenue, New York, New York 10022, with a statement that such successor is empowered on respondents' behalf to accept service for purposes of this order.

VII.

It is further ordered, That for a period of ten (10) years after the date this order becomes final and for the purpose of determining or securing compliance with this order, subject to any legally recognized privilege, and upon written request and with reasonable notice to respondents, respondents shall permit any duly authorized representative or representatives of the Commission: (1) 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 their respective possession relating to any matters contained in this order; and (2) upon five (5) days written notice to respondents and without restraint or interference from respondents, to interview management personnel of any Bottling Operation that they control, who may have counsel present, regarding any matters contained in this order.

Commissioner Azcuenaga recused, Commissioner Owen dissenting, and Commissioner Starek recused.*

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and between Harold A. Honickman ("Honickman"), an individual, with a place of residence at 66 Bayview Drive, Loveladies ("BBCA"), New Jersey; Brooklyn Beverage Acquisition Corporation, a corporation, with a principal place of business located at 1500 The Fidelity Building, Philadelphia, Pennsylvania; and the Federal Trade Commis-

*Prior to leaving the Commission, Commissioner Strenio registered his vote in the affirmative for the Commission Decision and Order in this matter. Commissioner Yao did not register a vote in this matter.

sion (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.* (Honickman and BBAC individually, the "respondents"; Honickman BBAC and the Commission collectively, the "Parties").

Premises

Whereas, on or about July 30 and August 3, 1987, respondents acquired interests in certain assets acquired from Seven-Up Brooklyn Bottling Company, Inc. ("Acquisition"), which assets were operated under the name of Seven-Up Brooklyn Bottling Company; and

Whereas, on or about December 13, 1988, respondents divested all their interests in Seven-Up Brooklyn Company to LTF 1987-3, Inc.; and

Whereas, respondents and Seven-Up Brooklyn Bottling Company, Inc., were both engaged and respondents and Seven-Up Brooklyn Bottling Company are still engaged in the bottling of carbonated soft drinks ("CSDs") in certain counties within the New York Metropolitan Area; and

Whereas, the Commission issued a Complaint alleging that the Acquisition was unlawful under Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act; and

Whereas, if the Commission accepts the attached Agreement Containing Consent Order ("Consent Order"), respondents may acquire any bottling operation in any county in the New York Metropolitan Area (the "Newly-Acquired Honickman Bottling Operation") only if they divest the Existing Honickman Bottling Operations in such county; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of assets and businesses during the time period provided by the Consent Agreement for divestiture, divestiture might be a less than effective remedy; and

Whereas, the purpose of this Agreement and the Consent Order is to:

(i) Preserve the Newly-Acquired Honickman Bottling Operation as a viable independent business pending the divestiture of the Existing Honickman Bottling Operation to be divested, and

(ii) Remedy any anticompetitive effects of the Acquisition; and

Whereas, respondents' entering into this Agreement shall in no way be construed as an admission by respondents that the Acquisition is unlawful; and

Whereas, respondents 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, the parties agree, in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, the Commission will not seek further relief from respondents with respect to the Acquisition, except relief pursuant to Section 7A(g)1 of the Clayton Act, 15 U.S.C. 18a(g)1, and 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, as follows:

1. Respondents agree to execute and be bound by the attached Consent Order.

2. If the Commission issues the Consent Order and in the event that respondents acquire a Newly-Acquired Honickman Bottling Operation, until the date the divestiture(s) required by the Consent Order is (are) accomplished, respondents shall hold and operate the assets and businesses associated with Newly-Acquired Honickman Bottling Operations in the New York Metropolitan Area as they are constituted and operated at the time that respondents acquire them, separate and apart on the following terms and conditions:

a. The Newly-Acquired Bottling Operation, as it is constituted at the time of acquisition, shall be held separate and apart from and shall be operated independently of all Existing Honickman Bottling Operations owned or controlled by respondents in the New York Metropolitan Area.

b. Except as provided herein and as is necessary to assure compliance with this Agreement and the Consent Order, respondents shall not exercise direction or control over, or influence directly or indirectly, the Newly-Acquired Honickman Bottling Operation or any of its operations or businesses.

c. Respondents shall maintain the viability and marketability of the Newly-Acquired Honickman Bottling Operation, shall maintain separate financial and operating records for it, and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair its marketability or viability.

d. Respondents shall not permit any director, officer, employee or agent of respondents to be a director, officer, or employee of the Newly-Acquired Honickman Bottling Operation held separate under this Agreement, except as provided in subparagraph h of this paragraph 2.

e. Except as required by law, and except to the extent that necessary information is exchanged in defending investigations or litigation or in negotiating agreements to dispose of assets, respondents shall not receive or have access to any confidential or proprietary information of the Newly-Acquired Honickman Bottling Operation.

f. Respondents shall not change the composition of the management of the Newly-Acquired Honickman Bottling Operation except to the extent necessary to comply with the Agreement.

g. All material transactions, out of the ordinary course of business and not precluded by subparagraphs a - f of this paragraph 2 shall be subject to a majority vote of the New Management Committee (as defined in subparagraph h of this paragraph 2).

h. Respondents shall establish an entity to conduct the Newly-Acquired Honickman Bottling Operation in accordance with this Agreement. Respondents shall also select a new three-person Management Committee ("Management Committee") to govern such entity; *provided, however,* that such Management Committee shall consist of no more than one Honickman or BBAC director, officer, employee, or agent of any Existing Honickman Bottling Operation. Except as permitted by this Agreement, the member of the Management Committee who is also a director, officer, employee or agent of an Existing Honickman Bottling Operation, shall not receive material confidential information as to profitability and sales and shall not disclose any such information received under this Agreement to respondents or use it to obtain any advantage for respondents. Said member of the Management Committee who is also a director, officer, employee or agent of an Existing Honickman Bottling Operation, shall enter into a confidentiality agreement prohibiting disclosure of confidential information. Such Management Committee member shall participate in matters which come before the Management Committee only for the limited purpose of considering a capital investment or other transactions exceeding $200,000 and carrying out respondents responsibility to assure that the Newly-Acquired Honickman Bottling Operations are maintained in such manner as will permit their divestiture as ongoing, viable assets. Except as permitted by this Agreement, such Management Committee member shall not participate in any matter, or attempt to influence the votes of the other Management Committee members with respect to matters that would involve a conflict of interest if respondents and the Newly-Acquired Honickman Bottling Operation were separate and independent entities. Meetings of the Management Committee during the term of this Agreement shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Agreement.

(i) All earnings and profits of the Newly-Acquired Honickman Bottling Operation shall be retained separately in that Operation. If necessary, respondents shall provide the Newly-Acquired Honickman Bottling Operation with sufficient working capital to operate at the current rate of operation.

3. 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 respondents made to their counsel, respondents shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of any entity owned or controlled by respondents 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 respondents relating to compliance with this Agreement;

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

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

ADDENDUM TO AGREEMENT CONTAINING CONSENT ORDER TO PRESERVE SEVEN-UP BROOKLYN FRANCHISES

This Addendum to Agreement Containing Consent Order to Preserve Seven-Up Brooklyn Franchises ("Addendum") is by and between Harold A. Honickman ("Honickman"), an individual, with a place of residence at 66 Bayview Drive, Loveladies, New Jersey; Brooklyn Beverage Acquisition Corporation ("BBAC"), a corporation, with a principal place of business located at 1500 The Fidelity

Building, Philadelphia, Pennsylvania; 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.* (Honickman and BBAC individually, the "respondents"; Honickman, BBAC and the Commission collectively, the "Parties").

Premises

Whereas, on or about July 30 and August 3, 1987, respondents acquired interests in certain assets acquired from Seven-Up Brooklyn Bottling Company, Inc. ("Acquisition"), which assets were operated under the name of Seven-Up Brooklyn Bottling Company; and

Whereas, on or about December 13, 1988, respondents divested all of their interests in the operating assets of Seven-Up Brooklyn Bottling Company ("Seven-Up Brooklyn") to LTF 1987-3, Inc.; and

Whereas, respondents and Seven-Up Brooklyn were both engaged, and respondents are still engaged, in the bottling or distribution of carbonated soft drinks ("CSDs"), noncarbonated soft drinks, still waters and carbonated waters in certain counties within the New York Metropolitan Area; and

Whereas, Seven-Up Brooklyn is now in a bankruptcy proceeding that has made it incapable of manufacturing or distributing CSDs, noncarbonated soft drinks, still waters and carbonated waters; and

Whereas, the Commission issued a Complaint alleging that the Acquisition was unlawful under Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; and

Whereas, the Commission is concerned that if temporary provision is not made to continue the manufacture and distribution of the CSDs, previously manufactured and distributed by Seven-Up Brooklyn in the franchise territories it served, such product temporarily would be unavailable to consumers in such territories; and

Whereas, the purpose of this Addendum is to:

(i) Maintain the uninterrupted competitive presence of the brands of CSDs previously manufactured or distributed by Seven-Up Brooklyn in the franchise territories previously serviced by it;

(ii) Preserve the CSD businesses of Seven-Up Brooklyn as independent and viable businesses; and

(iii) Prevent anticompetitive effects that might result from any interim arrangement; and

Whereas, respondents' entering into this Addendum shall in no way be construed as an admission by respondents that the Acquisition is unlawful; and

Whereas, respondents understand and agree that no act or transaction contemplated by this Addendum 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 Addendum.

Now, therefore, the parties agree, in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, the Commission will not seek further relief from Respondents with respect to the Acquisition, except relief pursuant to Section 7A(g)1 of the Clayton Act, 15 U.S.C. 18a(g)1, and except that the Commission may exercise any and all rights to enforce this Addendum and the Consent Order to which it is annexed and made a part thereof, as follows:

1. Respondents agree to execute and be bound by the Agreement Containing Consent Order, signed by respondents on January 9, 1991.

2. Respondents waive all rights to contest the validity of this agreement.

3. Respondents may enter into an interim manufacturing and distribution arrangement covering the CSDs previously manufactured and distributed by Seven-Up Brooklyn on the following terms and conditions:

a. The franchisors shall approve respondents' interim manufacturing and distribution arrangements and may rescind the arrangements, at any time for competitive or other reasons;

b. The manufacturing and distribution arrangement shall continue for a period not to exceed 90 days, unless extended by the Commission;

c. For all brands distributed on an interim basis, respondents shall use all reasonable efforts to maintain the viability, marketability, market share, and separate identity of all Seven-Up Brooklyn businesses and franchises and the distinct brand identification of Seven-Up Brooklyn brands and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability, or separate identity of the Seven-Up Brooklyn businesses and franchises.

d. For all brands distributed on an interim basis, respondents shall use all reasonable efforts to maintain and preserve the shelf space of all Seven-Up Brooklyn businesses and franchises and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the shelf space of the Seven-Up Brooklyn businesses and franchises. Respondents shall raise no objections to, impose no conditions on returning or refuse to return the shelf space to any new owners of the Seven-Up Brooklyn businesses and franchises, provided that respondents did not pay a fee for the shelf space or used the shelf space for respondents' existing brands and businesses before the date that this Addendum was signed.

4. Upon ten days notice, the Federal Trade Commission may rescind this Addendum, and respondents shall not raise any objections based on the fact that the Commission has approved the manufacturing and distribution arrangement.

5. For the purpose of determining or securing compliance with this Addendum, subject to any legally recognized privilege, and upon written request with reasonable notice to respondents made to their counsel, respondents shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of any entity owned or controlled by respondents 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 respondents relating to compliance with this Addendum;

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

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

DISSENTING STATEMENT OF COMMISSIONER DEBORAH K. OWEN

Unlike the overwhelming majority of our consent orders in cases of this nature, this consent order does not require Harold Honickman to obtain prior Commission approval before acquiring soft drink bottling companies that compete with him in the product and geographic markets at issue in this case. When the Commission considered whether to accept this order for public comment, I felt compelled to dissent because I believed that the need for a prior approval provision in this order was substantial. Nothing has been brought to my attention during the public comment period to alter this conviction, and I still believe that the order settling this case should require Mr. Honickman to obtain prior Commission approval before making any acquisition of a competing bottler in the markets in question. I therefore dissent from the final acceptance of the consent order.

