Findings, Opinions, and Orders

IN THE MATTER OF

BOZELL WORLDWIDE, INC.

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

Docket C-3845. Complaint, Jan. 4, 1999--Decision, Jan. 4, 1999

This consent order, among other things, prohibits Bozell Worldwide, Inc., the national advertising agency for Chrysler Corporation, from disseminating deceptive lease and/or credit advertising and requires the disclosure of cost information in advertisements mandated by the Consumer Leasing Act.

Participants

For the Commission: *Rolando Berrelez, Sally F. Pitofsky, David Medine,* and *Mark Hertzendorf.*

For the respondent: *Merton Simons,* Southfield, MI.

COMPLAINT

The Federal Trade Commission, having reason to believe that Bozell Worldwide, Inc., a corporation ("respondent" or "Bozell"), has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 45-58, as amended, and the Consumer Leasing Act, 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Bozell Worldwide, Inc. is a Delaware corporation with its principal office or place of business at 40 West 23rd Street, New York, New York.

2. Respondent, at all times relevant to this complaint, has provided advertising services to Chrysler Corporation ("Chrysler") and to dealer marketing groups that promote Chrysler and Jeep vehicles ("Chrysler vehicles"). Respondent has disseminated advertisements to the public that promote consumer leases, as the terms "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 CFR 213.2, as amended.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

4. Respondent has prepared and disseminated or has caused to be prepared and disseminated consumer lease advertisements ("lease advertisements") for Chrysler vehicles, including but not necessarily limited to the attached Bozell Exhibit A. Bozell Exhibit A is a television lease advertisement (attached in video and storyboard format). The advertisement contains the following statements:

A. [Video:][Footage of two cars, exterior and interior shots]

"Sebring JX Convertible
$299/mo. 30 mos."

[The advertisement contains the following disclosure at the bottom of the screen in white fine print superimposed on a black background for approximately 3 seconds:

"$1,619 Due at signing (plus tax, title & license) Limited model shown, higher. Call 1-888-CHRYSLER for lease example details."

[Audio:] "Some decisions are harder than others. The Chrysler Sebring LXI Coupe or the Sebring Limited Convertible. For the passionate side. Fully independent suspension, speed sensitive steering, multi-valve V6, and a luxurious leather-trimmed interior. The practical side -- lease the convertible for just two ninety-nine a month and on the coupe get one thousand cash back and luxurious leather at no extra charge. Some decisions are easier than others. Chrysler -- engineered to be great cars."
[Super:] "$1000 Cash Back
Chrysler Sebring Coupe"
[Chrysler logo]

ENGINEERED TO BE GREAT CARS" (Bozell Exhibit A).

FEDERAL TRADE COMMISSION ACT VIOLATIONS
COUNT I: FAILURE TO DISCLOSE ADEQUATELY IN LEASE ADVERTISING

5. In lease advertisements, including but not necessarily limited to Bozell Exhibit A, respondent has represented, expressly or by implication, that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount. These advertisements do not adequately disclose additional terms pertaining to the lease offer, such as the total amount of any payments due at

lease inception. The existence of these additional terms would be material to consumers in deciding whether to lease a Chrysler vehicle. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

6. Respondent knew or should have known that the failure to disclose adequately material terms as set forth in paragraph five was, and is, deceptive.

7. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II: MISREPRESENTATION OF MODEL AVAILABILITY

8. In lease advertisements, including but not necessarily limited to Bozell Exhibit A, respondent has represented, expressly or by implication, that consumers can lease the Chrysler vehicles featured in respondent's advertisements at the lease terms prominently stated in the advertisements.

9. In truth and in fact, consumers cannot lease the Chrysler vehicles featured in the advertisements at the terms prominently stated in the advertisements. The prominently stated lease terms in respondent’s advertisements apply to Chrysler models of lesser value than the Chrysler vehicles featured in the advertisements. The fine print disclosures in respondent’s lease advertisements, including but not necessarily limited to "Limited model shown, higher" in Bozell Exhibit A, are inadequate to disclaim or modify the representation as alleged in paragraph eight. Therefore, respondent's representation as alleged in paragraph eight, was, and is, false or misleading.

10. Respondent knew or should have known that the representation set forth in paragraph eight was, and is, false and misleading.

11. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT III: CONSUMER LEASING ACT AND REGULATION M VIOLATIONS

12. Respondent's lease advertisements, including but not necessarily limited to Bozell Exhibit A, state a monthly payment amount but fail to disclose clearly and conspicuously certain additional terms required by the Consumer Leasing Act and

Regulation M, including one or more of the following terms: that the transaction advertised is a lease; the total amount due prior to or at consummation or by delivery, if delivery occurs after consummation, and that such amount: 1) excludes third-party fees, such as taxes, licenses, and registration fees, and discloses that fact or 2) includes third-party fees based on a particular state or locality and discloses that fact and the fact that such fees may vary by state or locality are disclosed; whether or not a security deposit is required; and the number, amount, and timing of scheduled payments.

13. The lease disclosures in respondent's television lease advertisements, including but not necessarily limited to Bozell Exhibit A, are not clear and conspicuous because they appear on the screen in very small type, for a very short duration, and/or accompanied by background sounds and images.

14. Respondent's practices violate Section 184 of the Consumer Leasing Act, 15 U.S.C. 1667c, as amended, and Section 213.7 of Regulation M, 12 CFR 213.7, as amended.

BOZELL EXHIBIT A

[Audio:] "Some decisions are harder than others. The Chrysler Sebring LXI Coupe or the Sebring Limited Convertible. For the passionate side. Fully independent suspension, speed sensitive steering, multi-valve V6, and a luxurious leather-trimmed interior. The practical side -- lease the convertible for just two ninety-nine a month and on the coupe get a thousand cash back and luxurious leather at no extra charge. Some decisions are easier than others. Chrysler -- engineered to be great cars."

[Video:] [Footage of two cars, exterior and interior shots]
[Super: white letters on black background]
"Sebring JX Convertible
$299/mo. 30 mos."
[The advertisement contains the following disclosure at the bottom of the screen in white fine print superimposed on a black background for approximately 3 seconds: "$1,619 Due at signing (plus tax, title & license) Limited model shown, higher. Call 1-888-CHRYSLER for lease example details."]
[Footage of two cars]
[Super:]
"$1000 Cash Back
Chrysler Sebring Coupe"
"CHRYSLER
[Chrysler logo]
ENGINEERED TO BE GREAT CARS"

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 the respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, 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 the respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that 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, 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:

l. Respondent Bozell Worldwide, Inc. is a Delaware corporation with its principal office or place of business at 40 West 23rd Street, New York, 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

DEFINITIONS

1. "*Clearly and conspicuously*" as used herein shall mean: 1) video or written disclosures must be made in a manner that is readable and understandable to a reasonable consumer and 2) audio or oral disclosures must be made in a manner that is audible and understandable to a reasonable consumer.

2. "*Total amount due at lease signing or delivery*" as used herein shall mean the total amount of any initial payments required to be paid by the lessee on or before consummation of the lease or delivery of the vehicle, whichever is later, as required by Regulation M, 12 CFR 213, as amended. The total amount due at lease signing or delivery may: 1) exclude third-party fees, such as taxes, licenses, and registration fees, and disclose that fact, or 2) provide a total that includes third-party fees based on a particular state or locality as long as that fact and the fact that such fees may vary by state or locality are disclosed. (Section 213.7 of Regulation M, 12 CFR 213.7, as amended.)

3. Unless otherwise specified, "*respondent*" as used herein shall mean Bozell Worldwide, Inc., its successors and assigns, and its officers, agents, representatives, and employees.

4. "*Commerce*" as used herein shall mean as defined in Section 4 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly, any consumer lease involving motor vehicles in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 CFR 213.2, as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the vehicle model(s) available to consumers in connection with any advertised lease offer;

B. Misrepresent the total amount due at lease signing or delivery, the amount down, and/or the downpayment, capitalized cost reduction, or other amount that reduces the capitalized cost of the vehicle (or that no such amount is required);

C. Make any reference to any charge that is part of the total amount due at lease signing or delivery or that no such charge is required, not including a statement of the periodic payment, more prominently than the disclosure of the total amount due at lease signing or delivery;

D. State the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously all of the terms required by Regulation M, as follows:

1. That the transaction advertised is a lease;
2. The total amount due at lease signing or delivery;
3. Whether or not a security deposit is required;
4. The number, amount, and timing of scheduled payments; and
5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

(Section 184(a) of the Consumer Leasing Act ("CLA"), 15 U.S.C. 1667c(a), as amended, and Section 213.7 of Regulation M, 12 CFR 213.7, as amended.)

For radio advertisements, respondent may also comply with the requirements of this subparagraph by utilizing Section 184(c) of the CLA, 15 U.S.C. 1667c(C), and Section 213.7(f) of Regulation M, 12 CFR 213.7(f), as amended. For television advertisements, respondent may also comply with the requirements of this subparagraph by utilizing Section 213.7(f) of Regulation M, as amended.

II.

It is further ordered, That respondent Bozell Worldwide, Inc., and its successors and assigns, shall, for five (5) years after the date of service of this order, maintain and upon request make available to the Commission for inspection and copying all records that will demonstrate compliance with the requirements of this order.

III.

It is further ordered, That respondent Bozell Worldwide, Inc., and its successors and assigns, shall:

A. Within thirty (30) days after the date of service of this order, distribute a copy of this order to all current principals, officers, directors, managers, employees, agents, and representatives having responsibilities involving motor vehicle lease advertising; and

B. For a period of ten (10) years from the date of service of this order, distribute a copy of this order to all future principals, officers, directors, managers, employees, agents, and representatives having responsibilities involving motor vehicle lease advertising, within thirty (30) days after the person or entity assumes such position or responsibilities.

IV.

It is further ordered, That respondent Bozell Worldwide, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not necessarily limited to dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent Bozell Worldwide, Inc., and its successors and assigns, shall within one hundred and twenty (120) days after the date of service of this order, and at such other times as the Federal Trade 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.

VI.

This order will terminate on January 4, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;
B. This order's application to any respondent that is not named as a defendant in such complaint; and
C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

MARTIN ADVERTISING, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE CONSUMER LEASING ACT, TRUTH IN LENDING ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3846. Complaint, Jan. 4, 1999--Decision, Jan. 4, 1999

This consent order, among other things, prohibits Martin Advertising, Inc., a regional advertising agency for General Motors' dealerships and associations, from disseminating deceptive lease and/or credit advertising and requires the disclosure of cost information in advertisements mandated by the Consumer Leasing Act and/or the Truth in Lending Act.

Participants

For the Commission: *Rolando Berrelez, Sally F. Pitofsky, David Medine,* and *Mark Hertzendorf.*

For the respondent: *Jonathan Waller, Campbell & Waller,* Birmingham, AL.

COMPLAINT

The Federal Trade Commission, having reason to believe that Martin Advertising, Inc., a corporation ("respondent" or "Martin"), has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, as amended, and the Truth in Lending Act, 15 U.S.C. 1601-1667, as amended, and its implementing Regulation Z, 12 CFR 226, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Martin Advertising, Inc. is a Delaware corporation with its principal office or place of business at 2801 University Boulevard, Suite 200, Birmingham, Alabama.

2. Respondent, at all times relevant to this complaint, has provided advertising services to automobile dealers and dealer marketing groups, including but not limited to dealer marketing groups that promote General Motors Corporation ("GM") vehicles. Respondent has disseminated advertisements to the public that promote consumer leases, as the terms "advertisement" and

"consumer lease" are defined in Section 213.2 of Regulation M, 12 CFR 213.2, as amended.

3. Respondent has disseminated advertisements to the public that promote credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms "advertisement," "credit sale," and "consumer credit" are defined in Section 226.2 of Regulation Z, 12 CFR 226.2, as amended.

4. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

FEDERAL TRADE COMMISSION ACT VIOLATIONS
LEASE ADVERTISING

5. Respondent has prepared and disseminated or has caused to be prepared and disseminated consumer lease advertisements for motor vehicles, including but not necessarily limited to the attached Martin Exhibits A through D. Exhibits A and B are representative examples of respondent's radio advertisements and are attached hereto in storyboard format. Exhibits C and D are representative examples of respondent's television advertisements and are attached hereto in video and storyboard format.

A. [Audio:] "Lincolns, Mercurys, Jeeps, Eagles, or Hyundais just 96 cents over factory invoice! It's Capital Motor Company's 96-hour countdown. Now through Monday buy any new Lincoln, Mercury, Jeep, Eagle, or Hyundai in stock and pay just 96 cents over factory invoice. Capital is out to break all sales records. Cash in with up to $2,000 cash back, discounts up to $5,500 and financing as low as 1.9%. Plus, act now and drive away in a new '97 Jeep Grand Cherokee for just 3-29 a month. Now is the best time to save on every new car in stock at Capital Motor Company. Everything must go - nothing will be held back. Plus, Capital guarantees to have the best price on any new car or they'll pay you $1,000 cash. Don't let time run out - take advantage of huge year-end savings during the 96 Hour Capital Countdown - only at Capital Motor Company - home of the $1,000 price guarantee. See our ad in Saturday's Tallahassee Democrat for details." (Martin Exhibit A).

B. [Audio:] "Choose the way you want to save this holiday season at Mid South Nissan. See Mid South Nissan before the New Year and drive a loaded '97 Nissan pickup for only 99 dollars a month with zero down payment! You get air, stereo cassette, alloy wheels, chrome package, sliding rear window and more. Drive it for 99 dollars a month with zero down! Or buy the same loaded '97 Nissan pickup for only 10-8-88. That's a total savings of over 4500 dollars. Plus when you buy, Mid South Nissan writes you a check for 1000 dollars. One thousand dollars

holiday cash to use any way you choose. A fun new '97 pickup, thousands in savings, plus a thousand bucks. Choose the way you want to save this holiday at Mid South Nissan. Drive a new '97 Nissan pickup for 99 dollars a month with zero down. Or buy it for just 10-8-88 and get 1000 dollars holiday cash. Hurry to Mid South Nissan, 966 South Gloster, Tupelo."

[The following disclosure is rapidly stated at the end of the advertisement, over background sound: "Sale prices plus tax, tag, and fees. 24 month lease with approved credit. Acquisition fee, security deposit and first month's payment at inception. See dealer for details."] (Martin Exhibit B).

C. [Audio:] "Premier Pontiac Nissan's Final Four Year-end clearance! You'll score big on every car in stock, get financing as low as 3.9%, and no payments up to 6 months... Plus, drive away in a '97 Nissan pick-up for just $99 a month or Altima for just 1-29 a month."

[Video:] "FINANCING AS LOW AS 3.9%*
NO PAYMENT UP TO 6 MONTHS
97 VTP NISSAN PICK-UP
$99 A MONTH**
97 NISSAN ALTIMA
$129 A MONTH***"

[The advertisement contains the following disclosure at the bottom of the screen in light-colored fine print superimposed on moving background:

"*You must take retail delivery from dealer stock by 1/2/97. Dealer financial participation may affect consumer cost. Length of finance contract is limited. See dealer for details.

**36-month NMAC lease. Stock #8501; MSRP $13,868. Sale price $11,525. Residual $9,085.12. 36 payments of $99.43 with $1675 cash or trade plus tax, title, tag and security deposit. See dealer for details.

***36-month NMAC lease. Stock #8328; MSRP $20,597. Sale price $18,095. Residual $13,799.99. 36 payments of $129.15 with $1,999 cash or trade plus tax, title, tag and security deposit. See dealer for details."]

(Martin Exhibit C).

D. [Audio] "Right now drive a new '97 GMC Sierra extended cab 4 by 4 for only 2-89 a month. Or how about a new '97 Pontiac Sunfire for just 1-99 a month."

[Video:] "'97 GMC SIERRA EXTENDED CAB 4X4
$289 MONTH/36 MONTH LEASE*
$2200 CASH OR TRADE DOWN
4 SPEED AUTOMATIC
CAST ALUMINUM WHEELS"
"'97 PONTIAC SUNFIRE
$199 MONTH/48 MONTH LEASE**
$1500 CASH OR TRADE DOWN"

[The advertisement contains the following lease disclosure at the bottom of the screen in light-colored fine print superimposed on moving background:

"* 289 per month/36 month lease. $2200 cash or trade down payment. $2789 due at lease signing (first's month payment of $289, $300 refundable security deposit plus downpayment). Customer has option to purchase vehicle at lease end. See dealer for details.

**$199 per month/48 month lease. $1500 cash or trade down payment. $1899 due at lease signing (first month's payment of $199, $200 refundable security deposit plus down payment). Customer has option to purchase vehicle at lease end. See dealer for details."]

(Martin Exhibit D).

FEDERAL TRADE COMMISSION ACT VIOLATIONS
COUNT I: MISREPRESENTATION OF ADVERTISED TRANSACTION

6. In lease advertisements, including but not necessarily limited to Martin Exhibits A through C, respondent has represented, expressly or by implication, that consumers can purchase the advertised vehicles by financing the vehicles through credit for the monthly payment amounts prominently stated in the advertisements.

7. In truth and in fact, consumers cannot purchase the advertised vehicles by financing the vehicles through credit at the monthly payment prominently amounts stated in the advertisements. Each monthly payment amount prominently stated in Martin Exhibits A through C is a component of a lease offer and not a credit offer. Therefore, respondent's representation as alleged in paragraph six was, and is, false or misleading.

8. Respondent knew or should have known that the representation set forth in paragraph six was, and is, false and misleading.

9. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II: MISREPRESENTATION OF INCEPTION FEES

10. In lease advertisements, including but not necessarily limited to Martin Exhibits B and D, respondent has represented, expressly or by implication, that the amount stated as "down" or "cash or trade down" in respondent's lease advertisements is the total amount consumers must pay at lease inception to lease the advertised vehicles.

11. In truth and in fact, the amount stated as "down" or "cash or trade down" in respondent's lease advertisements is not the total amount consumers must pay at lease inception to lease the advertised vehicles. Consumers must also pay additional fees beyond the amount stated as "down" or "cash or trade down," such as the first month's payment, security deposit, and acquisition fee at lease inception.

Therefore, respondent's representation as alleged in paragraph ten was, and is, false or misleading.

12. Respondent knew or should have known that the representation set forth in paragraph ten was, and is, false and misleading.

13. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT III: FAILURE TO DISCLOSE ADEQUATELY THAT TRANSACTION ADVERTISED IS A LEASE

14. In lease advertisements, including but not necessarily limited to Exhibits A through C, respondent has represented, expressly or by implication, that consumers can purchase the advertised vehicles for the monthly payment amounts prominently stated in the advertisements. These advertisements do not adequately disclose that each advertised monthly payment amount is a component of a lease offer.

15. The existence of this additional information would be material to consumers in deciding whether to visit the dealership named in the advertisement and/or whether to lease or purchase an automobile from the dealership. The failure to disclose adequately this additional information, in light of the representation made, was, and is, a deceptive practice.

16. Respondent knew or should have known that the failure to disclose adequately that the advertised monthly payment amount was a component of a lease offer as set forth in paragraph fourteen was, and is, deceptive.

17. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT IV: FAILURE TO DISCLOSE ADEQUATELY INCEPTION FEES

18. In its lease advertisements, including but not limited to Martin Exhibits A - D, respondent has represented, expressly or by implication, that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or amount stated as "down." These lease advertisements do not adequately disclose additional terms pertaining to the lease offer, including but not necessarily limited to one or more of the following charges: a

required security deposit, first month's payment, and/or acquisition fee.

19. These additional terms would be material to consumers in deciding whether to visit a dealership named in respondent's advertisement and/or whether to lease an automobile from the dealership. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

20. Respondent knew or should have known that the failure to disclose adequately material terms as set forth in paragraph eighteen was, and is, deceptive.

21. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT V: CONSUMER LEASING ACT AND REGULATION M VIOLATIONS

22. Respondent's lease advertisements, including but not necessarily limited to Martin Exhibits A through D, state a monthly payment amount, the number of required payments, and/or an amount "down." Respondent's advertisements omit or fail to clearly and conspicuously disclose certain additional terms required by the Consumer Leasing Act and Regulation M, including one or more of the following terms: that the transaction advertised is a lease; the total amount of any payments such as a capitalized cost reduction required at lease inception; that a security deposit is required; and the number, amount, and timing of scheduled payments.

23. Respondent's practices violate Section 184 of the Consumer Leasing Act, 15 U.S.C. 1667c, as amended, and Section 213.7 of Regulation M, 12 CFR 213.7, as amended.

CREDIT ADVERTISING

24. Respondent has prepared and disseminated or has caused to be prepared and disseminated credit sale advertisements ("credit advertisements") for motor vehicles, including but not necessarily limited to the attached Martin Exhibits A, C, and E. Martin Exhibit E, a television credit advertisement (attached in video and storyboard format), contains the following statements:

[Audio:][Announcer]: "Then we told them that Jimmy was only $299 a month with a GMAC SmartBuy. [Consumer #6:] $299 a month? [Consumer #7:] $299 a month -- that's great. [Consumer #8:] A Jimmy like this for $299 a month would be fantastic."
[Video:]"$299 a month 36-month GMAC SmartBuy"
[The advertisement contains the following credit disclosure in white print superimposed on a light-colored background and accompanied by background sound and images: "Example based on Jimmy MSRP of $20,498. 6.9% APR GMAC SMARTBUY FINANCING. For 36 months, 35 months at $299.38 per month and final payment of $9441.94. $3350 down, actual down payment may vary. Tax, license, title fees and insurance extra. Purchaser may refinance the final payment, or with 30 days advance written notice sell the vehicle to GMAC at end of term and pay $250 disposal fee plus any excess mileage and wear charges. Dealer financial participation may affect consumer cost. See your participating dealer for qualification details. You must take retail delivery out of dealer stock by 9/22/93."] (Martin Exhibit E).

FEDERAL TRADE COMMISSION ACT VIOLATIONS
COUNT VI: MISREPRESENTATION IN CREDIT ADVERTISING

25. In credit advertisements, including but not necessarily limited to Martin Exhibit E, respondent has represented, expressly or by implication, that consumers can buy the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount.

26. In truth and in fact, consumers cannot buy the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount. Consumers are also responsible for a final balloon payment of several thousand dollars to purchase the advertised vehicles. Therefore, respondent's representation as alleged in paragraph twenty-five was, and is, false or misleading.

27. Respondent knew or should have known that the representation set forth in paragraph twenty-five was, and is, false and misleading.

28. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT VII: FAILURE TO DISCLOSE ADEQUATELY
IN CREDIT ADVERTISING

29. In credit advertisements, including but not necessarily limited to Martin Exhibit E, respondent has represented, expressly or by

implication, that consumers can buy the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount and/or number of required monthly payments. These advertisements do not adequately disclose additional terms pertaining to the credit offer, including but not necessarily limited to a final balloon payment of several thousand dollars, the amount of the downpayment, and the annual percentage rate. The existence of these additional terms would be material to consumers in deciding whether to buy the advertised vehicle. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

30. Respondent knew or should have known that the failure to disclose adequately material terms as set forth in paragraph twenty-nine was, and is, deceptive.

31. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

TRUTH IN LENDING ACT AND REGULATION Z VIOLATIONS
COUNT VIII: FAILURE TO STATE RATE OF FINANCE CHARGE AS ANNUAL PERCENTAGE RATE

32. In credit advertisements, including but not necessarily limited to Martin Exhibits A and C, respondent has stated a rate of finance charge without stating that rate as an "annual percentage rate," using that term or the abbreviation "APR."

33. Respondent's aforesaid practice constitutes a violation of Section 144 and 107 of the TILA, 15 U.S.C. 1664 and 1606, respectively, and Sections 226.24(b) and 226.22 of Regulation Z, 12 CFR 226.24(b) and 226.22, respectively.

COUNT IX: FAILURE TO DISCLOSE REQUIRED INFORMATION CLEARLY AND CONSPICUOUSLY

34. In credit advertisements, including but not necessarily limited to Martin Exhibit E, respondent has stated a rate of finance charge, monthly payment amount, and/or an amount "down" as terms for financing the purchase of the advertised vehicles.

35. These credit advertisements have omitted or failed to disclose clearly and conspicuously all of the terms required by Regulation Z, as follows: the amount or percentage of the downpayment, the terms

of repayment, and the annual percentage rate, using that term or the abbreviation "APR."

36. Respondent's aforesaid practice violates Section 144 of the Truth in Lending Act, 15 U.S.C. 1664, as amended, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c), as amended.

EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBIT D

EXHIBIT E

EXHIBIT E

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 the respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, 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 the respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that 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, 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 Martin Advertising, Inc. is a Delaware corporation with its principal office or place of business at 2801 University Boulevard, Suite 200, Birmingham, Alabama.

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

1. "*Clearly and conspicuously*" as used herein shall mean: 1) video or written disclosures must be made in a manner that is readable and understandable to a reasonable consumer and 2) audio

or oral disclosures must be made in a manner that is audible and understandable to a reasonable consumer.

2. "*Total amount due at lease signing or delivery*" as used herein shall mean the total amount of any initial payments required to be paid by the lessee on or before consummation of the lease or delivery of the vehicle, whichever is later, as required by Regulation M, 12 CFR 213, as amended. The total amount due at lease signing or delivery may: 1) exclude third-party fees, such as taxes, licenses, and registration fees, and disclose that fact, or 2) provide a total that includes third-party fees based on a particular state or locality as long as that fact and the fact that such fees may vary by state or locality are disclosed. (Sections 213.2 and 213.7 of Regulation M, 12 CFR 213.2 and 213.7, as amended.)

3. "*Balloon payment*" as used herein shall mean any scheduled payment with respect to a consumer credit transaction that is at least twice as large as the average of earlier scheduled payments.

4. Unless otherwise specified, "*respondent*" as used herein shall mean Martin Advertising, Inc., its successors and assigns, and its officers, agents, representatives, and employees.

5. "*Commerce*" as used herein shall mean as defined in Section 4 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly, any consumer lease involving motor vehicles in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 CFR 213.2, as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent that any advertised lease terms, including but not limited to a monthly payment amount or downpayment, pertain to a cash or credit offer;

B. Misrepresent the total amount due at lease signing or delivery, the amount down, and/or the downpayment, capitalized cost reduction, or other amount that reduces the capitalized cost of the vehicle (or that no such amount is required);

C. Make any reference to any charge that is part of the total amount due at lease signing or delivery or that no such charge is

required, not including a statement of the periodic payment, more prominently than the disclosure of the total amount due at lease signing or delivery;

D. State the amount of any payment or any capitalized cost reduction or other payment required prior to or at consummation or delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously all of the terms required by Regulation M, as follows:

1. That the transaction advertised is a lease;
2. The total amount due at lease signing or delivery;
3. Whether or not a security deposit is required;
4. The number, amount, and timing of scheduled payments; and
5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

(Section 184(a) of the Consumer Leasing Act ("CLA"), 15 U.S.C. 1667c(a),as amended, and Section 213.7 of Regulation M, 12 CFR 213.7, as amended.)

For radio advertisements, respondent may also comply with the requirements of this subparagraph by utilizing Section 184(c) of the CLA, 15 U.S.C. 1667c(C), and Section 213.7(f) of Regulation M, 12 CFR 213.7(f), as amended. For television advertisements, respondent may also comply with the requirements of this subparagraph by utilizing Section 213.7(f) of Regulation M, as amended; and

E. Fail to comply in any other respect with Section 184 of the CLA and Section 213.7 of Regulation M.

(CLA, 15 U.S.C. 1667-1667e, as amended, and Regulation M, 12 CFR 213, as amended).

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly, any extension of closed-end credit involving motor vehicles in or affecting commerce, as "advertisement" and "closed-end credit" are defined in Section 226.2 of Regulation Z, 12 CFR

226.2, as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the existence and amount of any balloon payment or the annual percentage rate;

B. State the amount of any payment, including but not limited to any monthly payment, in any advertisement unless the amount of any balloon payment is disclosed prominently and in close proximity to the most prominent of the above statements;

C. State a rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR," using that term;

D. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Regulation Z, as follows:

1. The amount or percentage of the downpayment;

2. The terms of repayment, including but not limited to the amount of any balloon payment; and

3. The correct annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

(Sections 107 and 144(d) of the TILA, 15 U.S.C. 1606 and 1664(d), as amended, and Sections 226.22 and 226.24(c) of Regulation Z, 12 CFR 226.22 and 226.24(c), as amended.); and

E. Fail to comply in any other respect with Section 144 of the TILA and Section 226.24 of Regulation Z.

(TILA, 15 U.S.C. 1601-1667, as amended, and Regulation Z, 12 CFR 226, as amended).

III.

It is further ordered, That respondent Martin Advertising, Inc., and its successors and assigns, shall, for five (5) years after the date of service of this order, maintain and upon request make available to the Commission for inspection and copying all records that will demonstrate compliance with the requirements of this order.

IV.

It is further ordered, That respondent Martin Advertising, Inc., and its successors and assigns, shall:

A. Within thirty (30) days after the date of service of this order, distribute a copy of this order to all current principals, officers, directors, managers, employees, agents, and representatives having responsibilities involving motor vehicle lease and/or motor vehicle closed-end credit advertising; and

B. For a period of ten (10) years from the date of service of this order, distribute a copy of this order to all future principals, officers, directors, managers, employees, agents, and representatives having responsibilities involving motor vehicle lease and/or motor vehicle closed-end credit advertising, within thirty (30) days after the person or entity assumes such position or responsibilities.

V.

It is further ordered, That respondent Martin Advertising, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not necessarily limited to dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VI.

It is further ordered, That respondent Martin Advertising, Inc., and its successors and assigns, shall within one hundred and twenty (120) days after the date of service of this order, and at such other times as the Federal Trade 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.

VII.

This order will terminate on January 4, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;
B. This order's application to any respondent that is not named as a defendant in such complaint; and
C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

CHRYSLER CORPORATION

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

Docket C-3847. Complaint, Jan. 4, 1999--Decision, Jan. 4, 1999

This consent order, among other things, prohibits Chrysler Corporation from disseminating deceptive lease advertising and requires the disclosure of cost information in advertisements mandated by the Consumer Leasing Act.