IN THE MATTER OF

FIRESTONE TIRE & RUBBER CO., ET AL.

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

Docket 6487. Final Order, Mar. 9, 1961—Set Aside Order, Aug. 2, 1991

The Federal Trade Commission has set aside a 1961 order with the Firestone Tire & Rubber Co. and Shell Oil Co., (58 FTC 371), thus terminating provisions, as to Shell Oil, that prohibited the use of certain sales commission agreements and related practices with Firestone and other suppliers of tires, batteries, and accessories. The Commission concluded that significant changes of law since the entry of the final order warranted reopening and setting aside the entire order as it applies to Shell.

ORDER REOPENING AND SETTING ASIDE FINAL ORDER ISSUED ON MARCH 9, 1961

On April 4, 1991, the Shell Oil Company ("Shell") filed a request to reopen and set aside ("request") the Final Order that was entered in Docket No. 6487 on March 9, 1961 ("order"). 58 FTC 371 (1961). The request was filed pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) and Section 2.51 of the Federal Trade Commission Procedures and Rules of Practice, 16 CFR 2.51 (1991). The request was on the public record for thirty days. No comments were received.

The order Shell seeks to have set aside was based on a finding by the Commission that agreements between Shell and the Firestone Tire and Rubber Company ("Firestone") and between Shell and the Goodyear Tire and Rubber Company ("Goodyear") constituted unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. Under the agreements, Shell received commissions on the sale of Firestone and Goodyear "TBA products"[1] to designated Shell franchisees.

The order prohibits Shell from continuing the sales commission agreements and related business practices with Firestone or other Shell suppliers. The order also prohibits Firestone from maintaining such agreements with Shell or any other marketing oil company. Goodyear was prohibited from engaging in such practices in a similar

[1] TBA products are tires, batteries, and other automotive accessories.

order that was entered in a companion case, Docket No. 6486, brought against Goodyear and the Atlantic Refining Company ("Atlantic").[2]

Docket No. 6487 was fully litigated. The Commission's order was modified in part by the Court of Appeals in 1966. *Shell Oil Company v. FTC,* 360 F.2d 470 (5th Cir. 1966), *cert. denied,* 385 U.S. 1002 (1967).

Shell asserts that, since the adjudication of the Commission's order, there have been changes of law and of fact that warrant reopening the order and setting it aside.

Previously, the Commission reopened and set aside the order in the companion case, both as to Atlantic, 111 FTC 662 (1989), and as to Goodyear, 113 FTC 763 (August 21, 1990), on the grounds that there have been relevant changes of law and there is no longer any need for that order.

Shell argues that its order ought to be set aside as well. It does not advance any arguments that were not urged on behalf of Atlantic and Goodyear; rather, its arguments include the grounds articulated by the Commission in setting aside the order in Docket No. 6486 as to Atlantic and Goodyear.

The Commission has considered Shell's request and has concluded that Shell has made a satisfactory showing of changed conditions of law that warrants setting aside the entire order in Docket No. 6487 as it applies to Shell. Significant changes of law since the entry of the order in this matter warrant reopening and setting aside the order.

Background

The Commission issued its complaint on January 11, 1956, alleging that the sales commission agreement concerning tires, batteries and other automotive accessories ("TBA") between Shell and Firestone constituted an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. The sales commission agreement provided that, in return for Shell's efforts to promote Firestone's TBA, Firestone would pay Shell a commission of ten percent on gross sales made by Firestone to Shell franchisees. The initial decision of the

[2] *Atlantic Refining Co.,* Docket 6486, 58 FTC 309 (1961), *aff'd,* 331 F.2d 394 (7th Cir. 1964), *aff'd,* 381 U.S. 357, *reh'g denied,* 382 U.S. 873 (1965), *order set aside,* 111 FTC 662 (1989) (as to Atlantic) and 113 FTC 763 (August 21, 1990) (as to Goodyear); An additional case involved sales commission agreements between petroleum product and TBA product companies, *B.F. Goodrich Co.,* 62 FTC 1172 (1963), *rev'd,* 336 F.2d 754 (D.C. Cir. 1964), *vacated & remanded,* 381 U.S. 739 (1965), *opinion on remand,* 60 FTC 22 (1966), *rev'd,* 383 F.2d 942 (D.C. Cir. 1967), *rev'd & remanded,* 393 U.S. 223 (1968), *order modified,* 75 FTC 410 (1969).

hearing examiner was issued on October 23, 1959. The Commission's opinion, issued on March 9, 1961, found "Shell has sufficient economic power over its wholesale and retail distributors to cause them to purchase substantial amounts of sponsored TBA even without the use of overt coercive tactics" and concluded "the use of the sales commission plan in favor of Firestone constitutes an unfair method of competition." 58 FTC 371, 385. The Commission supported its conclusion by finding that the agreements unlawfully restricted competition in TBA products at the manufacturing, wholesale and retail levels and denied consumers the benefits of competition. 58 FTC at 385, 414-15.

The Commission ordered Shell to cease:

1. All agreements under which Shell would receive anything of value from vendors of TBA for sales to Shell franchisees;
2. Accepting anything of value for promoting the sale of any vendor's TBA products;
3. Using contracts or other means to encourage its franchisees to acquire any vendor's TBA products (other than Shell TBA products);
4. Monitoring the sale of any vendor's TBA products other than its own;
5. Coercing Shell franchisees to acquire TBA products;
6. Preventing Shell franchisees from acquiring the TBA products of their choice.

The Court of Appeals upheld the Commission's finding that the sales commission agreement constituted an unfair method of competition.[3] The court found that Shell had economic power over its dealers, which it derived from its control of the dealers' supplies of petroleum products, short-term leases and equipment loan contracts, financing arrangements and housekeeping requirements for dealers. *See* 360 F.2d at 479-481. The court of appeals affirmed the Commission's conclusions that Shell used its economic leverage over its dealers in carrying out the sales commission plan, causing adverse competitive effects in the TBA market in violation of Section 5. 360 F.2d at 486-87; *see also Atlantic Refining Co.*, 381 U.S. at 368 (Atlantic "exerted the persuasion that is a natural incident of its economic power.")[4] Although the court spoke of Shell's "dominant economic power over its dealers," 360 F. 2d at 479, it did not make any findings concerning

[3] *Shell Oil Co. v. FTC*, 360 F. 2d 470 (5th Cir. 1966), *cert. den.*, 385 U.S. 1002 (1967).

[4] *See also Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) (fear of nonrenewal of short-term leases used to enforce resale prices).

the firm's market power in an interbrand market. But, the court of appeals also determined that Shell had not coerced its franchisees and, therefore, declined to enforce paragraphs 5 and 6, described above, that ordered Shell to cease coercing its dealers. 360 F.2d at 486.

The court of appeals viewed the commission sales agreements as similar to tying arrangements. 360 F. 2d at 477. But the court recognized that the agreements were not tying arrangements and declined to apply a *per se* rule. 360 F. 2d at 477, 487. *See also Atlantic Refining Co.*, 381 U.S. at 369 ("We recognize that the . . . contract is not a tying arrangement."). Instead, the anticompetitive effects of the commission sales agreements in the TBA market, especially the "destructive effects" on competitors of Firestone and Goodyear, were examined. 360 F.2d at 484. At the same time, however, consistent with the opinion of the Supreme Court in *Atlantic Refining Co.*, the court said that "extensive [full scale] economic analysis of the competitive effect" was unnecessary. 360 F. 2d at 483 (alteration in original), *quoting* 381 U.S. at 371. Instead, it was sufficient to find that a not insubstantial portion of the TBA market was foreclosed. *Id.*; 381 U.S. at 371. The Supreme Court also said that the Commission need not consider "evidence of economic justification" for the sales commission agreements: "While these contracts may provide [Shell] with an economical method of assuring efficient product distribution among its dealers they also amount to a device that permits [TBA] suppliers . . . through the use of oil company power, to effectively sew up large markets." 381 U.S. at 371. Thus, while the court did not apply a *per se* standard, the standard it applied was similar to a *per se* standard, in that it did not include a detailed explanation of the competitive effects of the agreements. Any deviation from a *per se* standard rested on the court's insistence on evidence of Shell's possession of some "dominant power" over its dealers, its exercise of that power, and the effect of that power over a not insubstantial amount of commerce. *See* 360 F. 2d at 487 (summarizing evidence).

Standard for Reopening a Final Order of the Commission

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be altered, modified, or set aside if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require.[5] A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986) at 4. *See*, S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *see Phillips Petroleum Co.*, Docket No. C-1088, 78 FTC 1573, 1575 (1971) (modification not required for changes reasonably foreseeable at time of consent negotiations); *Pay Less Drugstores Northwest, Inc.*, Docket No C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers order sought to remedy) (unpublished); *see also United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("clear showing" of changes that eliminate reasons for order or such that order causes unanticipated hardship).

The language of Section 5(b) plainly anticipates that the burden is on the requester to make "a satisfactory showing" of changed conditions to obtain reopening of the order. *See also Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982) (requester must show "exceptional circumstances, new, changed or unforeseen at the time the decree was entered"). The legislative history also makes clear that the requester has the burden of showing, by means other than conclusory statements, why an order should be modified.[6] If the Commission determines that the requester has made the necessary showing, the Commission must reopen the order to determine whether

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

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

The 1980 amendment to Section 5(b) did not change the standard for order reopening and modification, but "codifie[d] existing Commission procedures by requiring the Commission to reopen an order if the specified showing is made," S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979), and added the requirement that the Commission act on petitions to reopen within 120 days of filing.

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

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

modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the requester fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. The requester's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie,* 425 U.S. 394 (1981) (strong public interest considerations support repose and finality); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 296 (1974) ("sound basis for . . . [not reopening] except in the most extraordinary circumstances"); *RSR Corp. v. FTC,* 656 F.2d 718; 721-22 (D.C. Cir. 1981) (applying *Bowman Transportation* standard to FTC order).

Shell has requested that the Commission reopen and set aside the order because changed conditions of fact and of law require such action. For the reasons described below, changes of law warrant reopening and setting aside the order against Shell. Having reopened and set aside the order on the basis of changes of law, the Commission does not reach the issue of whether the changes of fact warrant reopening.

Changed Conditions of Law Warrant Reopening the Order

A change in law that is sufficient to require reopening is one that has the effect of bringing the terms of the order in conflict with existing law. *See Louisiana-Pacific Corp.,* Docket C-2956, slip op. at 20 (Nov. 15, 1989); *Lenox, Inc.,* Docket 8718, 111 FTC 612, 614 (1989). Shell claims that, since the order was entered, the law applicable to tying arrangements and nonprice vertical restraints has changed significantly, requiring consideration of issues that were not considered when the order was entered. Shell asserts that the decisions in *United States v. Fortner Enterprises, Inc.,* 429 U.S. 610 (1977) and *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2, 17-18 (1984), require a showing that "the Commission in 1961 did not require, that Shell had market power in the tying product—retail gasoline sales." Request at 11. Shell also asserts that the Commission did not in 1961 consider the possible justifications for the sales commission agreements, as required by the decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977). Request at 10-15.

The Commission has concluded that the order in this matter should be reopened for two reasons. First, because the earlier analysis that formed the basis for the Commission's 1961 order did not rest on a determination regarding the market power of the respondents—a determination that would be an integral part of such an analysis under *Fortner* and *Hyde*—the Commission has concluded that the legal standard for liability has changed. Second, the Commission did not consider "evidence of economic justification" for the sales commission agreements. This was consistent with the opinion of the Supreme Court in *Atlantic Refining Co.*, 381 U.S. 357, 371 (1965), even though, the Court said, the agreements "may provide. . .an economical method of assuring efficient product distribution." *Id.* at 369. To the extent that this case involved nonprice vertical restraints by a supplier, inquiry into economic justifications has been required since the decision of the Supreme Court in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). These conclusions are consistent with the Commission's actions vacating the orders in *Atlantic* and *B.F. Goodrich.*

The Order Should Be Set Aside

The question remains whether modification of the order is appropriate. An order is not automatically set aside on the ground that the law has changed, unless the petitioner also shows that there is no need for the order or continued application of the order is inequitable or harmful to competition. *See Lenox, Inc.*, Docket 8718, 111 FTC 612, 614 (1989); *Bulova Watch Co., Inc.*, 102 FTC 1834 (1983). *See also Louisiana Pacific Corp.*, Docket C-2956, slip. op. at 6-7 (Nov. 27, 1989).