Participants

For the Commission: *Rolando Berrelez, Sally F. Pitofsky, David Medine,* and *Mark Hertzendorf.*

For the respondent: *Judith Shumaker-Holland,* in-house counsel, Auburn Hills, MI.

COMPLAINT

The Federal Trade Commission, having reason to believe that Chrysler Corporation, a corporation ("respondent" or "Chrysler"), has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 45-58, as amended, and the Consumer Leasing Act, 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Chrysler Corporation is a Delaware corporation with its principal office or place of business at 1000 Chrysler Drive, Auburn Hills, Michigan. Respondent offers Chrysler, Jeep, Plymouth, Dodge, and Eagle brand vehicles (hereinafter collectively referred to as "Chrysler vehicles") for sale or lease to consumers.

2. Respondent has disseminated advertisements to the public that promote consumer leases, as the terms "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 CFR 213.2, as amended.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

4. Respondent has disseminated or has caused to be disseminated consumer lease advertisements ("lease advertisements") for

Chrysler vehicles, including but not necessarily limited to the attached Chrysler Exhibit A. Chrysler Exhibit A is a television lease advertisement (attached in video and storyboard format). The advertisement contains the following statements:

A. [Video:][Footage of two cars, exterior and interior shots]
"Sebring JX Convertible
$299/mo. 30 mos."
[The advertisement contains the following disclosure at the bottom of the screen in white fine print superimposed on a black background for approximately 3 seconds:
"$1,619 Due at signing (plus tax, title & license) Limited model shown, higher.
Call 1-888-CHRYSLER for lease example details."
[Audio:] "Some decisions are harder than others. The Chrysler Sebring LXI Coupe or the Sebring Limited Convertible. For the passionate side. Fully independent suspension, speed sensitive steering, multi-valve V6, and a luxurious leather-trimmed interior. The practical side -- lease the convertible for just two ninety-nine a month and on the coupe get one thousand cash back and luxurious leather at no extra charge. Some decisions are easier than others. Chrysler -- engineered to be great cars."
[Super:] "$1000 Cash Back
Chrysler Sebring Coupe"
[Chrysler logo]
ENGINEERED TO BE GREAT CARS" (Chrysler Exhibit A).

FEDERAL TRADE COMMISSION ACT VIOLATIONS
COUNT I: FAILURE TO DISCLOSE ADEQUATELY IN LEASE ADVERTISING

5. In lease advertisements, including but not necessarily limited to Chrysler Exhibit A, respondent has represented, expressly or by implication, that consumers can lease the advertised vehicles at the terms prominently stated in the advertisements, including but not necessarily limited to the monthly payment amount. These advertisements do not adequately disclose additional terms pertaining to the lease offer, such as the total amount of any payments due at lease inception. The existence of these additional terms would be material to consumers in deciding whether to lease a Chrysler vehicle. The failure to disclose adequately these additional terms, in light of the representation made, was, and is, a deceptive practice.

6. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II: MISREPRESENTATION OF MODEL AVAILABILITY

7. In lease advertisements, including but not necessarily limited to Chrysler Exhibit A, respondent has represented, expressly or by implication, that consumers can lease the Chrysler vehicles featured in respondent's advertisements at the lease terms prominently stated in the advertisements.

8. In truth and in fact, consumers cannot lease the Chrysler vehicles featured in the advertisements at the terms prominently stated in the advertisements. The prominently stated lease terms in respondent's advertisements apply to Chrysler models of lesser value than the Chrysler vehicles featured in the advertisements. The fine print disclosures in respondent's lease advertisements, including but not necessarily limited to "Limited model shown, higher" in Chrysler Exhibit A, are inadequate to disclaim or modify the representation as alleged in paragraph seven. Therefore, respondent's representation as alleged in paragraph seven, was, and is, false or misleading.

9. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT III: CONSUMER LEASING ACT AND REGULATION M VIOLATIONS

10. Respondent's lease advertisements, including but not necessarily limited to Chrysler Exhibit A, state a monthly payment amount but fail to disclose clearly and conspicuously certain additional terms required by the Consumer Leasing Act and Regulation M, including one or more of the following terms: that the transaction advertised is a lease; the total amount due prior to or at consummation or by delivery, if delivery occurs after consummation, and that such amount: 1) excludes third-party fees, such as taxes, licenses, and registration fees, and discloses that fact or 2) includes third-party fees based on a particular state or locality and discloses that fact and the fact that such fees may vary by state or locality are disclosed; whether or not a security deposit is required; and the number, amount, and timing of scheduled payments.

11. The lease disclosures in respondent's television lease advertisements, including but not necessarily limited to Chrysler Exhibit A, are not clear and conspicuous because they appear on the

screen in very small type, for a very short duration, and/or accompanied by background sounds and images.

12. Respondent's practices violate Section 184 of the Consumer Leasing Act, 15 U.S.C. 1667c, as amended, and Sections 213.2 and 213.7 of Regulation M, 12 CFR 213.2 and 213.7, as amended.

EXHIBIT A

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 the respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, 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 the respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that 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, 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 Chrysler Corporation is a Delaware corporation with its principal office or place of business at 1000 Chrysler Drive, Auburn Hills, Michigan.

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

1. "*Clearly and conspicuously*" as used herein shall mean: 1) video or written disclosures must be made in a manner that is

readable and understandable to a reasonable consumer and 2) audio or oral disclosures must be made in a manner that is audible and understandable to a reasonable consumer.

2. "*Total amount due at lease signing or delivery*" as used herein shall mean the total amount of any initial payments required to be paid by the lessee on or before consummation of the lease or delivery of the vehicle, whichever is later, as required by Regulation M, 12 CFR 213, as amended. The total amount due at lease signing or delivery may: 1) exclude third-party fees, such as taxes, licenses, and registration fees, and disclose that fact, or 2) provide a total that includes third-party fees based on a particular state or locality as long as that fact and the fact that such fees may vary by state or locality are disclosed. (Section 213.7 of Regulation M, 12 CFR 213.7, as amended.)

3. Unless otherwise specified, "*respondent*" as used herein shall mean Chrysler Corporation, its successors and assigns, and its officers, agents, representatives, and employees.

4. "*Commerce*" as used herein shall mean as defined in Section 4 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly, any consumer lease in or affecting commerce, as "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 CFR 213.2, as amended, shall not, in any manner, expressly or by implication:

A. Misrepresent the vehicle model(s) available to consumers in connection with any advertised lease offer;

B. Misrepresent the total amount due at lease signing or delivery, the amount down, and/or the downpayment, capitalized cost reduction, or other amount that reduces the capitalized cost of the vehicle (or that no such amount is required).

C. Make any reference to any charge that is part of the total amount due at lease signing or delivery or that no such charge is required, not including a statement of the periodic payment, more prominently than the disclosure of the total amount due at lease signing or delivery.

D. State the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously all of the terms required by Regulation M, as follows:

1. That the transaction advertised is a lease;
2. The total amount due at lease signing or delivery;
3. Whether or not a security deposit is required;
4. The number, amount, and timing of scheduled payments; and
5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle.

(Section 184(a) of the Consumer Leasing Act ("CLA"), 15 U.S.C. 1667c(a), as amended, and Section 213.7 of Regulation M, 12 CFR 213.7, as amended.)

For radio advertisements, respondent may also comply with the requirements of this subparagraph by utilizing Section 184(c) of the CLA, 15 U.S.C. 1667c(C), and Section 213.7(f) of Regulation M, 12 CFR 213.7(f), as amended. For television advertisements, respondent may also comply with the requirements of this subparagraph by utilizing Section 213.7(f) of Regulation M, as amended.

II.

It is further ordered, That respondent Chrysler Corporation, and its successors and assigns, shall, for five (5) years after the date of service of this order, maintain and upon request make available to the Commission for inspection and copying all records that will demonstrate compliance with the requirements of this order.

III.

It is further ordered, That respondent Chrysler Corporation, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of this order and to all advertising agencies; and shall secure from each such person or entity a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel or entities within thirty (30) days after the date of service of this order, and to such future

personnel or entities within thirty (30) days after the person or entity assumes such position or responsibilities.

IV.

It is further ordered, That respondent Chrysler Corporation, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not necessarily limited to dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent Chrysler Corporation, and its successors and assigns, shall within one hundred and twenty (120) days after the date of service of this order, and at such other times as the Federal Trade 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.

VI.

This order will terminate on January 4, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and
C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

THE MAY DEPARTMENT STORES COMPANY

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

Docket C-3848. Complaint, Jan. 20, 1999--Decision, Jan. 20, 1999

This consent order, among other things, prohibits the respondent, a consumer retail business, from: misrepresenting that reaffirmation agreements will be filed in bankruptcy court; misrepresenting that any reaffirmation agreement is legally binding on the consumer; or taking any action to collect any debt that has been legally discharged in bankruptcy proceedings and that respondent is not permitted by law to collect.

Participants

For the Commission: *John Dugan, Paul Block,* and *Andrew Caverly.*

For the respondent: *George Skelly, Skadden, Arps, Slate, Meagher & Flom,* Boston, MA.

COMPLAINT

The Federal Trade Commission, having reason to believe that The May Department Stores Company, a corporation, also doing business as Lord & Taylor, Hecht's, Strawbridge's, Foley's, Robinsons-May, Kaufmann's, Filene's, Famous Barr, L.S. Ayres, and Meier & Frank ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent The May Department Stores Company is a New York corporation with its principal office or place of business at 611 Olive Street, St. Louis, Missouri. Respondent is engaged in, among other things, the consumer retail business. In the course and conduct of its business, respondent has regularly extended credit for the purpose of facilitating consumers' purchase of respondent's products and services (hereinafter referred to as "consumer credit accounts").

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

THE UNITED STATES BANKRUPTCY CODE

3. Under the United States Bankruptcy Code (11 U.S.C. 1-1330), a debtor may be granted a discharge in a Chapter 7 bankruptcy proceeding from debts that have arisen prior to the filing of the bankruptcy petition (hereinafter referred to as "pre-petition debts"), meaning that the debtor is no longer individually liable for these debts. The granting of a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived. . . ." 11 U.S.C. 524(a)(2). The purpose of the injunction is to protect the debtor's "fresh start" by ensuring that no debt collection efforts are taken against the debtor personally for pre-petition debts.

4. The United States Bankruptcy Code provides, however, that a debtor may agree with a creditor that the creditor can enforce what would otherwise be a discharged debt. In other words, a debtor may reaffirm his or her pre-petition debts, as long as certain requirements are met. These so-called "reaffirmation agreements" are enforceable only if, among other things, the agreement is filed with the bankruptcy court. If the debtor is not represented by an attorney, the bankruptcy court must hold a hearing to determine that the reaffirmation agreement would not impose an undue hardship on the debtor and is in the best interest of the debtor, and must approve the reaffirmation agreement before it becomes enforceable. 11 U.S.C. 524(c) and (d).

5. If the requirements of 11 U.S.C. 524(c) and (d) are not met, an agreement to reaffirm a debt is not binding and a creditor violates the bankruptcy code if it attempts to collect that debt. 11 U.S.C. 524(a).

VIOLATIONS OF SECTION 5(a) OF THE FEDERAL TRADE COMMISSION ACT

6. From at least 1986 to 1997, respondent regularly induced consumers who had filed for protection under Chapter 7 of the United States Bankruptcy Code to enter into agreements reaffirming some or all of their pre-petition consumer credit account debts that would otherwise be discharged through bankruptcy proceedings.

7. In numerous instances, respondent represented, expressly or by implication, to consumers that their reaffirmation agreements

would be filed with the bankruptcy courts, as required by the United States Bankruptcy Code.

8. In truth and in fact, in many cases respondent did not intend to file, and in fact did not file, the reaffirmation agreements with the bankruptcy courts. Therefore, the representation made in paragraph seven was, and is, false or misleading.

9. In numerous instances, respondent represented, expressly or by implication, to consumers that their reaffirmation agreements were legally binding on the consumers and that the consumers were legally required to pay their pre-petition debts.

10. In truth and in fact, in many cases, the reaffirmation agreements were not legally binding on the consumers and the consumers were not legally required to pay their pre-petition debts for reasons including, but not necessarily limited to, the following: (a) respondent did not file the reaffirmation agreements with the bankruptcy courts; or (b) respondent filed the reaffirmation agreements, but the agreements were then not approved by the bankruptcy courts. Therefore, the representation made in paragraph nine was, and is, false or misleading.

11. In the course and conduct of its business, respondent regularly collected from consumers debts that had been legally discharged in bankruptcy proceedings and that respondent was not permitted by law to collect. Respondent's actions have caused or were likely to cause substantial injury to consumers that is not offset by any countervailing benefits and is not reasonably avoidable by these consumers. 15 U.S.C. 5(n). Therefore, respondent's collection of debts that it was not permitted by law to collect was, and is, unfair.

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

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint that the Boston Regional Office proposed to present to the Commission for its consideration and which, if

issued by the Commission, would charge the respondent with violations of the Federal Trade Commission Act; and

The respondent, its attorneys, 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 the respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent The May Department Stores Company is a New York corporation with its principal office or place of business at 611 Olive Street, St. Louis, Missouri.

2. The acts and practices of the respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. 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 following definitions shall apply:

1. Unless otherwise specified, "*respondent*" shall mean The May Department Stores Company, a corporation, its successors and assigns, and its officers, agents, representatives, and employees.

2. "*Debt*" shall mean any obligation or alleged obligation of a consumer to pay money arising out of any transaction.

3. "*Reaffirmation Agreement*" shall mean any agreement between a creditor and debtor in bankruptcy whereby a debt that is otherwise dischargeable with respect to the personal liability of the debtor is reaffirmed by the debtor.

4. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the collection of any debt, shall not:

A. Misrepresent, expressly or by implication, to consumers who have filed petitions for bankruptcy protection under the United States Bankruptcy Code that reaffirmation agreements will be filed in bankruptcy court;

B. Misrepresent, expressly or by implication, to consumers who have filed petitions for bankruptcy protection under the United States Bankruptcy Code that any reaffirmation agreement is legally binding on the consumer; or

C. Take any action to collect any debt (including any interest, fee, charge, or expense incidental to the principal obligation) that has been legally discharged in bankruptcy proceedings and that respondent is not permitted by law to collect.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, shall not make any material misrepresentation, expressly or by implication, in the collection of any debt subject to a pending bankruptcy proceeding.

III.

It is further ordered, That respondent The May Department Stores Company, and its successors and assigns, for five (5) years after the date of issuance of this order, shall maintain and upon request make available to the Federal Trade Commission business records demonstrating their compliance with the terms and provisions of this order, including but not limited to all reaffirmation agreements signed by consumers and records sufficient to show that such reaffirmation

agreements were filed in bankruptcy courts and were subsequently approved by bankruptcy courts as part of the underlying bankruptcy proceedings, if required by the United States Bankruptcy Code.

IV.