Shell has satisfied the standard to have the order set aside. As in the companion case involving Atlantic and Goodyear, the Commission never had evidence that Shell, the oil marketing company, possessed "economic power" as that term has been understood since *Fortner*, supra.[7] Furthermore, since 1961, the influence of gas station franchisors over franchisees has been limited by enactment of the Petroleum Marketing Practices Act, 15 U.S.C. 2801 *et seq.*, in 1978.

Shell has also shown that there is no need for the order by citing evidence that gas stations as a group currently have too small a market share to produce substantial competitive effects on TBA distribution. Gas stations nationwide sold only 3 percent of replace-

[7] The Commission's 1961 opinion in Docket 6487 suggests that Shell's share of national gasoline sales was on the order of 5 percent. 58 FTC at 407.

ment batteries and 8 percent of replacement tires in 1987, compared, respectively, to 44 percent and 37 percent of such replacement sales in 1961. 58 FTC at 325-26; Request at 18. Specialty stores and mass merchandisers have become more important suppliers of these products. Request at 18-19. As a result, distribution arrangements like those at issue in this case would not likely have the same adverse foreclosure and entry deterring effects on competition in the TBA market that the Commission found in 1961.

Accordingly, *it is ordered*, that this matter be reopened and that the Commission's order in Docket No. 6487 issued on March 9, 1961, be set aside as to Shell Oil Co. as of the date of this order.

Commissioner Yao not participating.

IN THE MATTER OF

ADVENTIST HEALTH SYSTEM/WEST, ET AL.

Docket 9234. Interlocutory Order, August 2, 1991

ORDER

This matter has been heard by the Commission upon the appeal from the initial decision of counsel supporting the complaint, and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying opinion, the Commission has determined to reverse the initial decision and remand the matter for further proceedings. Therefore,

It is ordered, That the initial decision of the Administrative Law Judge is reversed and the matter remanded for further proceedings in accordance with this order and accompanying opinion.

By the Commission.*

OPINION OF THE COMMISSION[1]

By Strenio, *Commissioner*:

The issue presented here in whether the Administrative Law Judge ("ALJ") erred when he granted Adventist Health System/West's ("AHS/West") and Ukiah Adventist Hospital's ("Ukiah Adventist") motion to dismiss and motion for summary decision on the ground that respondents' acquisition of substantially all the assets of Ukiah General Hospital ("UGH") did not satisfy the jurisdictional requirements of the Clayton Act. We find that the ALJ erred when he granted the motion to dismiss. His order is reversed and the matter remanded for further proceedings consistent with this opinion.

I. PROCEDURAL HISTORY

On November 7, 1989, the Federal Trade Commission ("Commis-

*Prior to leaving the Commission, Commissioner Strenio registered a vote in the affirmative for the Order and Opinion of the Commission in this matter. Commissioner Yao did not register a vote in this matter.

[1] The following abbreviations are used in this opinion:

STIP.	-	Stipulations (June 19, 1990) (in camera).
CCAB	-	Appeal Brief of Counsel Supporting the Complaint (Sept. 10, 1990).
RAB	-	Brief of Appellees Adventist Health System/West and Ukiah Adventist Hospital (Oct. 11, 1990).
CCRB	-	Reply Brief of Counsel Supporting the Complaint (Oct. 23, 1990).
TOA	-	Official Transcript of the Oral Argument before the Federal Trade Commission (Dec. 18, 1990).

sion" or "FTC") issued a complaint alleging that respondents Ukiah Adventist and AHS/West, two nonprofit religious corporations, violated Section 7 of the Clayton Act, 15 U.S.C. 18, when they acquired substantially all the assets of UGH.[2] Complaint, ¶¶ 2, 4, 10, 20. The complaint sets forth two separate and distinct bases for the Commission's subject matter jurisdiction. The first is that Section 11 of the Clayton Act, 15 U.S.C. 21, provides the FTC with jurisdiction to enforce Section 7 of the Clayton Act over assets acquisitions by not-for-profit corporations. *See* Complaint, ¶¶ 2, 4, 20. The second is **[2]** that this assets acquisition was "tantamount in its effects to a merger" and therefore subject to the stock or share capital provision of Section 7 of the Clayton Act. Complaint, ¶ 20.[3]

Respondents' answer to the complaint denies most of the allegations and raises three affirmative defenses. Only one of those defenses, that the FTC lacks Section 7 jurisdiction over this acquisition, is relevant to this appeal.[4]

Respondents filed a motion to dismiss the complaint on January 19, 1990. The motion sought dismissal on the grounds that the FTC lacks jurisdiction under either Section 7 or Section 11 of the Clayton Act and that respondents' activities in or affecting interstate commerce are insubstantial. Respondents further requested that the ALJ stay further proceedings pending a final decision on the jurisdictional issue.[5]

Complaint counsel opposed the motion to dismiss, arguing that: (1) the FTC has authority under Section 11(a) of the Clayton Act to enforce Section 7 of the Clayton Act against nonprofit hospitals; (2) respondents' acquisition is subject to antitrust scrutiny under Section 7 if it is found to be "tantamount in its effects to a merger"; (3) respondents have failed to show that, as a matter of law, the interstate commerce tests of Section 7 of the Clayton Act cannot be

[2] The complaint alleges that the acquisition was made by both Ukiah Adventist and AHS/West, through its control of, and affiliation with, Ukiah Adventist. Complaint, ¶ 12. Respondents disagree and assert that the acquisition was made solely by Ukiah Adventist and that AHS/West "served only as the guarantor for the acquisition." *See* STIP. at 1 n.1. Because both Ukiah Adventist and AHS/West are not-for-profit corporations, this issue has no bearing on the pending appeal.

[3] Of course, the complaint also alleges that "respondents have been and are now engaging in or affecting commerce within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. 12." Complaint, ¶ 6.

[4] The two other affirmative defenses asserted by respondents are: (1) that the Commission lacks jurisdiction because of Ukiah Adventist's insubstantial effect on interstate commerce; and (2) that the combination of two inefficient hospitals' operations is in the best interest of health care consumers. Answer at 8-13 (Dec. 26, 1989). In light of the procedural posture of this case, neither of these two affirmative defenses is before us for review. Thus, we intimate no decision as to their merits and await further proceedings before deciding whether these defenses are meritorious.

[5] *See* Respondents' Motion to Dismiss (Jan. 19, 1990).

satisfied in this matter; and (4) respondents' request for a stay should be denied.[6]

On February 8, 1990, Chief Administrative Law Judge Lewis F. Parker issued his Order Ruling on Respondents' Motion to Dismiss. **[3]** In that Order, the ALJ granted respondents' motion to dismiss on the issue of Section 7's reach over a "pure" assets acquisition. He deferred rulings on the interstate commerce question and the issue of whether the challenged transaction is "tantamount in its effects to a merger" until the factual record on those issues could be completed. He also declined to stay the proceedings pending a final determination on the jurisdictional issue. Order Ruling on Respondents' Motion to Dismiss (Feb. 8, 1990).

Respondents then requested that the ALJ certify to the Commission the "tantamount in its effects to a merger" issue, the interstate commerce issue, and the question of whether the proceedings should be stayed pending a determination of these issues.[7] Complaint counsel opposed respondents' application[8] and filed its own request with the ALJ to file an application for review by the Commission of the portion of the ALJ's February 8, 1990 Order holding that the Commission lacks jurisdiction over the challenged transaction under the assets acquisition clause of Section 7 of the Clayton Act.[9] On March 6, 1990, the ALJ issued his Order Denying Complaint Counsel's and Respondents' Requests for Permission to File Applications for Review.[10]

After the Court of Appeals for the Seventh Circuit issued its decision in *United States v. Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir.), *cert. denied*, 111 S. Ct. 295 (1990), both **[4]** complaint counsel and respondents filed motions for reconsideration with the ALJ.[11] The ALJ denied both motions.[12]

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[6] Complaint Counsel's Memorandum of Points and Authorities in Opposition to Respondents' Motion to Dismiss (Jan. 29, 1990).

[7] Application for Review of Ruling on Respondents' Motion to Dismiss (Feb. 13, 1990).

[8] Complaint Counsel's Opposition to Respondents' Application for Review (Feb. 26, 1990).

[9] Complaint Counsel's Request to File Application for Review of Order on Respondents' Motion to Dismiss (Feb. 23, 1990). Respondents replied to complaint counsel's February 23, 1990 request. *See* Respondents' Answer in Opposition to Complaint Counsel's Request to File Application for Review (March 6, 1990).

[10] On March 15, 1990, after the ALJ denied respondents' Application for Review of Ruling on Respondents' Motion to Dismiss, respondents filed Respondents' Request for a Writ of Mandamus to Compel Certification of a Controlling Question of Law or for Dismissal Due to the Lack of FTC Jurisdiction. Complaint counsel opposed that request. Complaint Counsel's Reply to Respondents' Request for Writ of Mandamus (March 22, 1990). The Commission never ruled on respondents' request.

[11] *See* Motion for Reconsideration (April 13, 1990) (complaint counsel's motion); Respondents' Motion for Reconsideration (April 25, 1990).

[12] *See* Order Denying Complaint Counsel's Motion for Reconsideration of Part III of Order Ruling on Respondents' Motion to Dismiss (April 26, 1990); Order Denying Respondents' Motion for Reconsideration (May 8, 1990).

After the parties agreed to be bound to a stipulated record on the issue of whether the transaction was "tantamount in its effects to a merger," the parties filed cross-motions for summary decision.[13] On August 2, 1990, the ALJ issued his initial decision, in which he held that this assets acquisition was not tantamount in its effects to a merger and the Commission therefore cannot challenge it under Section 7 of the Clayton Act. The ALJ dismissed the complaint.

Counsel supporting the complaint appealed the ALJ's initial decision to the Commission.

II. ISSUES

The issues before the Commission are twofold. First, whether Section 7 of the Clayton Act reaches assets acquisitions by not-for-profit corporations by operation of Section 11 of the Clayton Act. Second, whether the purchase of assets that occurred in this transaction was "tantamount in its effects to a merger" and therefore subject to the stock or share capital provision of Section 7 of the Clayton Act. If the resolution of either of these two issues is in the affirmative, then the decision of the ALJ must be reversed and the matter remanded for further proceedings.

We will treat respondents' motion for summary decision as a renewed motion to dismiss and treat the ALJ's grant of respondents' motion in the initial decision as a grant of a motion to dismiss. As such, the standard of review for both issues before the Commission is identical. **[5]**

III. SECTION 7'S REACH OVER ASSETS ACQUISITIONS BY NOT-FOR-PROFIT CORPORATIONS

We begin with the premise that "[i]mmunity from the antitrust laws is not lightly implied." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348 (1963) (quoting *California v. Federal Power Commission*, 369 U.S. 482, 485 (1962)). Our examination of the arguments and the relevant authorities has led us to the conclusion that Section 7 of the Clayton Act reaches anticompetitive assets acquisitions by not-for-profit corporations, even if those corporations are not subject to the FTC's jurisdiction under the FTC Act. In other words, we find the Clayton Act to be a separate and distinct basis for the Commission's jurisdiction in nonprofit transactions such as this one.

[13] *See* Complaint Counsel's Motion for Partial Summary Decision (July 8, 1990); Respondents' Motion for Summary Decision (July 20, 1990). Apparently, complaint counsel's motion was "partial" because if it prevailed, other jurisdictional and substantive issues still would need to be resolved. On the other hand, if respondents prevailed, the complaint would be dismissed for lack of subject matter jurisdiction.

The complaint in this case alleges that respondents are "persons" within the meaning of the Clayton Act and thereby subject to jurisdiction of those with enforcement authority under that Act. Section 1(a) of the Clayton Act defines "persons" to "include corporations and associations existing under or authorized by the laws of . . . any State." 15 U.S.C. 12(a). Thus, the Clayton Act contains a broad definition of "persons" who are subject thereto and that definition makes no exception for nonprofit corporations.