It is further ordered, That respondent The May Department Stores Company, and its successors and assigns, for five (5) years after the date of issuance of this order, shall deliver a copy of this order to all current and future principals, officers, directors, managerial employees, and bankruptcy court representatives having debt collection responsibilities with respect to the subject matter of this order (collectively, "bankruptcy personnel"), and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall, for five (5) years after each such statement acknowledging receipt of the order is signed and dated, maintain and upon request make available to the Federal Trade Commission for inspection and copying such statements. Respondent shall deliver this order to current bankruptcy personnel within thirty (30) days after the date of service of this order, and to future bankruptcy personnel within ninety (90) days after the person assumes such position or responsibilities.

V.

It is further ordered, That respondent The May Department Stores Company, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director,

Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VI.

It is further ordered, That respondent, and its successors and assigns, shall provide notification of all proposed settlement terms relating to allegations made by the Attorneys General of various states and any other currently pending legal actions by government entities not cited herein, and all currently pending class action lawsuits, against respondent or any of its predecessors or affiliates, that challenge conduct similar to that challenged by the Commission in this proceeding, to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, in writing, at least ten (10) days before any such proposed settlement is submitted to a court for final approval.

VII.

It is further ordered, That respondent The May Department Stores Company, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

VIII.

This order will terminate on January 20, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;
B. This order's application to any respondent that is not named as a defendant in such complaint; and
C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

R.J. REYNOLDS TOBACCO COMPANY

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

Docket 9285. Complaint, May 28, 1997–Final Order, Jan. 26, 1999

This final order, among other things, dismisses the complaint against the respondent, for its Joe Camel cigarette advertising campaign, on the grounds that the relief sought in the proceeding has now been achieved through a multistate tobacco settlement and revisions of the U.S. Dept. of Health and Human Services' data collection protocol.

Participants

For the Commission: *Rosemary Rosso, David Shonka, C. Lee Peeler, Gerard Butters, Joseph Mulholland, Russ Porter* and *Genevieve Fu.*

For the respondent: *Guy Blynn,* in-house counsel, Winston-Salem, N.C. and *Judith Oldham, Collier, Shannon, Rill & Scott,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that R.J. Reynolds Tobacco Company, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

1. Respondent R.J. Reynolds Tobacco Company is a New Jersey corporation, with its office and principal place of business located at 401 North Main Street, P.O.B. 2959, Winston-Salem, North Carolina.

2. Respondent has advertised, promoted, offered for sale, sold, and distributed cigarettes and other tobacco products.

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

4. Beginning sometime before 1987, Reynolds identified the need to attract "first usual brand" and/or "presmokers" and/or "learning" smokers to its brands in order to maintain or increase its market share. By 1984, some Reynolds employees recommended that the company establish a formal program to attract "first usual brand" smokers.

5. Beginning in or around 1987, respondent disseminated or caused to be disseminated advertisements and promotions for its Camel brand cigarettes, including, but not necessarily limited to, the attached Exhibits A through F. The ads and promotions have as their central theme a cartoon camel sometimes referred to as "Old Joe," "Smooth Character" or as "Joe Camel" (hereinafter "Joe Camel"), and other similar cartoon characters.

6. The purpose of the Joe Camel campaign was to reposition the Camel brand to make it attractive to younger smokers. At least one of the targets of the campaign was "first usual brand" smokers.

7. The Joe Camel campaign was successful in repositioning the Camel brand to make it attractive to younger smokers. In fact, the campaign was successful in appealing to many children and adolescents under the age of 18, or under the age at which cigarettes may lawfully be sold to consumers.

8. The Joe Camel campaign induced many of these children and adolescents under the age of 18 to smoke Camel cigarettes or increased the risk that they would do so. For many of these children and adolescents, the decision to smoke Camel cigarettes was a decision to begin smoking; for others, the decision to smoke Camel cigarettes was a decision to continue smoking. As a result, the Joe Camel campaign caused or was likely to have caused these children and adolescents to initiate or continue smoking cigarettes.

9. In fact, after the initiation of the Joe Camel campaign, the percentage of smokers under the age of 18 who smoked Camel cigarettes became larger than the percentage of all adult smokers aged 18 and older who smoked Camel cigarettes.

10. Reynolds knew or should have known:

a. That because of the themes and techniques it used in the Joe Camel advertising and promotional campaign, that campaign would have a substantial appeal to children and adolescents below the age of 18, as well as to smokers over the age of 18; or

b. That many smokers initiate smoking and become regular smokers before the age of 18, and that by targeting "first usual brand" and/or "presmokers" and/or "learning" smokers, the Joe Camel campaign would cause many children and adolescents below the age of 18 to smoke Camel cigarettes.

11. Consumers who smoke cigarettes risk addiction (*i.e.*, nicotine dependency) and a number of immediate and long term adverse health effects including, but not limited to, coronary heart disease, lung and laryngeal cancer, oral cancer, esophageal cancer, chronic obstructive pulmonary disease, and low-birth-weight babies.

12. Many children and adolescents do not adequately comprehend the nature of the risk or the seriousness of nicotine addiction, or the other dangerous health effects of smoking cigarettes.

13. R.J. Reynolds' actions, as set forth in paragraphs 4, 5, 7, 8, 9 and 10 have caused or were likely to cause substantial and ongoing injury to the health and safety of children and adolescents under the age of 18 that is not offset by any countervailing benefits and is not reasonably avoidable by these consumers.

14. Since at least 1988, most states and the District of Columbia have enacted laws that make it illegal to sell cigarettes to persons under the age of 18, in order to protect children and adolescents from the significant adverse consequences of cigarette smoking. In 1992, Congress passed a federal statute that provided that, as a condition of receiving grant funds for substance abuse programs, states must enact and enforce laws prohibiting the sale or distribution of tobacco products to persons under the age of 18.

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

Commissioner Azcuenaga and Commissioner Starek dissenting.

EXHIBIT A

EXHIBIT A

EXHIBIT A

EXHIBIT A

EXHIBIT B

EXHIBIT B

EXHIBIT B

EXHIBIT B

EXHIBIT B

EXHIBIT B

EXHIBIT B

EXHIBIT B

EXHIBIT B

EXHIBIT B

EXHIBIT B

EXHIBIT C

EXHIBIT C

EXHIBIT D

EXHIBIT E

EXHIBIT E

EXHIBIT F

EXHIBIT F

EXHIBIT F

EXHIBIT F

STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today, the Commission issues a complaint against R.J. Reynolds Tobacco Company ("Reynolds") alleging that Reynolds' "Joe Camel" advertising campaign constitutes an unfair act or practice in violation of Section 5 of the Federal Trade Commission Act. The actions alleged in the complaint are serious, and intuition suggests reason to believe they are true. Intuition alone, however, is not a sufficient basis for issuing a complaint under the statute. The Commission is an agency of limited jurisdiction and is authorized to bring a case only if certain elements of the law are satisfied.[1] Not having found reason to believe that the evidence supports each of those elements, I must dissent.[2]

The issues underlying the complaint issued today differ little from those considered by the Commission in its 1993-94 inquiry into the same advertising campaign.[3] That inquiry was closed by a majority vote of the Commission without law enforcement action. I have decided to take the unusual step of writing to explain my position on the current decision despite the adjudicative status of the case. I emphasize that although as a matter of law I am unable to vote to issue a complaint, I would be free at a later stage in the proceeding to find a violation of law if the record in the upcoming adjudication so demonstrates.

When the Commission voted in 1994 to close its investigation of Joe Camel, the Commission majority issued a Joint Statement (copy attached). The Commission said then, and it is equally true now:

> Although it may seem intuitive to some that the Joe Camel advertising campaign would lead more children to smoke or lead children to smoke more, the evidence to support that intuition is not there. Our responsibility as commissioners is not to make decisions based on intuition but to evaluate the evidence and determine whether there is reason to believe that a proposed respondent violated the law.

The Statement continued:

> If intuition and concern for children's health were a sufficient basis under the law for bringing a case, we have no doubt that a unanimous Commission would have

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[1] 15 U.S.C. 45(b) and (n).

[2] Unlike my colleague, Commissioner Starek, I would find that the case is in the public interest, but I concur in the first paragraph of his dissenting statement.

[3] File No. 932 3162.

taken that action long ago. The dispositive issue here, however, was whether the record showed a link between the Joe Camel advertising campaign and increased smoking among children, not whether smoking has an effect on children or whether the health of children is important.

Like my colleagues, I always am willing to revisit past decisions in light of new evidence, particularly if that evidence might provide a basis for Commission action to protect the health of children. In my view, the serious health issues concerning smoking by children mandate our utmost attention to any new information that might support a case against advertising that can be shown to cause or increase smoking among children.

I have carefully considered the totality of the available evidence, including new material that has been presented to the Commission, and have concluded that the new information does not strengthen the case the Commission rejected in 1994. As in 1994, the available evidence does not support the specific legal requirements of a complaint under Section 5 of the Federal Trade Commission Act.

ATTACHMENT

JOINT STATEMENT OF COMMISSIONERS MARY L. AZCUENAGA, DEBORAH K. OWEN, AND ROSCOE B. STAREK, III

Today, the Commission closes its investigation of the Joe Camel advertising campaign after voting not to issue a complaint. Although it is unusual to comment on our reasons for taking such action, we have decided to explain our decision in light of the statements of our dissenting colleagues and the widespread public interest the matter has generated.

Although it may seem intuitive to some that the Joe Camel advertising campaign would lead more children to smoke or lead children to smoke more, the evidence to support that intuition is not there. Our responsibility as commissioners is not to make decisions based on intuition but to evaluate the evidence and determine whether there is reason to believe that a proposed respondent violated the law. The Commission has spent a great deal of time and effort reviewing the difficult factual and legal questions raised by this case, including a comprehensive review of relevant studies and statistics. Because the evidence in the record does not provide reason to believe that the law has been violated, we cannot issue a complaint.

If intuition and concern for children's health were a sufficient basis under the law for bringing a case, we have no doubt that a unanimous Commission would have taken that action long ago. The dispositive issue here, however, was whether the record showed a link between the Joe Camel advertising campaign and increased smoking among children, not whether smoking has an effect on children or whether the health of children is important. Indeed, our concern about the health of children led us to consider every possible avenue to a lawsuit before reaching today's decision.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I am very concerned about the harm that cigarette smoking poses to children, but I also take seriously the statutory limits on the Commission's authority to pursue enforcement actions against allegedly unfair practices. The evidence before us now, including the evidence obtained since the Commission considered this matter in 1994, does not convince me that there is reason to believe that the law has been violated. The issue in this case is whether the Joe Camel advertising campaign causes or is likely to cause children to begin or to continue smoking. As was true three years ago, intuition and concern for children's health are not the equivalent of – and should not be substituted for – evidence sufficient to find reason to believe that there is a likely causal connection between the Joe Camel advertising campaign and smoking by children.

Moreover, it simply is not in the public interest to bring this case now. Before committing a vast amount of scarce agency resources to this litigation, the Commission should await the resolution of the appeal of the federal district court decision striking down the Food and Drug Administration's tobacco advertising restrictions and the outcome of widely-reported settlement discussions between tobacco companies and numerous states. Either of these developments might result in advertising restraints that would largely duplicate any remedies the Commission might obtain.

Accordingly, I dissent from the majority's determination to issue a complaint.

FINAL ORDER

ORDER DISMISSING COMPLAINT

On November 24, 1998, complaint counsel filed a motion to dismiss this matter on the grounds that the relief sought in this proceeding has now been achieved through a recent settlement between the major tobacco companies (including respondent) and the attorneys general for 46 state and 5 other jurisdictions[1] and a modification of the annual survey on tobacco, alcohol, and drug use that is conducted by the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services. The Administrative Law Judge ("ALJ"), by order dated December 2, 1998, certified this motion to the Commission, and, by order dated December 7, 1998, stayed further action in the adjudication before him, pending the Commission's review of complaint counsel's motion to dismiss. Respondent's answer, directed to the ALJ on December 4, states that it agrees that this matter should be dismissed but urges the ALJ to recommend that the Commission dismiss with prejudice.[2] Respondent also asked the ALJ to take action respecting placement on the public record of certain materials received in discovery from the Robert Wood Johnson Foundation ("Foundation") and Dr. John P. Pierce. In a statement filed with the Commission, the Foundation requested the Commission to order *in camera* treatment for its submissions and to order related relief.

Upon consideration of the submission of the parties, the Commission hereby dismisses the complaint without prejudice and denies the Foundation's request for relief respecting materials it submitted in discovery. By Order dated December 29, 1998, the ALJ has denied respondent's motion for action respecting discovery materials.

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[1] Master Settlement Agreement Between Settling State Officials and Participating Manufacturers (Nov. 23, 1998)(available as of December 15, 1998 at http://www.naag.org/settle.html)(hereafter the "November 23 Master Settlement Agreement").

[2] Respondent attached to its response its Motion to Dismiss on the grounds that complaint counsel failed to satisfy its evidentiary burden, filed November 23, 1998. This motion was not certified to the Commission by the ALJ and is, accordingly, not before the Commission.

DISCUSSION

Complaint Counsel's Motion to Dismiss

The Commission's notice order accompanying the complaint set out three key areas of relief: (1) a prohibition of advertisements to children of Camel brand cigarettes through the use of themes or images relating to "Joe Camel" or associated figures; (2) dissemination of public education messages discouraging persons under 18 from smoking; and (3) collection, maintenance, and making data available to the Commission concerning sales of each brand of respondent's cigarettes to persons under 18 and each brand's share of smokers under 18.

With respect to the first area of relief, the November 23 Master Settlement Agreement specifically bans the use of all cartoon characters, including Joe Camel, in the advertising, promotion, packaging, and labeling of any tobacco product. As for the second, the settlement requires the tobacco companies to help finance a national public education fund designed to carry out on a nationwide basis sustained advertising and education programs to counter underage usage of tobacco products and to educate consumers about the causes and prevention of diseases associated with the use of tobacco products.[3] Finally, the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services is revising the protocol for its annual national household survey on drug abuse to add specific questions to elicit brand share of smokers under 18.[4]

Accordingly, the most important elements of the relief set out in the Commission's notice order should be accomplished without the need for further litigation in this case. Therefore, the public interest warrants dismissal of the complaint.

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[3] The November 23 Master Settlement Agreement anticipates that each state will seek state court approval of the settlement.

[4] *See* Department of Health & Human Servs., Substance Abuse & Mental Health Servs., Agency Information Collection Activities: Submission for OMB Review; Comment Request, 63 Fed. Reg. 44,866 (1998) (noting that annual survey will be revised to include information on usual brands, including Reynolds' brands, smoked by persons 12 and over). In the past, this survey has been used to determine the prevalence of use of tobacco, alcohol, and illegal drugs among persons 12 and over.

Respondent's Request for Dismissal With Prejudice

In its response, which was filed after the ALJ certified complaint counsel's motion to dismiss to the Commission, respondent requested that the ALJ make certain recommendations to the Commission to the effect that the complaint should be dismissed with prejudice.[5] Respondent also asked the ALJ to forward to the Commission the motion to dismiss that respondent filed with the ALJ at the close of complaint counsel's case-in-chief. That motion asked the ALJ to determine that complaint counsel had failed to meet its evidentiary burden on causation. Respondent claimed that forwarding its motion to the Commission would "inform it of the strong nature of Reynolds' defenses -- and the concomitant advisability of a public interest dismissal" and thus would support respondent's request for a dismissal with prejudice. Respondent's Response to Complaint Counsel's Motion to Dismiss, at 4.