While broadly defining the "persons" subject to the Clayton Act, Congress created certain exemptions from the Act's coverage in Section 6 of the Clayton Act, 15 U.S.C. 17. Where Congress specifically exempts, inference of other exemptions is difficult to assert and sustain.

Congress clarified further the application of certain provisions of the Clayton Act as to nonprofit institutions when, in 1938, it enacted the Non-Profit Institutions Act, which amended the Robinson-Patman provisions of the Clayton Act, to exempt expressly certain nonprofit institutions from Robinson-Patman coverage. The amendment provides that nothing in the Robinson-Patman Act "shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit." 15 U.S.C. 13c. This amendment demonstrates that Congress has utilized its power to exclude not-for-profit entities, including hospitals, from the requirements of certain provisions of the Clayton Act through clear language, and accordingly not by implication.

Both parties claim support for their respective positions from the text of the statutes, the legislative histories and case law. These subjects are discussed below. **[6]**

A. *The Text of the Relevant Statutes*

The Commission's complaint refers to Section 11 of the Clayton Act as the basis for its jurisdiction. *See* Complaint ¶¶ 2, 4.[14] Section 11(a) provides as follows:

> Authority to enforce compliance with Sections 2, 3, 7, and 8 of [the Clayton] Act by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to subtitle IV of title 49; in the Federal Communications Commission where applicable to common carriers

[14] The preamble to the complaint also states that the Commission "hereby issues its complaint, pursuant to the provisions of Section 11 of the Clayton Act, as amended, 15 U.S.C. 21 . . . ."

engaged in wire or radio communication or radio transmission of energy; in the Secretary of Transportation where applicable to air carriers and foreign air carriers subject to the Federal Aviation Act of 1958; in the Board of Governors of the Federal Reserve System where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce . . . .

15 U.S.C. 21(a). In this case, the complaint alleges that the acquisition in question violates Section 7 of the Clayton Act and jurisdiction to challenge the acquisition is based on Section 11. Section 7 provides in relevant part as follows:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person also engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. 18. **[7]**

Section 7 of the Clayton Act contains two distinct clauses by which acquisitions are measured. The first is known as the "stock acquisition clause" and the second is known as the "assets acquisition clause." While both clauses are germane to this appeal, only the assets acquisition clause is relevant to the not-for-profit corporation issue.[15] This is because the stock acquisition clause applies to all "persons" within the meaning of the Clayton Act and the assets acquisition clause applies only to "persons" who are "subject to the jurisdiction of the Federal Trade Commission."

The issue in this appeal is the meaning of the phrase "subject to the jurisdiction of the Federal Trade Commission." Complaint counsel argues that this "phrase refers to the Commission's jurisdiction under Section 11" of the Clayton Act. *See, e.g.,* CCAB at 18. Respondents argue that this phrase refers to the Commission's jurisdiction under the FTC Act, and that the Commission therefore lacks jurisdiction because of the limited definition of "corporation" in Section 4 of the FTC Act. *See, e.g.,* RAB at 13-14.

Respondents argue vigorously that complaint counsel's reading of the statutory provisions is incorrect and characterize complaint

[15] The stock acquisition clause is relevant to the "tantamount in its effects to a merger" issue which is discussed *infra* at page 34.

counsel's argument as follows: Complaint counsel relies upon Section 11 of the Clayton Act as the jurisdictional basis for this case. For alleged anticompetitive acquisitions such as this one, Section 11 refers to persons subject to Section 7 of the Clayton Act. Section 7's assets acquisition clause (the clause relied upon by complaint counsel for this part of its case) refers to persons "subject to the jurisdiction of the Federal Trade Commission." Complaint counsel then—erroneously in respondents' view—looks back to Section 11 of the Clayton Act to see if respondents are persons subject to the jurisdiction of the FTC.

Respondents have no quarrel with complaint counsel's use of Section 11 as the starting point, or the subsequent move to Section 7. They argue that from Section 7, we should proceed to Section 4 of the FTC Act instead of returning to Section 11 of the Clayton Act. To do otherwise, they assert, is to engage in circular reasoning.

However, this argument by respondents fails to recognize that complaint counsel's statutory analysis is not necessarily circular because it goes from one paragraph of Section 11, then to Section 7, and then back to that same Section 11 paragraph. Instead, complaint counsel's statutory analysis begins with the **[8]** initial portion of Section 11(a) of the Clayton Act,[16] then moves to the assets acquisition provision of Section 7,[17] and finally ends with the concluding portion of Section 11(a).[18] Referring to two provisions within the same paragraph at different points in the analysis does not constitute a fatal "circularity" problem as suggested by respondents.

If respondents' arguments were taken to their logical conclusion, the result would be that neither the FTC, the Department of Justice, the state attorneys general nor private parties would have authority to file suit under the Clayton Act to enjoin or otherwise redress plainly anticompetitive assets acquisitions by not-for-profit corporations.[19]

[16] "Authority to enforce compliance with Sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in . . . ." 15 U.S.C. 21(a).

[17] "[N]o person subject to the jurisdiction of the Federal Trade Commission shall acquire, directly or indirectly, the whole or any part of the assets of another person engaged in commerce. . . ." 15 U.S.C. 18.

[18] Jurisdiction to enforce, *inter alia*, Section 7 is conferred upon four specific regulatory agencies where applicable and "in the Federal Trade Commission where applicable to all other character of commerce . . . ." 15 U.S.C. 21(a). The four other specific regulatory agencies provided specific grants of jurisdiction in Section 11(a) of the Clayton Act are the: (1) Interstate Commerce Commission; (2) Federal Communications Commission; (3) Department of Transportation; and (4) Federal Reserve Board. *Id.*

[19] Indeed, as respondents' counsel asserted during the oral argument before the Commission, it is respondents' position that no one has jurisdiction under either the stock acquisition clause or the assets acquisition clause of Section 7 of the Clayton Act to pursue anticompetitive acquisitions made by not-for-profit corporations. *See* TOA at 28-32 (colloquy between Commissioner Owen and counsel for respondents as well as colloquy between Chairman Steiger and counsel for respondents); *Id.* at 47-48 (colloquy between Commissioner Strenio and counsel for respondents).

(footnote cont'd)

Respondents' reasoning is that the Section 7 assets acquisition clause may be **[9]** applied only to a "person subject to the jurisdiction of the Federal Trade Commission." If respondents are correct that this phrase refers to the FTC Act, and since Section 4 of the FTC Act expressly excludes most nonprofit corporations from its coverage, no one could challenge an anticompetitive assets acquisition under Section 7 of the Clayton Act if consummated by a corporation that is not "organized to carry on business for its own profit or that of its members."

Another statutory provision supplies additional guidance on how to interpret properly the phrase "subject to the jurisdiction of the Federal Trade Commission" from Section 7 of the Clayton Act. Section 11 of the FTC Act provides as follows:

> Nothing contained in [the Federal Trade Commission] Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts or the Acts to regulate commerce, nor shall anything contained in the [Federal Trade Commission] Act be construed to alter, modify, or repeal the said antitrust Acts or the Acts to regulate commerce or any part or parts thereof.

15 U.S.C. 51. Section 4 of the FTC Act defines "Antitrust Acts" to include the Clayton Act. 15 U.S.C. 44. The express language of Section 11 of the FTC Act, in turn, prohibits a construction of the FTC Act that would alter or modify the Clayton Act.[20]

Complaint counsel argues that respondents' approach of applying the FTC Act's narrower definition of corporations to Section 7 of the Clayton Act in effect impermissibly would construe the FTC Act in a manner that would alter or modify the Clayton Act. In light of the express language used in Section 11 of the FTC Act, we agree.

Respondents seek to apply the FTC Act's definition of "corporation" to limit the reach of Section 7. However, even though complaint counsel's appeal brief raised the Section 11 of the FTC Act issue (*see* CCAB at 19), respondents did not respond in their brief. During oral argument respondents appeared to take the position that Section 11 of the FTC Act applies only to the substantive scope of the other antitrust laws and not to the **[10]** identities of those who may be

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We note that respondents' interpretation of Section 7 in this regard appears to run counter to the admonition of the Supreme Court in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 343 (1963): "It is unquestioned that the stock-acquisition provision of § 7 embraces every corporation engaged in commerce, including banks."

[20] *See also Haffner v. United States*, 585 F. Supp. 354, 358 (N.D. Ill. 1984), *modified*, 757 F.2d 920 (7th Cir. 1985) ("[A]ll the sections of a single statute should be presumed to have been drafted with reference to one another; the whole statute is the context for construction of any of its individual sections.").

subject to the jurisdiction of the other antitrust laws.[21] However, no support for respondents' proposition is evident in the text of Section 11 of the FTC Act or in the cases construing that provision.[22]

Respondents point out that the Clayton Act and the FTC Act are to be read *in pari materia* and conclude that "Congress did not need to delineate an *exemption* for not-for-profits in Section 11 of the Clayton Act because not-for-profits were specifically *excluded* from the jurisdiction of the FTC." *See* RAB at 25 (emphasis in original). We agree with respondents that the two statutes are to be read *in pari materia*, but do not agree that this leads to respondents' conclusion.

Respondents contend that "the two statutes were intended to serve the same function—to supplement the Sherman Act and prevent restraints of trade." *Id.* at 24. While the two statutes **[11]** clearly are complementary, their language and legislative histories show that they serve different functions.

Congress created the Federal Trade Commission with two principal objectives. The first was to gather and publish information regarding the profitability and practices of major businesses.[23] The second was to define and curtail unfair business practices as such practices developed. The Clayton Act, on the other hand, contained no similar information gathering and reporting provisions and deemed unlawful certain broadly-defined practices.[24]

The different emphases of the two Acts support an inference that

[21] At oral argument before the Commission, this issue was probed with respondents. *See* TOA at 38-41. During the oral argument the following colloquy ensued with respondents' counsel:

> COMMISSIONER STRENIO: But I am curious as to why it is that Section 11 of the FTC Act ought not to be given the effect that, on the fact of it, it is apparently intended to have. At least, that is the argument.
>
> MR. CAMPBELL: I agree. I don't view restricting the applicability to the entities enumerated to be a restriction on the scope of the Act. I think that has to do with the substantive powers of the Act, and so I frankly view that as a non sequitur.

Id. at 41.

[22] *See United States v. Chas. Pfizer & Co.*, 205 F. Supp. 94, 96 (S.D.N.Y. 1962) (even though the facts underlying a subsequent Sherman Act prosecution were "in many respects identical" to a prior FTC complaint, Section 11 of the FTC Act was construed to permit simultaneous or successive prosecutions); *United States v. Cement Inst.*, 85 F. Supp. 344, 347 (D. Colo. 1949) ("It would seem the Federal Trade Commission Act was not designed to interfere with, or detract from the exercise of the authority and duty of the Attorney General to seek enforcement of the Sherman Act, as it especially provides that no order of the Commission, or judgment, shall in any wise relieve or absolve any person from liability under the anti-trust acts, which are defined as including the Sherman Act.").

[23] *See, e.g.*, H.R. Rep. No. 533, 63d Cong., 2d Sess., pt. 1, at 2-4 (1914) *reprinted in* 5 E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes*, at 3756-58 [hereinafter *Kintner*]; 51 Cong. Rec. 8842-43 (1914), *reprinted in* 5 *Kintner* at 3783-86 (statement of Rep. Covington). *See also* T. Blaisdell, *The Federal Trade Commission: An Experiment in the Control of Business* 105-20 (1932); G. Henderson, *The Federal Trade Commission: A Study in Administrative Law and Procedure* 19, 24-25, 45-46 (1924); Scherer, *Sunlight and Sunset at the Federal Trade Commission*, 42 Admin. L. Rev. 461 (1990).

[24] *See, e.g.*, 2 *Kintner* at 989-90 (discussing different emphasis in scope of Clayton and FTC Acts).

Congress was willing to tolerate some undefined unfair methods of competition by certain not-for-profit entities, but not those practices specifically condemned by the Clayton Act (such as unlawful tying arrangements, acquisitions and interlocking directorates). There is nothing illogical in denying the authority for the Commission to enforce the "unfairness" provisions in Section 5 of the FTC Act against certain not-for-profit corporations, but granting the authority under Section 11 of the Clayton Act for the Commission to enforce that statute's specific prohibitions against all "persons" subject to that Act.

We conclude that the plain language of Sections 7 and 11 of the Clayton Act strongly supports the proposition that Section 7 prohibits anticompetitive assets acquisitions by not-for-profit corporations, even when such corporations are not subject to the requirements of the FTC Act. Although our analysis might end here, we nonetheless look to the legislative histories of the relevant statutes to see if they support a different resolution. In construing congressional intent as discussed below, we are mindful that to interpret the Clayton Act otherwise would create a significant loophole in the coverage of this important **[12]** antitrust statute. Our reading of the statute is buttressed both by the legislative histories and the case law.

B. *The Relevant Legislative Histories*

We now examine the legislative histories of these Acts and amendments to them, as they shed additional light on their proper interpretation.

1. The Original Clayton Act

Our examination of the relevant legislative histories begins with the original Clayton Act, as well as its amendments, because the complaint alleges a violation of that statute. Respondents have not identified, and our independent examination has not uncovered, anything in the legislative history of the Clayton Act discussing not-for-profit entities. Thus, if any congressional intent did exist to exempt not-for-profit entities from Clayton Act enforcement by the FTC, it would have to be inferred from other actions of Congress and the statements of individual Members of Congress.

Congress passed the FTC Act about one month before it passed the Clayton Act.[25] It thus had the opportunity to conform the Clayton Act

[25] The House of Representatives was the last chamber to pass each Act. The FTC Act passed the House of (footnote cont'd)

to the FTC Act, if it had wanted to do so. This fact leads to a credible inference that Congress meant for the limitation on the Commission's jurisdiction over not-for-profit entities to be confined to matters arising under the FTC Act.

Respondents argue that the FTC Act's jurisdictional limitations were imported into Section 11 of the Clayton Act when Congress accepted an amendment to the original proposed Clayton Act enforcement language. *See* RAB at 26-28. Respondents' argument can be summarized by the following passage they quote from *United States v. FCC*, 652 F.2d 72, 84 (D.C. Cir. 1980) (*en banc*) (emphasis supplied by respondents):

> During much of the time the Clayton Act was debated the enforcement provisions of the two bills [the Clayton bill and the FTC bill] were identical. In fact, the Senate committee that reported the Clayton Act proposed language in the bill stipulating that, once a complaint has issued, "thereupon **[13]** such proceedings shall be had as are provided for in section 5 of the [FTC] act." *See* 51 Cong.Rec. 14224 (Aug. 25, 1914) . . . . *Since the FTC bill had not yet been passed, however, the committee decided it would be inappropriate to refer specifically to that Act in the Clayton Act.* It therefore substituted for the formulation quoted above the actual language of Section 5 of the FTC bill as it then existed. Id. at 14321-14322 (Aug. 27, 1914) . . . .
>
> There is no indication in the legislative history of the Clayton Act that that Act was intended to vest any less discretion in its enforcement agencies *than the FTC Act vested in the FTC.* On the contrary, the express purpose of using the language—as it was at the time—of Section 5 of the FTC bill was to *ensure that the enforcement provisions of the Clayton and FTC Acts would be exactly the same.* 51 Cong.Rec. 14224 (Aug. 25, 1914) (statement of Senator Walsh); *see Ash Grove Cement Co. v. FTC*, 577 F.2d 1368, 1374 n.9 (9th Cir.), *cert. denied*, 439 U.S. 982, 99 S.Ct. 571, 58 L.Ed.2d 653 (1978).

Respondents assert that this history evinces a congressional intention to confine Clayton Act enforcement by the Commission to entities subject to FTC Act jurisdiction. Respondents further assert that the subsequent incorporation, through substitution, into the Clayton Act of language from Section 5 of the FTC Act is an additional indication of this hypothesized intent. But, neither the statutes nor their legislative histories support this proffered conclusion. Instead, this combination of legislative history and congressional action bolsters the exercise of FTC jurisdiction over not-for-profit corporations in Clayton Act cases.

Representatives on September 10, 1914 (*See* 51 Cong. Rec. 14943 (1914), *reprinted in* 5 *Kintner* at 4756) and the Clayton Act passed the House of Representatives on October 8, 1914 (*see* 51 Cong. Rec. 16344 (1914), *reprinted in* 3 *Kintner* at 2833-34).

The language respondents cite deals with procedural, and not jurisdictional, provisions.[26] While Congress intended to keep the procedures under the Clayton Act and the FTC Act harmonious, **[14]** there is not discernible legislative intent to bring into conformity the respective jurisdictions conferred under the two Acts. Indeed, Senator Walsh, whose remarks are cited by the court in *United States v. FCC*, viewed the rationale as "obvious":

> Section 2 deals with one phase and aspect of unfair competition, as that expression is understood . . . in the trade commission bill. If therefore complaint were made of unfair competition by price cutting, charged as a violation of Section 5 of the trade commission bill, the procedure before the trade commission would be after one manner. If, however, price cutting were charged in violation of the provisions of Section 2 of this bill, the procedure would be before the trade commission, but by entirely different proceeding. I apprehend that no one would question that the two should be harmonized if that system is to go into force and effect at all.

51 Cong. Rec. 14266 (1914), *reprinted in* 3 *Kintner* at 2114.

Respondents' arguments also are not supported by the remaining fragments of the legislative history they have cited,[27] **[15]** including one sentence uttered by Senator Reed during an extended floor debate on the Clayton bill in which he asked that the Senate reconsider its

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[26] Respondents' quotation from *United States v. FCC*, as repeated in the text of this opinion, deleted the following sentence from the end of the first paragraph: "This language was ultimately adopted as Section 11(b) of the Clayton Act and is with us still." 652 F.2d at 84. Section 11(b) of the Clayton Act is a purely procedural provision. That provision is almost identical to Section 5(b) of the FTC Act, which sets forth similar procedures.

[27] For example, respondents quote an exchange between Senator Poindexter and Senator Walsh in which Senator Walsh concluded that "a Federal Trade Commission will be created *with some powers*." RAB at 20, quoting 51 Cong. Rec. 14323 (1914), *reprinted in* 3 *Kintner* at 2161 (emphasis added by respondents). Respondents assert that the underlined portion is a "jurisdictional reference to the FTC Act." *Id.* This is simply incorrect. The entire relevant exchange is as follows:

> Mr. Poindexter. Mr. President, I understood that the Senator from Montana substituted the amendment which was adopted this morning for the one he offered yesterday because the Federal trade commission referred to had not yet been established. I notice that <u>the amendment he offered this morning sets out the specific procedure; but it still vests the jurisdiction in the Federal Trade Commission</u>, and there is no such institution. I just thought I would call the Senator's attention to that, in view of the fact that he has been dealing with that general subject.
>
> Mr. Walsh. Mr. President, the fact had not been overlooked. We have indulged the expectation, or at least the hope, that a Federal Trade Commission will be created with some powers.
>
> Mr. Poindexter. I hope the Senator's expectation will be realized, but <u>I much prefer the amendment he had on yesterday, as being simpler in form, rather than repeating in a second statute the details of procedure.</u> If you are going to anticipate you might as well anticipate in one case as in the other. 51 Cong. Rec. at 14323 (1914), *reprinted in* 3 *Kintner* at 2161 (emphasis added).

While Senator Poindexter's principal point was that it made little sense to delete a reference to a non-existent agency and replace it with a procedure provision adopted from a non-existent statute, the import of the dialogue is significant. The amendments related solely to procedure and law enforcement actions. The Clayton Bill, both before and after the amendments, had jurisdictional provisions distinct from those in the FTC Act.

vote to delete Section 4 from the Senate version of the bill. *See* RAB at 20, quoting 51 Cong. Rec. 14090 (1914), *reprinted in* 3 *Kintner* at 1990. The decision to delete Section 4, which forbade tying arrangements, had been made "in consequence of the passage of the trade commission bill." 51 Cong. Rec. 14089 (1914), *reprinted in* 3 *Kintner* at 1988 (statement of Senator Culberson).[28] In urging reconsideration, Senator Reed said:

> As I was remarking, the trade commission finds its authority to act with reference to the practices referred to in Section 4 of this bill, if it finds it anywhere, in Section 5 of the trade commission bill. Section 5 simply provides "that unfair competition in commerce is hereby declared unlawful."

Id. at 14090, *reprinted in* 3 *Kintner* at 1990. **[16]**

As of August 21, 1914, at the moment Senator Reed was urging the Senate to put Section 4 back into the Clayton bill, the trade commission bill was still pending in the Congress; its "exact nature and terms" were unknown (*Id.* at 14322 (statement of Senator Walsh)); the version of the Clayton bill that had passed the House of Representatives did not even provide for FTC enforcement of the Clayton Act (H.R. 15657, 63d Cong., 2d Sess. (1914), *reprinted in* 2 *Kintner* at 1728-38); and the Senate had not yet voted on the committee proposal that the trade commission be given enforcement authority over certain provisions in the Clayton Act.[29] Senator Reed's comments concern the future Commission's likely ability, or inability, to challenge tying arrangements under Section 5 or the trade commission bill. (51 Cong. Rec. 14089-92 (1914), *reprinted in* 3 *Kintner* at 1987-95). His reference to the Commission's subject matter jurisdiction under Section 5 of the trade commission bill cannot be equated with a congressional intention to exempt not-for-profit entities from FTC enforcement actions brought under the Clayton Act.[30] **[17]**

[28] "Passage" in this case cannot refer to final action by both Houses of Congress before sending the bill to the President, since such action occurred several weeks later. Here, it likely refers to action by one of the Houses.

[29] The Senate began its debate on Section 9b on August 25, 1914. 51 Cong. Rec. 14223, *et seq.* (1914), *reprinted in* 3 *Kintner* at 2066, *et seq.*; *see id.* at 14266, *reprinted in* 3 *Kintner* at 2114 (statement of Senator Walsh).

[30] In its report on H.R. 15657, the Senate Judiciary Committee stressed that the bill was not intended to alter the Sherman Act (which had defined corporations in a way that included not-for-profit corporations), and stated that certain provisions of the proposed law should be enforced by a new agency, "to be created," the Federal Trade Commission, "in the case of individuals and corporations other than banks and common carriers." S. Rep. No. 698, 63d Cong., 2d Sess. 2, 42 (1914), *reprinted in* 2 *Kintner* at 1744-45.

2. The Original Federal Trade Commission Act

There appears to be no disagreement in this case that Section 4 of the FTC Act contains an express limitation on the definition of "corporation" that precludes any enforcement of Section 5 of the FTC Act against a corporation unless it "is organized to carry on business for its own profit or that of its members." Respondents have not pointed to anything in the legislative history of the FTC Act, express or implied, that this definition of "corporation" was meant to apply to the Clayton Act. Our examination of this legislative history also has not yielded any support for such an interpretation of Section 4 of the FTC Act. To the contrary, as discussed previously, we think that Section 11 of the FTC Act expressly precludes such an interpretation. Furthermore, as previously noted, in Section 6 of the Clayton Act, 15 U.S.C. 17, and in the Non-Profit Institutions Act, 15 U.S.C. 13c, Congress chose to provide certain exemptions which pointedly do not include the one urged by respondents.

3. The 1950 Amendments

By 1950 it was clear that Section 7 of the Clayton Act was an ineffective tool for preventing anticompetitive acquisitions and mergers. As we have noted, the original Section 7 prohibited only stock acquisitions. Asset acquisitions were beyond the statute's reach. *See United States v. Columbia Steel Co.*, 334 U.S. 495, 507 n.7 (1947). Hence, the statute's strictures were easily evaded. Furthermore, the Supreme Court had held that the Federal Trade Commission could not remedy an unlawful stock acquisition by ordering the divestiture of assets. *See Arrow-Hart & Hegeman Elec. Co. v. FTC*, 291 U.S. 587 (1934); *Thatcher Mfg. Co. v. FTC* and *Swift & Co. v. FTC*, decided together with *FTC v. Western Meat Co.*, 272 U.S. 554 (1926).