Rule 3.22(a) of the Commission's Rules of Practice contemplates that the ALJ will rule in the first instance on most motions; Rule 3.22(e) also authorizes the ALJ to defer ruling on a motion to dismiss for failure to meet an evidentiary burden until immediately after all evidence has been received and the hearing record is closed. The ALJ is also required to certify a motion to dismiss on public interest grounds to the Commission.[6] Finally, Rule 3.22(a) authorizes the ALJ to accompany such a certification with "any recommendation that he or she may deem appropriate."

Here, consistent with his authority under Rule 3.22(e), the ALJ has not ruled on respondent's motion to dismiss. As for complaint counsel's motion to dismiss, the ALJ has properly certified this motion to the Commission and has declined to make the recommendations requested by respondent. The ALJ did, however, state in his December 7 Order Staying Proceedings that:

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[5] Respondent requested that the ALJ recommend, among others, that "[t]his dismissal should be with prejudice. Subjecting Reynolds to the continued specter of litigation in this matter in light of the termination of the [Joe Camel] campaign, the length of the investigation and adjudication, and complaint counsel's failure to establish causation would be unreasonable and unfair." Recommendations Concerning Complaint Counsel's Motion to Dismiss, *R.J. Reynolds Co.*, Docket No. 9285 (Dec. 4, 1998) (attached to Respondent's Response to Complaint Counsel's Motion to Dismiss).

[6] *See* Rule 3.22(a); *Century 21 Commodore Plaza, Inc.*, 95 FTC 808, 818 (1980); *Herbert R. Gibson, Sr.*, 90 FTC 275 (1977).

[t]o recommend . . . that the complaint be dismissed on the merits would require more than a quick decision on the submitted papers. I am not convinced that the link between the Camel advertising campaign and increased smoking among children must be demonstrated, as argued by respondent, *only* by a definitive, statistically significant scientific study. Furthermore, there may well be reliable evidence in the record of this case on this issue, in the 2,000 exhibits that have been received thus far, or in the testimony of the expert witnesses.[7]

Further, in dismissing this complaint, the Commission is not reaching a decision on the merits. Respondent's motion to dismiss is not before the Commission for decision, and respondent does not appear to ask the Commission to enter a ruling on the merits.[8] Indeed, a ruling on the merits would require the Commission to remand this matter to the ALJ, resulting in a possible resumption of the trial.[9] We understand that neither complaint counsel nor respondent intends that result.

The Commission has consistently refrained from dismissing a complaint with prejudice absent a substantive ruling. Without such a ruling by the ALJ or the Commission, it is not appropriate to foreclose the possibility of further litigation where unanticipated problems might develop with one or more of the relevant remedies.[10]

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[7] (Emphasis in original) (footnote omitted). We decline to provide an advisory opinion on what is legally required to prove that the Joe Camel campaign caused or was likely to have caused children to begin or continue smoking. However, we do agree with the ALJ that proving a link between advertising and youth smoking might be accomplished by means other than a definitive, statistically significant scientific study. Because we are not ruling on the merits of this matter, we express no opinion on whether the record does or does not contain the necessary, relevant evidence.

[8] Respondent does argue that closure to the prosecution of Reynolds "can be accomplished by recognizing the arguments advanced in Reynolds' pending Motion for Dismissal as additional rationales for terminating this proceeding," Respondent's Response to Complaint Counsel's Motion to Dismiss, at 2. We view this discussion of possible outcomes to fall short of a request for an explicit ruling on the merits of Reynolds' motion.

[9] We view the ALJ's Order Staying Proceedings as indicative of his lack of willingness to decide Respondent's Motion to Dismiss at this time and, as discussed *supra*, the ALJ is authorized by Rule 3.22(e) to defer ruling on such a motion to dismiss until immediately after all evidence has been received and the hearing record is closed.

[10] The Commission is not persuaded that any future litigation challenging the Joe Camel campaign would violate any of Respondent's Due Process or other legal rights. The doctrine of res judicata, which bars a subsequent action only if there is a final judgment on the merits in the earlier action, would not apply. As described above, no such judgment was rendered here by the ALJ or the Commission. *See, e.g., United States v. Cunan*, 156 F.3d 110 (1st Cir. 1998). In addition, the Double Jeopardy Clause of the Fifth Amendment "protects only against the imposition of multiple *criminal* punishments for the same offense." *Hudson v. United States*, 118 S. Ct. 488, 493 (1997)(emphasis in the original). Nor can we conclude that any passage of time between the dismissal of the instant complaint and the possible commencement of a new proceeding would deprive respondent of an opportunity to present an effective defense. In any event, a future Commission would undoubtedly give careful consideration, as part of its determination that a case is in the public interest, to any claims respondent might make that it was unfairly prejudiced by the passage of time.

We, therefore, conclude that the complaint should be dismissed without prejudice.

Requests Relating to Third Party Submissions

Respondent's Response to Complaint Counsel's Motion to Dismiss initially requested that the ALJ hold open the public record to permit respondent "to place in evidence certain documents submitted in discovery from" the Foundation and Dr. Pierce. After opposing statements were filed by the Foundation and Dr. Pierce,[11] respondent filed a submission with the ALJ explaining that its response had only requested (and, notwithstanding the stay, continued to request) that the ALJ issue an order establishing a schedule for a briefing and hearing on the disclosure issue. By order dated December 29, 1998, the ALJ declined to issue such an order.

The Foundation's statement in opposition to respondent's request, which was filed with the Commission, asked the Commission to rule on its prior motion to the ALJ. That motion sought *in camera* treatment for Foundation documents. The statement also asked, as related relief, that respondent "be required to (i) submit a certification that it has fully complied with the terms of the protective order with regard to the Foundation's peer review materials [and] (ii) provide to the Foundation all copies of all agreements executed in accordance with paragraph 11 of the protective order."[12]

Rather than delaying the disposition of this matter by remanding the Foundation's requests to the ALJ, the Commission has considered and hereby denies them. There is no basis for granting the Foundation's request for *in camera* treatment because, in light of this Order dismissing the complaint, the documents are not to be used in litigation. In addition, paragraph 11 of the ALJ's July 18, 1997 protective order prohibits respondent from disclosing the documents

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[11] The Foundation and Dr. Pierce, along with the Commonwealth of Massachusetts, had previously filed oppositions before the ALJ to Respondent's Notice of Disclosure of confidential documents submitted by the Foundation and Dr. Pierce.

[12] The paragraph 11 agreements are those executed by certain recipients of confidential materials obtained by RJR.

The Foundation also sought other related relief, including a requirement that respondent ". . . (iii) identify all persons to whom the Foundation's peer review materials have been disseminated or disclosed; (iv) describe with particularity any dissemination or disclosure of the peer review materials not authorized by or in accordance with the terms of the protective order; and (v) retrieve and return to the Foundation all copies of the peer review materials disseminated or disclosed contrary to the protective order's terms."

outside of this litigation and paragraph 14 requires respondent to return the documents upon dismissal of the proceeding. Paragraph 11 itself already entitles the Foundation to copies of the paragraph 11 agreements at issue here.[13] The Foundation has not offered sufficient justification for the other related relief sought by its motion.

Accordingly, *It is ordered*, That the Complaint is dismissed without prejudice. *It is further ordered*, That the Foundation's motion for *in camera* treatment and related relief is denied.

[13] The protective order, by its own terms, continues to bind the parties' communication and use of confidential materials after conclusion of the action. *See* paragraph 16.

IN THE MATTER OF

FIRST AMERICAN REAL ESTATE SOLUTIONS, LLC

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

Docket C-3849. Complaint, Jan. 27, 1999--Decision, Jan. 27, 1999

This consent order, among other things, requires the respondent, a provider of consumer credit reports, to investigate information in the respondent's credit reports that consumers dispute and then either record the current status of the disputed information or delete it from the file. Within five business days after receiving a consumer dispute, the respondent must notify the furnisher of the information that the information is being disputed. The respondent must also maintain reasonable procedures to prevent the reappearance of information that has been deleted in future credit reports issued by respondent. In addition, the consent order requires that the respondent provide written notice to the consumer of the results of the reinvestigation of any disputed item and extend to the consumer the right to request that the respondent provide to any person designated by the consumer either a notice that the disputed item has been corrected or deleted, or a copy of the consumer's dispute statement.

Participants

For the Commission: *Thomas E. Kane, David Medine* and *Margaret Patterson*.

For the respondent: *Michael Meltzer, Miller, Nash, Wiener, Hager & Carlsen*, Portland, OR.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that certain prior practices of First American CREDCO, Inc., a corporation, violated the provisions of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681-1681u, as amended, as well as the provisions of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45-58, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. First American CREDCO, Inc. is incorporated in the State of Washington and has its principal office or place of business at 5625 Ruffin Road, Suite 200, San Diego, California.

2. As of November 30, 1997, the consumer reporting business of First American CREDCO, Inc. was reorganized as an operating

division of First American Real Estate Solutions, LLC ("respondent"). For purposes of this complaint, "CREDCO" refers to First American CREDCO, Inc., prior to the reorganization, and to respondent after the reorganization.

3. Respondent is a limited liability company organized under the laws of California, with its principal office or place of business at 150 Second Avenue North, Suite 1600, St. Petersburg, Florida.

4. CREDCO is now and has been regularly engaged in the practice of assembling or evaluating consumer credit information. CREDCO assembles or evaluates such information in order to provide "consumer reports," as defined by § 603(d) of the FCRA, 15 U.S.C. 1681a(d), to third parties. Accordingly, CREDCO is a "consumer reporting agency," as defined by § 603(f) of the FCRA, 15 U.S.C. 1681a(f).

5. The acts and practices of CREDCO alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. 44.

CREDCO'S COURSE OF BUSINESS

Instant Merge Reports

6. One of CREDCO's consumer reporting products is its Instant Merge Report ("IMR").

7. IMRs blend consumer account information from at least two, and often all three, of the national consumer reporting agencies ("repositories"), Trans Union, Equifax, and Experian. When these repositories provide contradictory information for a particular consumer account, CREDCO's reporting system merges this contradictory information into a single, unified trade line. CREDCO does not verify the accuracy of the information contained in its IMRs before delivering the IMRs to its customers.

8. CREDCO sells its IMRs to mortgage lenders, lenders in the automotive and home equity markets, and landlords and property managers in the residential rental market. The IMRs are produced and delivered electronically via computer directly to the end-user in a matter of seconds. Once an IMR is created, CREDCO's computer system maintains it on file but prevents any corrections from being made to it.

Consumer Disputes

9. CREDCO has not typically reinvestigated information in IMRs when consumers have disputed that information. Instead, CREDCO has referred such consumers to the repository or repositories from which CREDCO received the disputed information, so that the consumers could request that the repository or repositories reinvestigate the disputed information.

10. Even on the rare occasions when CREDCO has reinvestigated disputed information, CREDCO has not corrected or deleted information in its files found to be inaccurate or obsolete.

11. If a reinvestigation has not resolved a consumer's dispute about IMR information and the consumer has submitted a statement setting forth the nature of the dispute, CREDCO has not reported such disputes in future IMRs.

12. When CREDCO has learned through reinvestigation that IMR information is inaccurate or obsolete, CREDCO has not prevented the information from re-appearing in future IMRs.

CREDCO'S VIOLATIONS OF THE FCRA AND THE FTC ACT

13. In connection with its Instant Merge Reports, CREDCO has violated § 611 of the FCRA, 15 U.S.C. 1681i. CREDCO's violations include, but are not limited to:

A. Failing to reinvestigate disputed information;
B. Failing to correct or delete information in consumers' files that CREDCO has found to be inaccurate or obsolete, or whose accuracy can no longer be verified; and
C. Failing to include in subsequent IMRs a notation that a consumer disputes an item and a statement by the consumer setting forth the nature of the dispute or a codification or summary of that statement.

14. CREDCO has violated § 607(b) of the FCRA, 15 U.S.C. 1681e(b), by failing to follow reasonable procedures to prevent information that CREDCO has found to be inaccurate or obsolete, or whose accuracy could not be verified, from appearing on subsequent IMRs.

15. The acts and practices set forth in this complaint as violations of the FCRA constitute unfair or deceptive acts or practices in

commerce in violation of § 5(a) of the FTC Act, 15 U.S.C. 45(a), pursuant to § 621(a) of the FCRA, 15 U.S.C. 1681s(a).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of First American CREDCO, Inc., now a division of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft 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 the respondent with violation of the Fair Credit Reporting Act and the Federal Trade Commission Act; and

The respondent, its attorneys, 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 the respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true 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 First American CREDCO, Inc. 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 considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent First American Real Estate Solutions, LLC is a limited liability company organized under the laws of California, with

its principal office or place of business at 150 Second Avenue North, Suite 1600, St. Petersburg, Florida.

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

1. The term "*Fair Credit Reporting Act*" ("FCRA") refers to the Fair Credit Reporting Act, as amended by Public Law 104-208 (Sept. 30, 1996), 15 U.S.C. 1681-1681u, and as amended in the future.

2. The terms "*person*," "*consumer*," "*consumer report*," "*consumer reporting agency*," and "*file*," are defined as set forth in Sections 603(b), (c), (d), (f), and (g), respectively, of the FCRA, 15 U.S.C. 1681a(b), (c), (d), (f) and (g).