It was against this general background that Congress in 1950 enacted the Celler-Kefauver Antimerger Act, 64 Stat. 1125-29 (1950). The Act amended Section 7 to include an assets acquisition provision. As amended, Section 7 provided in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital *and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation* engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to **[18]** lessen competition, or to tend to create a monopoly.

Id. (emphasis added). The Act also amended Section 11 to make clear the Commission's power to compel the divestiture of assets, but did not modify, in any significant way,[31] the language in the first paragraph of Section 11, which vests jurisdiction in the various agencies to enforce Sections 2, 3, 7 and 8 of the Clayton Act.

Nothing in the language of the Celler-Kefauver Act or in its legislative history suggests a congressional purpose to limit or restrict the Commission's jurisdiction. Indeed, respondents concede that "[i]n none of the reports and debates leading up to the enactment of the 1950 Amendments to Section 7 is there any discussion of the activities of either not-for-profit community hospitals or any other not-for-profit institutions." RAB at 29; *see United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1280-81 (7th Cir.), *cert. denied*, 111 S. Ct. 295 (1990). Similarly we divine no intent in the Celler-Kefauver Act to change the Clayton Act's jurisdictional bases to require the FTC to enforce the Clayton Act under the jurisdictional limitations of a separate statute.[32] **[19]**

One more point regarding the Celler-Kefauver Act merits discussion. Congress reenacted much of the original language in Sections 7 and 11 when it passed the Celler-Kefauver Act. This is significant, because the unambiguous purpose of the 1950 amendment was to expand the coverage of Section 7 and close loopholes in the existing legislation. In *Philadelphia National Bank*, the Court held that Section 7's stock acquisition clause took on a broader coverage because of the 1950 amendments, even though the words in the clause were unchanged:

Thus, the stock-acquisition provision of § 7, though reenacted *in haec verba* by the

[31] In the intervening years the section had been amended to vest enforcement authority in the Federal Communications Commission and the Civil Aeronautics Authority. The only modification to Section 11's first paragraph made in 1950 was to change "Civil Aeronautics Authority" to "Civil Aeronautics Board." *See* S. Rep. No. 1775, 81st Cong., 2d Sess., 8 (1950), *reprinted in* 4 *Kintner* at 3526.

[32] The logical conclusion of respondents' argument is that the "jurisdiction" clause in Section 7 is nonsense. Assuming *arguendo* that the Commission's authority to enforce the Clayton Act derives from Section 5 of the FTC Act, it follows that the Commission lacks authority to enforce any provision of Sections 2, 3, 7, or 8 of the Clayton Act against not-for-profit entities, including the stock acquisition clause in Section 7. But if that were correct, it would follow that Congress was redundant in eliminating, as respondents contend, the Commission's jurisdiction over not-for-profit entities in the asset acquisition clause. *See Philadelphia Nat'l Bank*, 374 U.S. at 346.

While respondents might answer that the "jurisdiction" clause works to exempt not-for-profit entities not only from FTC jurisdiction but also from law suits by any other plaintiff, this answer is untenable. Nothing in Celler-Kefauver evinces a purpose to exempt not-for-profit entities. If Congress intended to create so broad a gap in Section 7 coverage, it could have spelled out that intention in the language of the statute. We decline to hold that we can imply congressional intent to exempt not-for-profit entities from jurisdiction when no express language, intent or purpose exists to support that determination.

1950 amendment, must be deemed expanded in its new context to include, at the very least, acquisitions by merger or consolidation, transactions which entail a transfer of stock of the parties, while the assets-acquisition provision clearly reaches corporate acquisitions involving no such transfer.

374 U.S. at 346.

Doubt—if any—about the Commission's jurisdiction under the original, 1914, version of Section 11 should be resolved by the "new context" in which the reenacted language appears in 1950. As we have noted, and as respondents have conceded, Congress did not even consider exempting not-for-profit entities in 1950.

4. The 1977 and 1989 Proposals to Amend the FTC Act and the 1980 Amendment to the Clayton Act

Respondents have implied in their brief and during oral argument that statements made by former FTC officials to Congress concerning the scope of FTC Act coverage in the nonprofit area limit the Commission's jurisdiction over nonprofit corporations under the Clayton Act. *See* RAB at 15 n.5; TOA at 34. It is clear from the full context of the statements of those former FTC officials that their remarks were limited to a discussion of FTC Act jurisdiction and there was no consideration given to the FTC's authority to enforce the Clayton Act.

In 1977, then-FTC Chairman Collier testified in support of a bill that would have amended several provisions in the FTC Act, including Section 4's definition of "corporation." Federal Trade Commission Amendments of 1977 and Oversight: **[20]** Hearings on H.R. 3816 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 68 *et seq.* (1977) (statement of Hon. Calvin J. Collier, Chairman, FTC). In his oral statement, Chairman Collier said: "The bill would make several changes in the jurisdiction of the Commission. In particular, it would: (1) *Broaden the reach of the FTC Act* by redefining "corporation" to include nonprofit corporations . . . ." *Id.* at 69 (emphasis added). This oral testimony focuses solely on the Commission's authority under the FTC Act and does not bear in any way on its authority, responsibilities, or jurisdiction under the Clayton Act.

Chairman Collier's written testimony (*Id.* at 81-82) is even clearer in this regard. After discussing the difficulties the Commission had experienced in dealing with "nonprofit" respondents in several FTC Act cases,[33] he said:

> Thus, recent interpretations of Section 4 have made it difficult for the Commission, without considerable delay and expense, to reach the anticompetitive or deceptive practices of any nonprofit corporation, whether of a charitable character or not. The result has naturally been to discourage Commission activities with respect to nonprofit organizations, even though *it is increasingly clear that "charitable" organizations have been responsible for very substantial fraud and other conduct that violates the FTC Act.*

Id. at 82 (emphasis added).[34] **[21]**

Thus, there is nothing "inconsistent" between Chairman Collier's congressional testimony in 1977 and our conclusion in this case that the Commission has jurisdiction under Section 11 of the Clayton Act to enforce that Act against not-for-profit corporations.[35]

The same result obtains with respect to then-Director of the FTC Bureau of Consumer Protection MacLeod's 1989 testimony which respondents offered into the Record. *See* pages 171-84 of the Record. Deceptive Fundraising by Charities: Hearing Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. 82-88 (1989). Mr. MacLeod never refers to the Clayton Act in that testimony. Moreover, he states, in part: *"Absent some other grounds for jurisdiction,* we are unlikely to open an investigation into charities that have been granted tax-exempt status by the IRS under Section 501(c)(3) of the Internal Revenue Code." *Id.* at 176 (emphasis added). Thus, Mr.

[33] Chairman Collier discussed or mentioned: *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *FTC v. National Comm'n on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1972); *Community Blood Bank of Kan. City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969); *Chamber of Commerce v. FTC*, 13 F.2d 673 (8th Cir. 1926).

Cement Institute actually concerned violations of both the FTC Act and the Clayton Act, but the trade association was plainly operating for the profit of its members, and Chairman Collier cited the case as an example in which "the language of Section 4 did not present a serious problem." Hearings on H.R. 3816 at 82. Indeed, it appears that the jurisdictional issue was not even litigated in that case.

[34] That Chairman Collier's comments involved the FTC Act, and not the Clayton Act, is further evinced by a dialogue between Congressman Rinaldo and Chairman Collier in which Chairman Collier referred only to expanded Commission jurisdiction over entities engaged in "unfair or deceptive acts or practices affecting commerce and unfair methods of competition affecting commerce" to reach, for example, false solicitations and false advertising by nonprofit entities. Thus, his answers were directed to the FTC Act's definition of "corporation" and the Commission's power to enforce the FTC Act, not the Clayton Act. *Id.* at 99.

[35] Respondents also point to a comment by a representative of nine nonprofit organizations, stating her understanding that an amendment to the FTC Act would work to make nonprofit entities subject to Section 7. RAB at 30, citing Federal Trade Commission Amendments of 1977 and Oversight: Hearings on H.R. 3816 Before the Subcomm. on Consumer Practice and Finance of the House Comm. on Interstate and Foreign Commerce, 95th Cont., 1st Sess. at 537 (1977) (testimony of Frances T. Farenthold). Another representative of those organizations stated that it was not clear whether nonprofit entities were then subject to Section 7 of the Clayton Act. *Id.* at 547 (testimony of Julian Atwater). These, however, are the views of witnesses with whom we disagree for the same reasons we disagree with respondents.

MacLeod's testimony leaves open the possibility of alternative grounds for Commission jurisdiction over certain not-for-profit corporations.

In 1980, Section 7 of the Clayton Act was amended, once again, to prohibit anticompetitive acquisitions by any "person" of another "person." Previously, the statute had prohibited such acquisitions by, or of, a "corporation." *Compare* 15 U.S.C. 18, *with* 64 Stat. 1125 (1950). The amendment was intended to close a loophole in Section 7's coverage and to bring Section 7 into line with the coverage of the Hart-Scott-Rodino Antitrust Improvements Act. 15 U.S.C. 18a. **[22]** *See* H.R. Rep. No. 871, 96th Cong., 2d Sess. 2 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 2732.

This amendment is worth noting for two reasons. First, it again expanded the coverage of Section 7 and manifests a repeated congressional intention to reach nearly all transactions that may have anticompetitive effects, exempting only "pure" asset acquisitions in certain regulated industries. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 342 (1963). This suggests that the jurisdictional provisions in Section 11 of the Act should not be construed narrowly to exempt a class of entities by implication. Second, by deleting the reference to "corporation" in favor of "person," the 1980 amendment makes Section 7 reach all entities, as defined in Section 1 of the Act, 15 U.S.C. 12, subject to the Act. If prior to 1980 there was an argument that the term "corporation" under the Clayton Act was synonymous with the term "corporation" under the FTC Act, that argument has been precluded by inserting the term "person" into Section 7.[36] **[23]**

[36] We think the two statutes would not support such an interpretation merely because both define "corporation." Any confusion on the point might arise only because the FTC Act defines the term expressly, while the Sherman and Clayton Acts define the term by stating that "person" includes corporation.

Respondents turn the 1980 amendment on its head when they assert that, by amending Section 7, but not Section 11, "Congress reaffirmed that the 'jurisdictional reach of Section 7 of the Clayton Act [was] co-extensive with that of Section 5 of the FTC Act.'" RAB at 30-31, quoting H.R. Rep. No. 871, at 5, *supra*. As with respondents' other citations to the legislative history, this one needs to be put into context. The entire relevant quote is:

> Section 7 was intended to supplement the Sherman Act by reaching incipient monopolies and restraints of trade before they become full fledged monopolies subject to the proscriptions of Section 2 of the Sherman Act. It is anomalous that the statute designed to prevent incipient monopolies has less jurisdictional reach than the statute designed to prevent the use of monopoly power in contravention to the law. . . .
>
> [The pending legislation] would remove an arbitrary limitation on the law, thereby bringing Section 7 into jurisdictional harmony with Sections 1 and 2 of the Sherman Act and Section 7A of the Clayton Act. The jurisdictional reach of Section 7 of the Clayton Act will also become co-extensive with the authority granted to the FTC under Section 5 of the FTC Act.

Id. at 4-5.

It is difficult to see how a statute can be "in harmony" with Sections 1 and 2 of the Sherman Act, and Section 7A of the Clayton Act (all of which reach nonprofit entities—and one of which is enforced by the

(footnote cont'd)

We think that the structures and plain meaning of the FTC and the Clayton Acts and their legislative histories taken together demonstrate that acquisitions by not-for-profit entities are within the Commission's reach in enforcing the Clayton Act.

C. *The Relevant Case Law*

1. The *Philadelphia National Bank* Decision

The most significant case expounding upon the jurisdictional basis for Section 7 of the Clayton Act is the Supreme Court's decision in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). In that case, the Department of Justice challenged the consolidation of the second- and third-largest commercial banks in the Philadelphia metropolitan area under both Section 1 of the Sherman Act and Section 7 of the Clayton Act.