3. Unless otherwise specified, "*respondent*" shall mean First American Real Estate Solutions, LLC, a limited liability company, its successors and assigns, and its officers, agents, representatives, and employees.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the collection, preparation, assembly, maintenance, and furnishing of consumer reports and files, shall comply with Section 611 of the FCRA, 15 U.S.C. 1681i, including but not limited to the following provisions:

A. Subject to Section 611(a)(3), 15 U.S.C. 1681i(a)(3), if the completeness or accuracy of any item of information contained in a consumer's file at respondent is disputed by the consumer and the consumer notifies respondent directly of such dispute, respondent shall reinvestigate free of charge and record the current status of the disputed information or delete the information from the file, as required by Section 611(a)(1), 15 U.S.C. 1681i(a)(1);

B. As required by Section 611(a)(2), 15 U.S.C. 1681i(a)(2), but subject to Section 611(a)(3), 15 U.S.C. 1681i(a)(3),

1. Before the expiration of the five (5)-business-day period beginning on the date on which respondent receives notice of a dispute from a consumer in accordance with Section 611(a)(1), 15 U.S.C. 1681i(a)(1), respondent shall provide notification of the dispute to any person who provided any item of information in dispute, at the address and in the manner established with the person; the notice shall include all relevant information regarding the dispute that respondent has received from the consumer; and

2. Respondent shall promptly provide to the person who provided the information in dispute all relevant information regarding the dispute that is received by respondent from the consumer after the five (5)-business-day period referred to in paragraph B.1. above and before the end of the thirty (30)-day period beginning on the date on which respondent receives the notice of the dispute directly from the consumer;

C. As required by Section 611(a)(4), 15 U.S.C. 1681i(a)(4), in conducting any reinvestigation under Section 611(a)(1), 15 U.S.C. 1681i(a)(1), with respect to disputed information in the file of any consumer, respondent shall review and consider all relevant information submitted by the consumer in the period described in Section 611(a)(1)(A) with respect to such disputed information;

D. As required by Section 611(a)(5)(C), 15 U.S.C. 1681i(a)(5)(C), respondent shall maintain reasonable procedures designed to prevent the reappearance in a consumer's file, and in consumer reports on the consumer, of information that has been deleted (other than information that has been reinserted after the person furnishing the information certifies that the information is complete and accurate, as required by Section 611(a)(5)(B)(i), 15 U.S.C. 1681i(a)(5)(B)(i));

E. Respondent shall provide written notice to the consumer of the results of the reinvestigation of any item disputed by the consumer under Section 611(a), 15 U.S.C. 1681i(a), not later than five (5) business days after the completion of the reinvestigation of the item, as required by Section 611(a)(6), 15 U.S.C. 1681i(a)(6), including but not limited to:

1. A notice that the consumer has the right to add a statement to the consumer’s file disputing the accuracy or completeness of the information ("dispute statement"), as required by Section 611(a)(6)(B)(iv); and

2. A notice, as required by Section 611(a)(6)(B)(v), that the consumer has the right to request that respondent provide either a notification that the item has been corrected or deleted, or the consumer's dispute statement described in paragraph E.1. above or a codification or summary of that dispute statement, to any person specifically designated by the consumer who has received a consumer report that contained the deleted or disputed information

(a) Within two years prior to the consumer's request, for employment purposes; or

(b) Within six months prior to the consumer's request, for any other purpose;

F. If the reinvestigation under Section 611(a), 15 U.S.C. 1681i(a), does not resolve the consumer's dispute, respondent shall permit the consumer to file a dispute statement, as required by Section 611(b), 15 U.S.C. 1681i(b);

G. As required by Section 611(c), 15 U.S.C. 1681i(c), whenever a consumer files a dispute statement pursuant to paragraph I.F. above, respondent shall include the consumer's dispute statement, or a codification or summary of the dispute statement, in all subsequent consumer reports that respondent prepares concerning the consumer that contains the information in question, unless respondent has reasonable grounds to believe the dispute statement is frivolous or irrelevant; and

H. Respondent shall, at the request of the consumer, provide a notification, as required by Section 611(d), 15 U.S.C. 1681i(d), that a disputed item has been corrected or deleted, or the consumer's dispute statement or a codification or summary of that dispute statement, to any person specifically designated by the consumer who has received a consumer report that contained the deleted or disputed information

1. Within two years prior to the consumer's request, for employment purposes; or

2. Within six months prior to the consumer's request, for any other purpose.

II.

It is further ordered, That respondent and its successors and assigns shall for five (5) years maintain and upon request make available to the Federal Trade Commission for inspection and copying all business records demonstrating respondent's compliance with the terms and provisions of this order.

III.

It is further ordered, That respondent and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and to such personnel hired after such date within thirty (30) days after the person assumes such position or responsibilities.

IV.

It is further ordered, That respondent and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in respondent that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the entity name or address. Provided, however, that, with respect to any proposed change in the entity about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent and its successors and assigns shall, within sixty (60) days after the date of service of this order, and, thereafter, within thirty (30) days of such other times as the Federal Trade 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.

VI.

This order will terminate on January 27, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

B. Any Part in this order that terminates in less than twenty (20) years;
C. This order's application to any respondent that is not named as a defendant in such complaint; and
D. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

GEOCITIES

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

Docket C-3850. Complaint, Feb. 5, 1999--Decision, Feb. 5, 1999

This consent order, among other things, prohibits GeoCities, a corporation that operates a World Wide Web site, from misrepresenting the purpose for which it collects or uses personal identifying information from or about consumers, including children. The consent order requires the respondent to: place a prominent privacy notice on its web sites; establish a system to obtain parental consent before collecting personal information from children; and notify individuals from whom it previously collected personal information and offer them an opportunity to have that information deleted. In addition, the order permits the respondent to collect or use personal information from children to the extent permitted by the Children's Online Privacy Protection Act of 1998, or by regulations or guides issued under that Act.

Participants

For the Commission: *Toby Levin, Dean Forbes, Martha Landesberg, C. Lee Peeler, Caroline Curtin* and *Louis Silversin.*

For the respondent: *Ronald Plesser, Piper & Marbury,* Washington, D.C. and *Bart Lazar, Seyfarth, Shaw, Fairweather & Geraldson,* Chicago, IL.

COMPLAINT

The Federal Trade Commission, having reason to believe that GeoCities, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent GeoCities is a California corporation with its principal office or place of business at 1918 Main Street, Suite 300, Santa Monica, California.

2. Respondent has operated a World Wide Web ("Web") site located at http://www.geocities.com. This Web site is a virtual community consisting of consumers' personal home pages that are organized into 40 themed neighborhoods. Respondent "hosts" a personal home page by posting it to an address in the consumer's chosen neighborhood.

3. Respondent has provided numerous services including free and fee-based personal home pages, free e-mail service, contests and children's clubs. Respondent provides personal home pages and e-mail addresses to adults and children who reveal personal identifying and demographic information when they register with the Web site.

4. Respondent has more than 1.8 million members whom it refers to as "homesteaders." As of December 2, 1997, approximately 200,000 GeoCities homesteaders were between the ages of 3 and 15. As of May 18, 1998, approximately 50,000 homesteaders were under age 13. Respondent's site is one of the ten most frequently visited Web sites, and was the sixth top trafficked site in April 1998 with 14.1 million unique visitors ages 12 and up. Among visitors between the ages of 12 and 17, it was the third most frequently visited Web site in March 1998. One out of five U.S. Web users visited respondent's Web site in October 1997.

5. Respondent has created opportunities for third party advertisers to promote products in a targeted manner to its more than 1.8 million members through respondent's collection of personal identifying, demographic, and "special interest" information obtained in the registration process and through the placement of members' personal home pages in themed neighborhoods.

6. Respondent has derived its revenues from: selling third party advertising space on the Web site (including rotated ad banners, pop-up ads, and sponsorships of major areas on the Web site); selling personal identifying, demographic, and/or interest information collected from consumers who register; GeoPlus, an enhanced fee-based service that provides members extra server space for their personal home pages, among other benefits; merchandising in the Web site's GeoStore; and respondent's publishing unit (GeoPress Publishing).

7. Respondent has required consumers, including children, to complete a "New Member Application" form to become a GeoCities member. The form requests certain mandatory information and certain other information that respondent describes as "optional." The form also asks consumers to designate whether they would like to receive "special offers" from a list of topics or from specific companies. The default setting on the form for special offers is for members to receive them unless members choose otherwise.

8. Respondent has promoted on its Web site a children's neighborhood called the "Enchanted Forest." The Enchanted Forest is designated as respondent's "KIDS" area, "[a] community for and by kids." To join the Enchanted Forest neighborhood, children must complete the New Member Application form and post personal home pages. As of May 18, 1998, there were approximately 40,300 homesteads in the Enchanted Forest neighborhood.

9. Respondent has promoted on its Web site a children's club in the Enchanted Forest neighborhood called the "GeoKidz Club." To join the GeoKidz Club, children must complete the "Official GeoCities GeoKidz Club Membership Request Form." This form requires applicants to be GeoCities members and to fill in all information requested, including name, age, e-mail address, GeoCities home page address, and gender. Respondent has also promoted on its Web site contests in the Enchanted Forest neighborhood for which children must complete the "Enchanted Forest Contest Entry Form," by providing their name, personal Web page address, and e-mail address.

10. Respondent has distributed a newsletter called the "World Report." The World Report is e-mailed at regular intervals to respondent's members and occasionally is posted on respondent's Web site. Members automatically receive the World Report but can discontinue receiving it by using respondent's "Profile Editor," a form used to revise members' registration information. The Profile Editor's default setting is for members to receive the World Report unless they request not to.

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

DECEPTIVE PRACTICES IN CONNECTION WITH RESPONDENT'S COLLECTION AND USE OF PERSONAL IDENTIFYING INFORMATION

Misrepresentations Involving Information Collection By GeoCities

12. Respondent has placed privacy statements on its New Member Application form [*Exhibit A*]. This form collects from consumers, including children, certain mandatory information (first and last name, zip code, e-mail address, gender, date of birth, and member name) and certain other information respondent designates as "optional" (education level, income, marital status, occupation, and

interests). The form also asks consumers to designate whether they wish to receive "special offers" from advertisers, to select from a list of special offer topics, and to designate whether they wish to receive specific products or services from individual companies. Respondent has also placed privacy statements on its "GeoCities Free Member E-mail Program" Web page [*Exhibit B*] and in the September 2, 1997 issue of the World Report newsletter [*Exhibit C*], which refer to consumers' information collected on the New Member Application form. Through the privacy statements in Exhibits A, B, and C, respondent has made the following statements about the uses and privacy of the information it collects:

A. "The following section is completely optional. We will not share this information with anyone without your permission, but will use it to gain a better understanding of who is visiting GeoCities. This information will help us to build a better GeoCities for everyone. . . . [The information requested is] Highest Level of Education Completed . . . Household Income . . . Marital Status . . . Occupation . . . Interests" [*Exhibit A*]

B. "When [consumers] apply to GeoCities we ask if they would like to receive information on a variety of topics. . . . Before we send anything out, we deliver an orientation e-mail to explain the program, to ensure that only those people who requested topically-oriented mail receive it and to protect your privacy. . . . We assure you this is a free service provided only to GeoCitizens who request this information, and we will NEVER give your information to anyone without your permission." [*Exhibit B*]

C. "[Certain e-mail to members] came from our friends at CMG Direct Corporation. It was only sent to homesteaders who clicked a box in the topic list on the GeoCities application. The letter was meant as a heads-up to those people that information about the interests they selected would be coming from reputable companies. . . . We are sorry about any confusion concerning these e-mails. We assure you that we will NEVER give your personal information to anyone without your permission." [*Exhibit C*]

13. Through the means described in paragraph 12, respondent has represented, expressly or by implication, that the personal identifying information collected through its New Member Application form is used only for the purpose of providing to members the specific e-mail advertising offers and other products or services they request.

14. In truth and in fact, the personal identifying information collected through respondent's New Member Application form is not used only for the purpose of providing to members the specific e-mail advertising offers and other products or services they request.

Respondent has also sold, rented, or otherwise marketed or disclosed this information, including information collected from children, to third parties who have used this information for purposes other than those for which members have given permission. For example, third parties have targeted unrequested e-mail advertising offers to individual members based on their chosen GeoCities neighborhoods. Therefore, the representation set forth in paragraph 13 was, and is, false or misleading.

15. Through the means described in paragraph 12, respondent has represented, expressly or by implication, that the "optional" information collected through its New Member Application form is not disclosed to third parties without the consumer's permission, and is used only to gain a better understanding of who is visiting GeoCities.

16. In truth and in fact, respondent has disclosed the "optional" information it collects through the New Member Application form to third parties without the consumer's permission, and for purposes other than to gain a better understanding of who is visiting GeoCities. Respondent has disclosed this information, including information collected from children, to third parties who have used this information to target advertising to GeoCities' members. Therefore, the representation set forth in paragraph 15 was, and is, false or misleading.

Misrepresentations Involving Sponsorship By GeoCities Where Information Is Collected By Third Parties

17. Respondent has disseminated or caused to be disseminated Enchanted Forest Web pages [*Exhibits D, H*]. These Web pages have promoted children's activities in the Enchanted Forest, including the Official GeoCities GeoKidz Club, through print [*Exhibit D*] and audio [*Exhibit E*] messages, and contests through print messages [*Exhibit H*]. Respondent has also disseminated or caused to be disseminated the July 16, 1997 issue of the World Report newsletter [*Exhibit F*], which also promotes the Official GeoCities GeoKidz Club. These promotions have caused children to reveal personal identifying information through the Official GeoCities GeoKidz Club Membership Request Form [*Exhibit G*] and the Enchanted Forest Contest Entry Form [*Exhibit I*]. Through its Web page and e-mail promotions, respondent has made the following statements:

A. "Welcome kids to this enchanting forest created by your friends for you to enjoy. . . . Join the GeoKidz Club at Enchanted Forest/3696 for fun and HTML help. Play Java games and be sure to visit Charlie, the GeoKidz Club's new dog." [*Exhibit E*]

B. "JOIN THE GEOKIDZ CLUB!
We all want a safe spot for our children to play and The GeoKidz Club is the perfect place. Enchanted Forest Community Leader Melange has been busy providing an HTML Center, games, message forums, a member's gallery and many more features for both parents and children to enjoy. The GeoKidz Club is always growing and expanding, so visit http://www.geocities.com/EnchantedForest/3696 often . . . and make sure to say hello to our virtual dog!" [*Exhibit F*]

C. "Join us in our quest to name our Prince and Princess, the mascots of Enchanted Forest! Enter the contest to name them by June 7th, and win 25 GeoPoints." (emphasis in original) [*Exhibit H*]

18. Through the means described in paragraph 17, respondent has represented, expressly or by implication, that respondent collects and maintains the children's personal identifying information collected through the Official GeoCities GeoKidz Club Membership Request Form and Enchanted Forest Contest Entry Form.

19. In truth and in fact, respondent does not collect and maintain the children's personal identifying information collected through the Official GeoCities GeoKidz Club Membership Request Form and Enchanted Forest Contest Entry Form. In fact, the Official GeoCities GeoKidz Club and the GeoCities Enchanted Forest contests are run by third parties hosted on the GeoCities Web site, who collect the children's personal identifying information directly and maintain it. Therefore, the representation set forth in paragraph 18 was, and is, false or misleading.

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

EXHIBIT A

EXHIBIT A

EXHIBIT A

94 Complaint

EXHIBIT A

EXHIBIT B

94 Complaint

EXHIBIT B

EXHIBIT C

EXHIBIT C

EXHIBIT C

EXHIBIT C

EXHIBIT D

EXHIBIT E

EXHIBIT F

94 Complaint

EXHIBIT F

EXHIBIT F

94 Complaint

EXHIBIT F

EXHIBIT G

94 Complaint

EXHIBIT G

EXHIBIT G

94 Complaint

EXHIBIT H

EXHIBIT I

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 attorneys, and counsel for Federal Trade 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent GeoCities, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office or principal place of business located at 1918 Main Street, Suite 300, Santa Monica, 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 proceeding is in the public interest.

ORDER

DEFINITIONS

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

1. "*Child*" or "*children*" shall mean a person of age twelve (12) or under.

2. "*Parents*" or "*parental*" shall mean a legal guardian, including, but not limited to, a biological or adoptive parent.

3. "*Personal identifying information*" shall include, but is not limited to, first and last name, home or other physical address (*e.g.*, school), e-mail address, telephone number, or any information that identifies a specific individual, or any information which when tied to the above becomes identifiable to a specific individual.

4. "*Disclosure*" or "*disclosed to third party(ies)*" shall mean (a) the release of information in personally identifiable form to any other individual, firm, or organization for any purpose or (b) making publicly available such information by any means including, but not limited to, public posting on or through home pages, pen pal services, e-mail services, message boards, or chat rooms.

5. "*Clear(ly) and prominent(ly)*" shall mean in a type size and location that are not obscured by any distracting elements and are sufficiently noticeable for an ordinary consumer to read and comprehend, and in a typeface that contrasts with the background against which it appears.

6. "*Archived*" database shall mean respondent's off-site "back-up" computer tapes containing member profile information and GeoCities Web site information.

7. "*Electronically verifiable signature*" shall mean a digital signature or other electronic means that ensures a valid consent by requiring: (1) authentication (guarantee that the message has come from the person who claims to have sent it); (2) integrity (proof that the message contents have not been altered, deliberately or accidentally, during transmission); and (3) non-repudiation (certainty that the sender of the message cannot later deny sending it).

8. "*Express parental consent*" shall mean a parent's affirmative agreement that is obtained by any of the following means: (1) a signed statement transmitted by postal mail or facsimile; (2) authorizing a charge to a credit card via a secure server; (3) e-mail accompanied by an electronically verifiable signature; (4) a procedure that is specifically authorized by statute, regulation, or guideline

issued by the Commission; or (5) such other procedure that ensures verified parental consent and ensures the identity of the parent, such as the use of a reliable certifying authority.

9. Unless otherwise specified, "*respondent*" shall mean GeoCities, its successors and assigns and its officers, agents, representatives, and employees.

10. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with any online collection of personal identifying information from consumers, in or affecting commerce, shall not make any misrepresentation, in any manner, expressly or by implication, about its collection or use of such information from or about consumers, including, but not limited to, what information will be disclosed to third parties and how the information will be used.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with any online collection of personal identifying information from consumers, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the identity of the party collecting any such information or the sponsorship of any activity on its Web site.

III.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the online collection of personal identifying information from children, in or affecting commerce, shall not collect personal identifying information from any child if respondent has actual knowledge that such child does not have his or her parent's permission to provide the information to respondent. Respondent shall not be deemed to have actual knowledge if the child has falsely represented that (s)he is not a child and respondent does not knowingly possess information that such representation is false.

IV.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the online collection of personal identifying information, in or affecting commerce, shall provide clear and prominent notice to consumers, including the parents of children, with respect to respondent's practices with regard to its collection and use of personal identifying information. Such notice shall include, but is not limited to, disclosure of:

A. What information is being collected (*e.g.*, "name," "home address," "e-mail address," "age," "interests");

B. Its intended use(s);

C. The third parties to whom it will be disclosed (*e.g.*, "advertisers of consumer products," mailing list companies," "the general public");

D. The consumer's ability to obtain access to or directly access such information and the means by which (s)he may do so;

E. The consumer's ability to remove directly or have the information removed from respondent's databases and the means by which (s)he may do so; and

F. The procedures to delete personal identifying information from respondent's databases and any limitations related to such deletion.

Such notice shall appear on the home page of respondent's Web site(s) and at each location on the site(s) at which such information is collected.

Provided that, respondent shall not be required to include the notice at the locations at which information is collected if such information is limited to tracking information and the collection of such information is described in the notice required by this Part.

Provided further that, for purposes of this Part, compliance with all of the following shall be deemed adequate notice: (a) placement of a clear and prominent hyperlink or button labeled **PRIVACY NOTICE** on the home page(s), which directly links to the privacy notice screen(s); (b) placement of the information required in this Part clearly and prominently on the privacy notice screen(s), followed on the same screen(s) with a button that must be clicked on to make it disappear; and (c) at each location on the site at which any personal

identifying information is collected, placement of a clear and prominent hyperlink on the initial screen on which the collection takes place, which links directly to the privacy notice and which is accompanied by the following statement in bold typeface:

NOTICE: We collect personal information on this site. To learn more about how we use your information click here.

V.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the online collection of personal identifying information from children, in or affecting commerce, shall maintain a procedure by which it obtains express parental consent prior to collecting and using such information.

Provided that, respondent may implement the following screening procedure that shall be deemed to be in compliance with this Part. Respondent shall collect and retain certain personal identifying information from a child, including birth date and the child's and parent's e-mail addresses (hereafter "screening information"), enabling respondent to identify the site visitor as a child and to block the child's attempt to register with respondent without express parental consent. If respondent elects to have the child register with it, respondent shall: (1) give notice to the child to have his/her parent provide express parental consent to register; and/or (2) send a notice to the parent's e-mail address for the purpose of obtaining express parental consent. The notice to the child or parent shall provide instructions for the parent to: (1) go to a specific URL on the Web site to receive information on respondent's practices regarding its collection and use of personal identifying information from children and (2) provide express parental consent for the collection and use of such information. Respondent's collection of screening information shall be by a manner that discourages children from providing personal identifying information in addition to the screening information. All personal identifying information collected from a child shall be held by respondent in a secure manner and shall not be used in any manner other than to effectuate the notice to the child or parent, or to block the child from further attempts to register or

otherwise provide personal identifying information to respondent without express parental consent. The personal identifying information collected shall not be disclosed to any third party prior to the receipt of express parental consent. If express parental consent is not received by twenty (20) days after respondent's collection of the information from the child, respondent shall remove all such personal identifying information from its databases, except such screening information necessary to block the child from further attempts to register or otherwise provide personal identifying information to respondent without express parental consent.

VI.

Nothing in this order shall prohibit respondent from collecting personal identifying information from children or from using such information, as specifically permitted in the Children's Online Privacy Protection Act of 1998 (without regard to the effective date of the Act) or as such Act may hereafter be amended; regulations or guides promulgated by the Commission; or self-regulatory guidelines approved by the Commission pursuant to the Act.

VII.

It is further ordered, That respondent GeoCities, and its successors and assigns, shall provide a reasonable means for consumers, including the parents of children, to obtain removal of their or their children's personal identifying information collected and retained by respondent and/or disclosed to third parties, prior to the date of service of this order, as follows:

A. Respondent shall provide a clear and prominent notice to each consumer over the age of twelve (12) from whom it collected personal identifying information and disclosed that information to CMG Information Services, Inc., describing such consumer's options as stated in Part VII.C and the manner in which (s)he may exercise them.

B. Respondent shall provide a clear and prominent notice to the parent of each child from whom it collected personal identifying information prior to May 20, 1998, describing the parent's options as stated in Part VII.C and the manner in which (s)he may exercise them.

C. Respondent shall provide the notice within thirty (30) days after the date of service of this order by e-mail, postal mail, or

facsimile. Notice to the parent of a child may be to the e-mail address of the parent and, if not known by respondent, to the e-mail address of the child. The notice shall include the following information:

1. The information that was collected (*e.g.*, "name," "home address," "e-mail address," "age," "interests"); its use(s) and/or intended use(s); and the third parties to whom it was or will be disclosed (*e.g.*, "advertisers of consumer products," "mailing list companies," "the general public") and with respect to children, that the child's personal identifying information may have been made public through various means, such as by publicly posting on the child's personal home page or disclosure by the child through the use of an e-mail account;

2. The consumer's and child's parent's right to obtain access to such information and the means by which (s)he may do so;

3. The consumer's and child's parent's right to have the information removed from respondent's or a third party's databases and the means by which (s)he may do so;

4. A statement that children's information will not be disclosed to third parties, including public posting, without express parental consent to the disclosure or public posting;

5. The means by which express parental consent may be communicated to the respondent permitting disclosure to third parties of a child's information; and

6. A statement that the failure of a consumer over the age of twelve (12) to request removal of the information from respondent's databases will be deemed as approval to its continued retention and/or disclosure to third parties by respondent.

D. Respondent shall provide to consumers, including the parents of children, a reasonable and secure means to request access to or directly access their or their children's personal identifying information. Such means may include direct access through password protected personal profile, return e-mail bearing an electronically verifiable signature, postal mail, or facsimile.

E. Respondent shall provide to consumers, including the parents of children, a reasonable means to request removal of their or their children's personal identifying information from respondent's and/or the applicable third party's databases or an assurance that such

information has been removed. Such means may include e-mail, postal mail, or facsimile.

F. The failure of a consumer over the age of twelve (12) to request the actions specified above within twenty (20) days after his/her receipt of the notice required in Part VII.A shall be deemed to be consent to the information's continued retention and use by respondent and any third party.

G. Respondent shall provide to the parent of a child a reasonable means to communicate express parental consent to the retention and/or disclosure to third parties of his/her child's personal identifying information. Respondent shall not use any such information or disclose it to any third party unless and until it receives express parental consent.

H. If, in response to the notice required in Part VII.A, respondent has received a request by a consumer over the age of twelve (12) that respondent should remove from its databases the consumer's personal identifying information or has not received the express consent of a parent of a child to the continued retention and/or disclosure to third parties of a child's personal identifying information by respondent within twenty (20) days after the parent's receipt of the notice required in Part VII.B, respondent shall within ten (10) days:

1. Discontinue its retention and/or disclosure to third parties of such information, including but not limited to (a) removing from its databases all such information, (b) removing all personal home pages created by the child, and (c) terminating all e-mail accounts for the child; and

2. Contact all third parties to whom respondent has disclosed the information, requesting that they discontinue using or disclosing that information to other third parties, and remove the information from their databases.

With respect to any consumer over the age of twelve (12) or any parent of a child who has consented to respondent's continued retention and use of personal identifying information pursuant to this Part, such consumer's or parent's continuing right to obtain access to his/her or a child's personal identifying information or removal of such information from respondent's databases shall be as specified in the notice required by Part IV of this order.

I. Within thirty (30) days after the date of service of this order, respondent shall obtain from a responsible official of each third party to whom it has disclosed personal identifying information and from each GeoCities Community Leader a statement stating that (s)he has been advised of the terms of this order and of respondent's obligations under this Part, and that (s)he agrees, upon notification from respondent, to discontinue using or disclosing a consumer's or child's personal identifying information to other third parties and to remove any such information from its databases.

J. As may be permitted by law, respondent shall cease to do business with any third party that fails within thirty (30) days of the date of service of this order to provide the statement set forth in Part VII.I or whom respondent knows or has reason to know has failed at any time to (a) discontinue using or disclosing a child's personal identifying information to other third parties, or (b) remove any such information from their databases. With respect to any GeoCities Community Leader, the respondent shall cease the Community Leader status of any person who fails to provide the statement set forth in Part VII.I or whom respondent knows or has reason to know has failed at any time to (a) discontinue using or disclosing a child's personal identifying information to other third parties, or (b) remove any such information from their databases.

For purposes of this Part: "third party(ies)" shall mean each GeoCities Community Leader, CMG Information Services, Inc., Surplus Software, Inc. (Surplus Direct/Egghead Computer), Sage Enterprises, Inc. (GeoPlanet/Planetall), Netopia, Inc. (Netopia), and InfoBeat/Mercury Mail (InfoBeat).

VIII.

It is further ordered, That for the purposes of this order, respondent shall not be required to remove personal identifying information from its archived database if such information is retained solely for the purposes of Web site system maintenance, computer file back-up, to block a child's attempt to register with or otherwise provide personal identifying information to respondent without express parental consent, or to respond to requests for such information from law enforcement agencies or pursuant to judicial process. Except as necessary to respond to requests from law enforcement agencies or pursuant to judicial process, respondent shall

not disclose to any third party any information retained in its archived database. In any notice required by this order, respondent shall include information, clearly and prominently, about its policies for retaining information in its archived database.

IX.

It is further ordered, That for five (5) years after the date of this order, respondent GeoCities, and its successors and assigns, shall place a clear and prominent hyperlink within its privacy statement which states as follows in bold typeface:

NOTICE: Click here for important information about safe surfing from the Federal Trade Commission.

The hyperlink shall directly link to a hyperlink/URL to be provided to respondent by the Commission. The Commission may change the hyperlink/URL upon thirty (30) days prior written notice to respondent.

X.

It is further ordered, That respondent GeoCities, and its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying the following:

A. For five (5) years after the last date of dissemination of a notice required by this order, a print or electronic copy in HTML format of all documents relating to compliance with Parts IV through IX of this order, including, but not limited to, a sample copy of every information collection form, Web page, screen, or document containing any representation regarding respondent's information collection and use practices, the notice required by Parts IV, V and VII, any communication to third parties required by Part VII, and every Web page or screen linking to the Federal Trade Commission Web site. Each Web page copy shall be accompanied by the URL of the Web page where the material was posted online. Electronic copies shall include all text and graphics files, audio scripts, and other computer files used in presenting information on the World Wide Web; and

Provided that, after creation of any Web page or screen in compliance with this order, respondent shall not be required to retain a print or electronic copy of any amended Web page or screen to the

extent that the amendment does not affect respondent's compliance obligations under this order.

B. For five (5) years after the last collection of personal identifying information from a child, all materials evidencing the express parental consent given to respondent.

XI.

It is further ordered, That respondent GeoCities, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

XII.

It is further ordered, That respondent GeoCities, and its successors and assigns, shall establish an "information practices training program" for any employee or GeoCities Community Leader engaged in the collection or disclosure to third parties of consumers' personal identifying information. The program shall include training about respondent's privacy policies, information security procedures, and disciplinary procedures for violations of its privacy policies. Respondent shall provide each such current employee and GeoCities Community Leader with information practices training materials within thirty (30) days after the date of service of this order, and each such future employee or GeoCities Community Leader such materials and training within thirty (30) days after (s)he assumes his/her position or responsibilities.

XIII.

It is further ordered, That respondent GeoCities, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation

or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XIV.

It is further ordered, That respondent GeoCities, and its successors and assigns, shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade 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.

XV.

This order will terminate on February 5, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;
B. This order's application to any respondent that is not named as a defendant in such complaint; and
C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the

deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

CONCURRING STATEMENT OF COMMISSIONER ORSON SWINDLE

I have voted in favor of final issuance of the consent order in this matter because its provisions are appropriate to remedy the alleged violations of the law by GeoCities, Inc. However, I want to emphasize that my support for these provisions as a remedy for alleged law violations in this particular case does not necessarily mean that I would support imposing these requirements on other commercial Internet sites through either legislation or regulation.

IN THE MATTER OF

ERNESTO L. RAMIREZ TORRES, D.M.D., ET. AL.

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

Docket C-3851. Complaint, Feb. 5, 1999--Decision, Feb. 5, 1999

This consent order, among other things, prohibits Ernesto L. Ramirez Torres, D.M.D., and other dentists in Juana Diaz, Coamo, and Santa Isabel, Puerto Rico, from fixing prices and engaging in a boycott in order to obtain higher reimbursement rates for dental services under Puerto Rico's government managed care plan.