In the text of its opinion, the Court makes a straightforward statement concerning the limitations on the FTC's jurisdiction: "The FTC, under § 5 of the Federal Trade Commission Act, has no jurisdiction over banks. 15 U.S.C. 45(a)(6). Therefore, if the proposed merger be deemed an assets acquisition, it is not within § 7."[37] This is a fairly strong conclusion by the Court that it is the FTC Act, rather than anything else, that precludes the FTC from enforcing Section 7 of the Clayton Act against banks. Indeed, if this were the end of the analysis and we had to apply the quoted sentences to not-for-profit corporations without more, we would be reluctant to decide that assets acquisitions by not-for-profit corporations are subject to the Clayton Act. **[24]**

However, the above quote is not the end of the analysis. First, the issue of the FTC's jurisdiction over assets acquisitions involving banks was not the subject of more than a cursory analysis by the parties before the Court.[38] In fact, the parties appear to have assumed that

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Commission (*i.e.*, Section 7A, 15 U.S.C. 18a)) and "co-extensive" with Section 5 of the FTC Act. Unless the whole quotation is considered in context, it is ambiguous. In context, it demonstrates a congressional purpose to expand Section 7 to its full limit and not a desire to limit FTC enforcement authority. *See United States v. Rockford Memorial Corp.*, 898 F.2d at 1281.

[37] 374 U.S. at 336 (footnote omitted).

[38] *See United States v. Philadelphia National Bank* in 13 Antitrust Law: Major Briefs and Oral Arguments of the Supreme Court of the United States, 1955 Term - 1975 Term 1-376 (P. Kurland & G. Casper eds. 1979). This probably explains the first sentence of Justice Harlan's dissent: "I suspect that no one will be more surprised than the Government to find that the Clayton Act has carried the day for its case in this Court." 374 U.S. at 373 (Harlan, J., dissenting) (Justice Stewart joined in that dissent).

the Commission lacked such jurisdiction and the record is, at best, confusing regarding the basis for this assumption.[39]

Second, in the footnote that accompanies the quote from the Court's opinion, the Court addressed the relationship of Sections 7 and 11 of the Clayton Act. In relevant part, the Court stated:[40]

> [I]t is clear from the language of § 11 that "banks, banking associations, and trust companies" are meant to comprise a distinct "character of commerce," and so cannot be part of the "other character of commerce" reserved to the FTC.
>
> The exclusion of banks from the FTC's jurisdiction appears to have been motivated by the fact that the banks were already subject to extensive federal administrative controls. *See T. C. Hurst & Son v. Federal Trade Comm'n,* 268 F. 874, 877 (D.C.E.D. Va. 1920).

Obviously, not-for-profit corporations are different from banks in the sense that not-for-profit corporations do not "comprise a distinct 'character of commerce'" as defined under Section 11. While hospitals may comprise a distinct character of commerce, **[25]** respondents are not arguing that it is their status as hospitals that makes them exempt from FTC jurisdiction, but their status as not-for-profit corporations. After all, there is no doubt that proprietary hospitals are subject to the assets acquisition clause of Section 7 of the Clayton Act.

Third, the Court appeared to be impressed that the banking industry was "already subject to extensive federal administrative controls." Neither not-for-profit corporations nor hospitals are included in the four highly-regulated industries specified in Section 11 (*i.e.*, ICC-regulated common carriers, FCC-regulated common carriers, DOT-regulated air carriers, and FRB-regulated banks).[41]

Fourth, respondents' interpretation of *Philadelphia National Bank* runs counter to the overall thrust of the Court's opinion. The Court construed broadly the 1950 Celler-Kefauver amendment to Section 7 that added the assets acquisition clause to fill a perceived gap in antitrust enforcement: "[T]he basic congressional design clearly

[39] Of course, because the Justice Department argued in *Philadelphia National Bank* and the Court agreed that it was the stock acquisition clause of Section 7 that provided the jurisdictional basis for the proposed bank consolidation, there was little need for precision on the issue of why the assets acquisition clause did not provide jurisdiction.

[40] *Id.* at 336 n.11.

[41] Later in its opinion, the Court added that excluding from Section 7 coverage assets acquisitions not by merger in industries outside the FTC's jurisdiction "does not appear to create a lacuna of practical importance." *Id.* at 344 (footnote omitted). In an accompanying footnote, the Court explained that administrative agencies such as the CAB (whose functions were taken over by DOT years after the Court's opinion), FRB, and ICC provide adequate review of industry participants within their jurisdiction so that "the exclusion of assets acquisitions in such industries from § 7 would seem to have little significance." *Id.* at 344 n.22. Once again, this analysis does not apply to acquisitions by not-for-profit corporations or hospitals.

emerges and from the design the answers to these questions may be inferred. Congress primarily sought to bring mergers within § 7 and thereby close what it regarded as a loophole in the section." 374 U.S. at 341.

In addition, it appears that the Court sought to interpret the amended Section 7 as broadly as possibly while placing the least possible limitation on the assets acquisition clause:

> In other words, Congress contemplated that the 1950 amendment would give § 7 a reach which would bring the entire range of corporate amalgamations, from pure stock acquisitions to pure assets acquisitions, within the scope of § 7. Thus, the stock-acquisition and assets-acquisition provisions, read together, reach mergers, which fit neither category perfectly but lie somewhere between the two ends of the **[26]** spectrum . . . . So construed, the specific exception for acquiring corporations not subject to the FTC's jurisdiction excludes from the coverage of § 7 only assets acquisitions by such corporations when not accomplished by merger.

Id. at 342 (emphasis in original). The Court made this point most forcefully when it provided its rationale for the statutory construction it employed: "Any other construction would be illogical and disrespectful of the plain congressional purpose in amending § 7, because it would create a large loophole." *Id.* at 343. Similarly, the Court declared that the 1950 amendment to the Clayton Act "was clearly intended to remove all question concerning the FTC's remedial power over corporate acquisitions, and therefore explicitly enlarged the FTC's jurisdiction." *Id.* at 348.

Thus, it is fair to read the Court's opinion in *Philadelphia National Bank* as interpreting Section 7 expansively. A corollary point buttresses this conclusion. As the Court said:

> It is settled law that "[i]mmunity from the antitrust laws is not lightly implied." *California v. Federal Power Comm'n,* 369 U.S. 482, 485. Cf. *United States v. Borden Co.,* 308 U.S. 188, 198-199; *United States v. Southern Pac. Co.,* 259 U.S. 214, 239-240. This canon of construction, which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy, is controlling here. For there is no indication in the legislative history to the 1950 amendment of § 7 that Congress wished to confer a special dispensation upon the banking industry; if Congress had so wished, moreover, surely it would have exempted the industry from the stock-acquisition as well as the assets-acquisition provision.

Id. at 348. As Part III.B. of this opinion establishes, there is no indication in the legislative history to the FTC Act, the Clayton Act or amendments to those statutes that Congress intended to confer a special dispensation upon not-for-profit entities for purposes of Section 7 of the Clayton Act or that Congress intended to have the FTC Act interpreted as a restriction on the Clayton Act. To the contrary, as noted earlier in this opinion, Section 11 of the FTC Act expressly provides that the FTC Act is not to be construed to alter or **[27]**modify the Clayton Act or any other antitrust act.[42] Further, if Congress had intended to confer such a special dispensation, it logically would have exempted not-for-profit entities from the assets acquisition provision as it did for not-for-profit entities originally covered by the Robinson-Patman Act provisions of the Clayton Act.[43]

The Supreme Court subsequently has applied this "canon of construction" in the context of nonprofit hospitals. In its *Abbott Laboratories* decision,[44] the Court examined Section 2c of the Clayton Act, 15 U.S.C. 13c, and decided that the exemption added to the Robinson-Patman Act for nonprofit hospitals was "to be construed strictly."[45] The Court analyzed the legislative history of this statutory exemption and determined:[46]

> The Congress surely did not intend to give the hospital a blank check. Had it so intended, it would not have qualified purchases by nonprofit institutions in the way it did in § 13c. **[28]**See H.R.Rep. No. 1983, 90th Cong., 2d Sess., 78-79 (1968). We are concerned, after all, with an exemption from an antitrust statute, and the accepted general principles [that antitrust exemptions are to be construed strictly], do have application even in the nonprofit hospital context.

Thus, the Court subjected nonprofit hospitals to possible treble damage liability under the Robinson-Patman Act in certain situations, despite the statutory exemption for nonprofit hospitals.[47]

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[42] *See supra* at pages 9-10.

[43] During oral argument, respondents contended that since not-for-profit corporations do not issue stock, the implication is that such corporations are exempt from Section 7 of the Clayton Act. *See* TOA at 31. We note that the antitrust laws are strictly construed and we disfavor their implied repeal. No language in Section 7 of the Clayton Act states that not-for-profit corporations are exempt from FTC scrutiny. Moreover, the question of whether Section 7 of the Clayton Act limited coverage only to corporations makes no difference since the jurisdictional language in Section 1 of the Act was expanded in 1980 to reach acquisitions done by any person. We also note that respondents contend that one must examine the Clayton and FTC Acts *in pari materia* to determine the meaning of each of the Acts. The FTC Act strictly defines a not-for-profit corporation under Section 4 of the Act. It would be anomalous indeed if Congress, which showed it could specifically delineate definitions for a not-for-profit corporation under Section 4 of the FTC Act, suddenly meant to exclude a not-for-profit corporation from coverage under the Clayton Act, enacted within a month of the FTC Act, without explicitly saying so.

[44] *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 11-12 (1976).

[45] *See* 425 U.S. at 11. Section 2c of the Clayton Act is also discussed *supra* at page 5.

[45] 425 U.S. at 13.

[47] For other Supreme Court decisions emphasizing that exemptions from the antitrust laws are to be narrowly construed, *see, e.g., Union Labor Life Ins. Co. V. Pireno*, 458 U.S. 119, 126 (1982); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979); *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956).

2. The *University Health, Rockford* and *Carilion* Decisions

In the decades after the *Philadelphia National Bank* decision, three federal courts have considered the issue of whether not-for-profit hospitals making assets acquisitions may be subjected to a government antitrust prosecution under the Clayton Act. We discuss these three cases, and their significance, below.

The most recent case pertaining to assets acquisitions by nonprofit hospitals is *FTC v. University Health, Inc.*, No. 91-8308 (11th Cir. May 6, 1991). In that case, the FTC sought a preliminary injunction to prevent the acquisition of St. Joseph Hospital, a nonprofit hospital, by University Health, Inc., a nonprofit corporation that owns University Hospital, another nonprofit hospital in the Augusta, Georgia area. While the district court denied the request for a preliminary injunction, it also denied defendants' motion to dismiss on the nonprofit issue.

The Commission appealed the adverse decision on the preliminary injunction to the Eleventh Circuit. The appellate court issued an order reversing the district court's denial of the preliminary injunction. While the Eleventh Circuit's terse order contains no discussion of jurisdiction (the parties at this time are awaiting an opinion), that issue was briefed by both parties and the court necessarily had to find that assets acquisitions by nonprofit hospitals are covered by Section 7 in order for it to reach its decision on the merits of the preliminary injunction. **[29]**

The next most recent case, which also contains a thorough analysis of the issues presented here, is *United States v. Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir.), *cert. denied*, 111 S. Ct. 295 (1990). The *Rockford* case involved a suit by the Antitrust Division of the Department of Justice to enjoin a proposed consolidation of two nonprofit hospitals. The complaint alleged that the proposed consolidation would violate both Section 7 of the Clayton Act and Section 1 of the Sherman Act. The district court held that the merger violated Section 7 and issued an injunction without reaching the Section 1 issue. The defendants appealed, raising the argument that the consolidation of two nonprofit hospitals was not encompassed by Section 7 of the Clayton Act.

In defense of the appeal, the Justice Department argued that the consolidation was covered by the stock acquisition clause of Section 7. The Justice Department did not argue that the consolidation was covered by the assets acquisition clause of Section 7.[48] The Seventh Circuit agreed with the defendants that the stock acquisition clause did not apply because nonprofit corporations were forbidden by Illinois law to have stock or share capital and because the court was unwilling to extend the broad reading of the stock acquisition clause that was used by the Supreme Court in *Philadelphia National Bank. See* 898 F.2d at 1280, 1281.

Judge Posner, writing for the court, evaluated the assets acquisition clause argument. Because his analysis represents the most comprehensive discussion by any court to date of the applicability of this clause to not-for-profit corporations **[30]**generally (and not-for-profit hospitals in particular), we set it out in full:[49]

> [Defendants'] second argument [that Section 4 of the FTC Act limits the scope of Section 7 of the Clayton Act], in assuming that the reference in Section 7 to "person[s] subject to the jurisdiction of the Federal Trade Commission" is to the Federal Trade Commission Act, overlooks the possibility that the reference is actually to the provision in the Clayton Act itself concerning the jurisdiction of the FTC—namely Section 11, 15 U.S.C. 21. Section 11 vests authority to enforce the prohibitions of the Clayton Act in five agencies. These are the Interstate Commerce Commission, with respect to the common carriers regulated by that Commission; the Federal Communications Commission, with respect to the common carriers regulated by it; ditto for the Civil Aeronautics Board (now defunct); the Federal Reserve Board, for banks; and, for everyone else, the FTC: "Authority to enforce compliance with Sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in . . . the Federal Trade Commission where applicable to all other character of commerce." Section 11 goes on to prescribe the procedure to be followed by these commissions and boards that have been given jurisdiction to enforce the Act. The procedure is self-contained and does not depend on particular provisions in the agencies' organic statutes, so that when in 1950 Congress amended Section 7 to broaden its reach, it amended Section 11 as well. We believe that the force of the assets-acquisition provision in Section 7 is, therefore, merely to exempt mergers in the regulated industries enumerated in Section 11. Areeda & Turner, Antitrust Law ¶ 906, at p. 797 n. 2 (1989 Supp.). Those industries do not include the hospital industry. The Clayton Act evinces a purpose of limiting the Federal Trade Commission's jurisdiction vis-a-vis that of other federal agencies charged with

[48] Indeed, as respondents point out in their brief in this case, the Justice Department's lawyers in *Rockford* conceded that the FTC has no Section 7 jurisdiction over assets acquisitions by not-for-profit corporations because "the FTC has no jurisdiction over nonprofit corporations under Section 5 of the [FTC] Act." *See* RAB at 35 (citing Memorandum of the United States in Support of its Motion for a Preliminary Injunction at 5-6, *United States v. Rockford Memorial Corp.*, 717 F. Supp. 1251 (N.D. Ill. 1989)). This admission by the Justice Department does not bind the FTC. We are not privy to the trial strategy considered and chosen by the Justice Department's lawyers. We note that merely because the Justice Department may have conceded this point before trial does not mean that after full briefing and argument an adjudicative body would not decide otherwise. To the contrary, the precise issue is now being considered in contested litigation with full briefing by the parties.

[49] *Id.*at 1280-81.

enforcing the Act in the industries that [31]they regulate, but it evinces no purpose of exempting nonprofit firms in industries within the domain that the Act bestows on the Commission ("all other character of commerce").

After providing this analysis, the Seventh Circuit commented on the district court decision in *United States v. Carilion Health System:*[50]

> [W]e believe (contrary to *United States v. Carilion Health System,* 707 F.Supp. 840, 841 n. 1 (W.D.Va.), aff'd without opinion, 892 F.2d 1042 (4th Cir.1989)) that the merger is subject to Section 7, once the reference in that section to the jurisdiction of the FTC is understood, as we think it should be understood, to refer to Section 11 of the Clayton Act rather than to Section 4 of the FTC Act.

Despite the willingness of the appellate court to evaluate the merits of the applicability of the assets acquisition clause to not-for-profit acquisitions, the court's analysis is dicta.[51] As pointed out previously, the Department of Justice conceded before trial that the FTC has no jurisdiction over nonprofit corporations under the FTC Act and that this precluded the Commission's jurisdiction under the Clayton Act. Although the court's analysis is dicta, it is well-considered and is accorded due respect by the Commission.[52] **[32]**

The Seventh Circuit had the benefit of two briefs that explicitly addressed the assets acquisition argument. One brief was from the defendants/appellants, raising the same arguments as those raised by respondents here.[53] The second brief was from the Voluntary Hospitals of America, Inc., as amicus curiae in support of the defendants/appellants.[54] Yet, despite two briefs arguing against assets acquisition jurisdiction, and no counterarguments offered, the Seventh Circuit reached the opposite conclusion from that urged by the *Rockford* defendants.

The Seventh Circuit then evaluated the hospital merger under

[50] *Id.* at 1281 (emphasis in original).

[51] As the Seventh Circuit exclaimed: "The government amazingly has failed to make this [assets acquisition] argument (thus waiving it) . . . ." *Id.* at 1281.

[52] *See, e.g., Max M. v. Thompson,* 585 F. Supp. 317, 324 (N.D. Ill. 1984) ("In the absence of a controlling Supreme Court ruling, a federal district court is required to give great weight to the pronouncements of its Court of Appeals, even though those pronouncements appear by way of *dictum.*"); *Harvey v. Levine,* 204 F. Supp. 947, 953 (N.D. Ohio 1962) (unless dictum from the court of appeals had been repudiated by that court, it must be accorded great weight by a district court); *United States v. Certain Lands in Jackson County, Mo.,* 69 F. Supp. 565, 569 (W.D. Mo. 1947) ("Although not essential to the disposition of a case, judicial dictum, as distinguished from obiter dictum, becomes an authoritative statement when it is expressly declared by a court and announced as a guide for future conduct.").

[53] *See* CCAB, Appendix A (Brief of Appellants Rockford Memorial Corporation and SwedishAmerican Corporation at 7-13, filed before the Seventh Circuit in *Rockford*).

[54] *See* CCAB, Appendix B (Brief of Amicus Curiae Voluntary Hospitals of America, Inc. in Support of Appellants at 2-10, filed before the Seventh Circuit in *Rockford*).

Section 1 of the Sherman Act and determined that it posed a restraint of trade within the meaning of the statute. The appellate court affirmed the decision of the district court to enjoin the merger.

The last case, but earliest decided in this series, is *United States v. Carilion Health System,* 707 F. Supp. 840 (W.D. Va.), *aff'd mem.,* 892 F.2d 1042 (4th Cir. 1989) (per curiam). In the *Carilion* case, like the later *Rockford* case, the Antitrust Division of the Department of Justice brought an antitrust action to prevent the merger of two nonprofit hospitals— this time in Roanoke, Virginia. The government claimed that defendants' planned affiliation would violate Section 1 of the Sherman Act, 15 U.S.C. 1, and Section 7 of the Clayton Act.

In an unpublished memorandum opinion referred to in its later published memorandum opinion, the district court dismissed the government's Clayton Act claim. *See id.* at 841 n.1 (citing the district court's Memorandum Opinion on Defendants' Motion to Dismiss dated Sept. 30, 1988). The district court found that the stock acquisition clause of Section 7 did not apply to defendants because as non-stock, not-for-profit corporations no stock was involved in their transaction. The court further ruled that the assets acquisition clause of Section 7 did not apply to defendants because the FTC Act did not confer jurisdiction over nonprofit entities.[55] The case proceeded to trial on the Sherman **[33]** Act claim and the district court found that the merger would not constitute an unreasonable restraint of trade under that Act.

The government appealed the adverse decision to the United States Court of Appeals for the Fourth Circuit. The appellate court issued a *per curiam* decision designated "not for publication," which affirmed the district court's Sherman Act findings as not "clearly erroneous." *United States v. Carilion Health System,* 1989-2 Trade Cas. (CCH) ¶ 68,859 (4th Cir. Nov. 29, 1989) (per curiam). The Fourth Circuit declined to address the Clayton Act jurisdictional issue, stating: "Because we see no need for further proceedings in the district court,

[55] *See id.* The unpublished memorandum opinion of September 30, 1988, of which we take judicial notice, does not shed much light on the reasoning the district court employed to reach the conclusion that the reference in Section 7 to "the jurisdiction of the Federal Trade Commission" refers to the FTC Act rather than to Section 11 of the Clayton Act. On page 4 of that opinion, the court wrote "[t]he FTC lacks jurisdiction over the defendants because of their nonprofit status. 15 U.S.C. 44 (1982)." After discussing why the acquisition in question was not covered by the stock acquisition clause of Section 7, the district court stated: "Section 7's [assets acquisition] clause does not apply to the transaction either, because defendants are not subject to the FTC's jurisdiction." The court's opinion does not reveal whether it considered and rejected the argument that Section 11 might provide an independent basis for the FTC's jurisdiction over the nonprofit hospital assets acquisition. *See United States v. Carilion Health Sys.,* No. 88-0249-R, slip op. at 4, 6 (W.D. Va. Sept. 30, 1988) (memorandum opinion granting defendants' motion to dismiss as to Section 7 of the Clayton Act).

we have no occasion to consider whether § 7 of the Clayton Act would apply to this merger." *Id.* at 62,516.

In assessing the contrasting analyses employed by the *Carilion* and *Rockford* courts on the assets acquisition issue, we find the *Rockford* decision more persuasive for three reasons. First, it is not apparent from the district court decision in *Carilion* that the court even considered the possibility that Section 11 of the Clayton Act might provide an independent basis for the FTC's jurisdiction to enforce Section 7. It is evident, however, from the Seventh Circuit's decision in *Rockford* that the appellate court analyzed this possibility as well as the argument accepted by the *Carilion* court that Section 7 of the Clayton Act refers to Section 4 of the FTC Act.

Second, on appeal, the Fourth Circuit declined to consider whether Section 7 of the Clayton Act would apply to the merger at issue in the *Carilion* case. Accordingly, even though the *Rockford* court's analysis of the assets acquisition issue is dictum, we find Judge Posner's thoughtful explication more persuasive than the conclusory findings of the district court in *Carilion*. Third, the Seventh Circuit had the benefit of the *Carilion* district court's decision (in addition to two briefs on **[34]** the assets acquisition issue). As such, the question of jurisdiction over acquisitions by nonprofit entities received the fullest airing to date in the Seventh Circuit forum.

IV. WHETHER THIS ACQUISITION WAS "TANTAMOUNT IN ITS EFFECTS TO A MERGER"

We have concluded that Section 7 of the Clayton Act covers assets acquisitions by nonprofit entities, even if we accept respondents' assertion that the Commission could not challenge the acquisition here if it were considered solely under the FTC Act.[56] Thus, we need not and do not address the second issue raised on appeal from the ALJ's initial decision of whether this acquisition was tantamount in its effects to a merger.

V. CONCLUSION

Upon a full review of the existing record, the initial decision and the arguments presented by complaint counsel and respondents, we have concluded that Section 7 of the Clayton Act reaches assets acquisitions by nonprofit hospitals. In our view, the plain language of the

[56] We reiterate that the issue of the FTC's jurisdiction under the FTC Act is not an issue in this case and we intimate no views in that regard.

Clayton Act compels that result. This conclusion is well buttressed by relevant legislative histories and case law. Further, unlike the situation that exists for the other four specified regulatory agencies denominated in Section 11 of the Clayton Act, assets acquisitions by not-for-profit corporations would be exempt from scrutiny by anyone under Section 7 of the Clayton Act if we adopted respondents' contentions to hold that nonprofit entities are not subject to the FTC's Clayton Act jurisdiction. Without divining any congressional intent to create such a chasm in antitrust enforcement, and for the other reasons set forth above, we think such a result was not intended by Congress in enacting and amending the Clayton Act.

For the reasons discussed above, we hereby reverse the Administrative Law Judge's initial decision and remand for further proceedings consistent with this opinion.

SEPARATE STATEMENT OF CHAIRMAN JANET D. STEIGER

I join in Commissioner Strenio's opinion. I am writing separately only to note that on July 26, 1991, after Commissioner Strenio departed from office, the United States Court of Appeals for the Eleventh Circuit issued its opinion in *FTC v. University Health, Inc.*, No. 91-8308 (11th Cir. July 26, 1991). The Court held, *inter alia*, that Section 7 of the Clayton Act reaches assets acquisitions by non-profit entities. The Court's May 6, 1991, order in that case is discussed at page 28 of the Commission's decision.