Participants

For the Commission: *Steven Osnowitz, Gary Schorr, Michael Kades, Patricia Allen, David Pender, Robert Leibenluft, Anne Schenof, Daniel Ducore, Willard Tom, William Baer, Louis Silvia* and *Peter Gulyn.*

For the respondents: *Manuel Fernandez-Mejias,* Hato Rey, Puerto Rico.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the individuals named above, hereinafter respondents, violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondents are dentists licensed and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico. These dentists constitute a majority of the dentists in the contiguous municipalities of Juana Diaz, Coamo, and Santa Isabel, Puerto Rico. The respondents are:

(a) Ernesto L. Ramirez Torres, D.M.D., Calle Comercio #105, Juana Diaz, Puerto Rico;

(b) Eric D. Frontera Roura, D.M.D., Calle Mario Braschi #7, Coamo, Puerto Rico;

(c) Ernesto L. Ramirez L.V., D.M.D., Comercio #105, Juana Diaz, Puerto Rico;

(d) Jaime R. Gierbolini Borelli, D.M.D., Jose I. Quinton #49, Coamo, Puerto Rico;

(e) Adolfo L. Gierbolini Borelli, D.M.D., P.O.Box 261, Coamo, Puerto Rico;

(f) Roberto L. Mateo Nieves, D.M.D., Calle Betances #12, Santa Isabel, Puerto Rico;

(g) Miguel E. Rivera Mateo, D.M.D., Haciendas del Monte, Calle 6 G-2, Santa Isabel, Puerto Rico;

(h) Hector Renta Melendez, D.M.D., Calle Florencio Santiago #41, Coamo, Puerto Rico;

(i) Migdalia E. Alvarado Burgos, D.M.D., Calle Santiago Iglesias #66, Coamo, Puerto Rico;

(j) Juan R. Rosario Ramos, D.M.D., Calle Comercio, Esq. Hostos #116-C, Juana Diaz, Puerto Rico;

(k) Jorge L. Rivera Rosario, D.M.D., Calle Munoz Rivera #47, Juana Diaz, Puerto Rico;

(l) Jorge C. Munoz Mattei, D.M.D., Munoz Rivera #54-C, Juana Diaz, Puerto Rico; and

(m) Raul D. Ortiz Escalera, D.D.S., Calle Baldoriaty #42, Coamo, Puerto Rico.

PAR. 2. The acts and practices of respondents, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 3. The acts and practices of respondents herein alleged concern their agreements, combinations, and conspiracies to set the prices and other terms and conditions under which they would participate in Puerto Rico's program to provide medical, pharmaceutical, and dental services to the indigent (the "Reform"), established pursuant to the Puerto Rico Health Insurance Administration Act of 1993, Act No. 72, Article II. The Reform was intended to create a health insurance system to give high quality health care, including dental services, to indigent residents of Puerto Rico. The Reform is financed by the Commonwealth, Federal Medicaid, other applicable Federal funds, contributions by employers and individual employees, and income from privatization funds (such as leases and sales of

government-owned health care facilities). To date, the Reform has been implemented throughout much of Puerto Rico, although it is not yet in place in San Juan and its environs, Ponce, or Mayaguez. The Reform currently covers 1.1 million individuals among the over 3.8 million residents of Puerto Rico.

PAR. 4. The Administración de Seguros de Salud ("ASES"), a public corporation, implements and administers the Reform. ASES has divided Puerto Rico into regions, soliciting for each region bids from payers to organize and provide services for beneficiaries. ASES currently selects one payer with which to contract per region. That payer then contracts with providers, including hospitals, physicians, pharmacies, and dentists.

PAR. 5. After reviewing bids from several payers, ASES selected La Cruz Azul to administer the Southeast Region of the Reform beginning October, 1994. Initially the municipalities of Juana Diaz, Coamo, and Santa Isabel were not included in the Reform, but ASES included them in the Southeast Region on December 20, 1995. The combined population of Juana Diaz, Coamo, and Santa Isabel is approximately 106,000 residents.

PAR. 6. Absent agreements among competing dentists on the price and other terms upon which they will provide services to third-party payers, competing dentists decide individually whether to enter into contracts with third-party payers, and on the terms and conditions under which they are willing to enter into such contracts.

PAR. 7. Beginning in September of 1995, many of the respondents, in various combinations, sometimes including other dentists, met and discussed the impending expansion of the Southeast Region to Juana Diaz, Coamo, and Santa Isabel, and the terms and conditions under which they would agree to participate in the Reform. During these meetings, respondents agreed to the price terms that would cause them to participate in the Reform, and respondents agreed that they would convey their joint response to La Cruz Azul's request to each of them to participate in the Reform. Thereafter, a letter was prepared to present to La Cruz Azul, stating respondents' opposition to certain terms and conditions, including the amount of payment, which they wanted increased. The respondents threatened a boycott of the Reform program if La Cruz Azul did not address their demands. During this period of time, the respondents constituted a majority of dentists engaged in the practice of dentistry in the municipalities of Juana Diaz, Coamo, and Santa Isabel.

PAR. 8. On December 14, 1995, the respondents met with representatives of La Cruz Azul, and presented their letter with the terms and conditions under which they would participate in the Reform, including price terms, for which they sought higher reimbursement. During the meeting with La Cruz Azul, and while a representative of La Cruz Azul was not present, the respondents discussed among themselves their response to the terms and conditions for participation in the Reform, and agreed to nearly identical responses. Each respondent provided La Cruz Azul written notice that the dentist would not participate in the Reform under the terms offered by La Cruz Azul.

PAR. 9. The respondents refused to participate in the Reform upon its expansion to the areas of their practices on December 20, 1995, and communicated with the public that they would not accept its terms and conditions. Respondents in Juana Diaz placed an advertisement in a newspaper notifying the public that they would not participate, and some respondents conveyed their refusal to deal with the Reform in a radio interview. Because of this concerted refusal to deal, residents of Juana Diaz, Coamo, and Santa Isabel who were eligible under the Reform were not able to receive dental services from local providers.

PAR. 10. Dentists from Ponce advertised their willingness to accept Reform patients from Juana Diaz, Coamo, and Santa Isabel. In response, respondents sought to have the Colegio de Cirujanos Dentistas de Puerto Rico (the "Colegio") prohibit this advertising. The Colegio eventually found advertisements by one of the dentists from Ponce to be in violation of the Colegio's rules, and notified the dentist, who then stopped advertising that was targeted to residents of Juana Diaz, Coamo, and Santa Isabel.

PAR. 11. La Cruz Azul acceded to respondents' demand to raise the level of reimbursement of dental fees under the Reform. The respondents then agreed to participate in the Reform, effective February 1, 1996.

PAR. 12. The respondents have not integrated their businesses in any economically significant way, nor have they created any efficiencies that might justify the acts and practices described in paragraphs seven through eleven.

PAR. 13. The acts and practices of the respondents as described in this complaint have had the purpose, tendency, effects, and

capacity to restrain trade unreasonably and hinder competition in the provision of dental goods and services in Southeast Puerto Rico, in the following ways, among others:

1. To restrain competition among dentists;
2. To fix the compensation and other terms and conditions upon which dentists would deal with payers and participate in the Reform, thereby raising the cost of and limiting access to dental services to be funded by the Reform; and
3. To deprive the Commonwealth of Puerto Rico, payers, and consumers of the benefits of competition among dentists.

PAR. 14. The combination or conspiracy and the acts and practices of respondents, as herein alleged, constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. The acts, practices, and violations, or the effects thereof, as herein alleged, will continue or recur in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the respondents, named in the caption above, and the respondents having been furnished thereafter with a copy of the draft complaint which the Bureau of Competition 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, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all of the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purpose only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true 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 the complaint should issue stating its

charges in that respect, and having thereupon accepted the executed consent agreement and placed it on the public record for a period of sixty (60) days, and having duly considered the comment received, 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. Respondents are dentists licensed and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with their names and principal places of business located at the addresses listed below:

(a) Ernesto L. Ramirez Torres, D.M.D., Calle Comercio #105, Juana Diaz, Puerto Rico;

(b) Eric D. Frontera Roura, D.M.D., Calle Mario Braschi #7, Coamo, Puerto Rico;

(c) Ernesto L. Ramirez L.V., D.M.D., Calle Comercio #105, Juana Diaz, Puerto Rico;

(d) Jaime R. Gierbolini Borelli, D.M.D., Calle Jose I. Quinton #49, Coamo, Puerto Rico;

(e) Adolfo L. Gierbolini Borelli, D.M.D., P.O. Box 261, Coamo, Puerto Rico;

(f) Roberto L. Mateo Nieves, D.M.D., Calle Betances #12, Santa Isabel, Puerto Rico;

(g) Miguel E. Rivera Mateo, D.M.D., Haciendas del Monte, Calle 6 G-2, Santa Isabel, Puerto Rico;

(h) Hector Renta Melendez, D.M.D., Calle Florencio Santiago #41, Coamo, Puerto Rico;

(i) Migdalia E. Alvarado Burgos, D.M.D., Calle Santiago Iglesias #66, Coamo, Puerto Rico;

(j) Juan R. Rosario Ramos, D.M.D., Calle Comercio, Esq. Hostos # 16 Juana Diaz, Puerto Rico;

(k) Jorge L. Rivera Rosario, D.M.D., Calle Munoz Rivera #47, Juana Diaz, Puerto Rico;

(l) Jorge C. Munoz Mattei, D.M.D., Calle Munoz Rivera #54-C, Juana Diaz, Puerto Rico; and

(m) Raul D. Ortiz Escalera, D.D.S., Calle Baldoriaty #42, Coamo, Puerto Rico.

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

ORDER

I.

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

A. "*Payer*" means any person that purchases, reimburses for, or otherwise pays for all or part of any health care services for itself or for any other person. Payer includes, but is not limited to, any health insurance company; preferred provider organization; prepaid hospital, medical, or other health service plan; health maintenance organization; government health benefits program; employer or other person providing or administering self-insured health benefits programs; and patients who purchase health care for themselves.

B. "*Person*" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

C. "*Provider*" means any person that supplies health care services to any other person, including, but not limited to, dentists, physicians, pharmacies, hospitals, and clinics.

D. "*Qualified risk-sharing joint arrangement*" means an arrangement to provide dental services in which (1) the arrangement does not restrict the ability, or facilitate the refusal, of providers participating in the arrangement to deal with payers individually or through any other arrangement, and (2) all providers participating in the arrangement share substantial financial risk from their participation in the arrangement through: (a) the provision of services to payers at a capitated rate; (b) the provision of services for a predetermined percentage of premium or revenue from payers; (c) the use of significant financial incentives (*e.g.*, substantial withholds) for its participating providers, as a group, to achieve specified cost-containment goals; or (d) the provision of a complex or extended course of treatment that requires the substantial coordination of care by different types of providers offering a complementary mix of services, for a fixed, predetermined payment, where the costs of that course of treatment for any individual patient can vary greatly due to

the individual patient's condition, the choice, complexity, or length of treatment, or other factors.

E. "*Qualified clinically-integrated joint arrangement*" means an arrangement to provide dental services in which (1) the arrangement does not restrict the ability, or facilitate the refusal, of providers participating in the arrangement to deal with payers individually or through any other arrangement, and (2) all providers participating in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the providers participating in the arrangement, in order to control costs and ensure quality of the services provided through the arrangement.

F. "*Reimbursement*" means any payment, whether cash or non-cash, or other benefit received for the provision of dental goods and services.

II.

It is further ordered, That each respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of dental goods and services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, cease and desist from:

A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding to:

1. Negotiate on behalf of any other dentist with any payer or provider;
2. Deal or refuse to deal with, boycott or threaten to boycott, any payer or provider; or
3. Determine any terms, conditions, or requirements upon which dentists deal with any payer or provider, including, but not limited to, terms of reimbursement.

B. Encouraging, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited if the person were subject to this order.

Provided that nothing in this order shall be construed to prohibit any agreement or conduct by any respondent that is reasonably necessary to form, facilitate, manage, operate, or participate in:

(a) A qualified risk-sharing joint arrangement; or

(b) A qualified clinically integrated joint arrangement, if the applicable respondent has provided the prior notification(s) as required by this paragraph (b). Such prior notification must be filed with the Secretary of the Commission at least thirty (30) days prior to forming; facilitating; managing; operating; participating in; or taking any action, other than planning, in furtherance of any joint arrangement requiring such notice ("first waiting period"), and shall include for such arrangement the identity of each participant, the location or area of operation, a copy of the agreement and any supporting organizational documents, a description of its purpose or function, a description of the nature and extent of the integration expected to be achieved and the anticipated resulting efficiencies, an explanation of the relationship of any agreement on reimbursement to furthering the integration and achieving the expected efficiencies, and a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from such agreement(s). If, within the first waiting period, a representative of the Commission makes a written request for additional information, the applicable respondent shall not form; facilitate; manage; operate; participate in; or take any action, other than planning, in furtherance of such joint arrangement until thirty (30) days after substantially complying with such request for additional information ("second waiting period") or such shorter waiting period as may be granted by letter from the Bureau of Competition.

III.

It is further ordered, That each respondent shall, within thirty (30) days after the date on which this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint, as well as certified Spanish translations thereof, to each payer or provider who, at any time since January 1, 1995, has communicated any desire, willingness, or interest in contracting for dentists' goods and services with the respondent.

IV.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final, each respondent 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, and has complied with paragraphs II and III of this order.

B. One (1) year from the date this order becomes final, annually for the next five (5) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, each respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraphs II and III of this order.

V.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, each respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in the possession or under the control of respondent relating to any matter contained in this order; and

B. Upon five business days' notice to a respondent, and without restraint or interference from that respondent, to interview that respondent or any employee or representative of that respondent.

VI.

It is further ordered, That this order shall terminate on February 5, 2019.

IN THE MATTER OF

ALLEGHANY CORPORATION

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

Docket C-3335. Consent Order, July 11, 1991–Modifying Order, Feb. 11, 1999

This order reopens a 1991 consent order -- that required Alleghany Corporation to divest certain rights and interests in title plants and back plants to a Commission-approved acquirer, and, for ten years, to obtain Commission approval before acquiring certain related assets -- and this order modifies the consent order by relieving Alleghany of its compliance obligations, under paragraphs VI, VII, VIII.B., IX and X, since Alleghany restructured itself and is no longer engaged in the title plant/back plant business.

Participants

For the Commission: *Pamela Gill* and *Roberta Baruch.*

For the respondents: *John C. Christie, Jr., Hale & Dorr,* Washington, D.C.

ORDER REOPENING AND MODIFYING ORDER

On October 14, 1998, respondent Alleghany Corporation ("Alleghany") filed a Petition to Reopen and Modify Consent Order ("Petition"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. In its Petition, Alleghany requests that the Commission reopen the order in Docket No. C-3335 ("Order") to relieve Alleghany of its compliance obligations under Paragraphs VI, VII, VIII.B., IX and X, the only remaining operative paragraphs of the Order.[1] The Petition was placed on the public record for thirty days pursuant to Section 2.51(c) of the Commission's Rules of Practice and Procedure. Paragraph VI of the Order prohibits Alleghany from acquiring for ten years without prior notice to the Commission any stock, share capital, or equity

[1] In support of its Petition, Alleghany provided the affidavits of Robert M. Hart, General Counsel of Alleghany and Thomas J. Adams, III, General Corporate Counsel of Chicago Title Corporation ("Chicago Title") and of Chicago Title and Trust Company ("CT&T") ("Hart Affidavit" and "Adams Affidavit").

interest in any concern that in turn has any direct or indirect ownership interest in a title plant or back plant servicing the same area, or acquire from any concern 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 has any ownership interest in a title plant or back plant servicing the same area. Paragraph VII of the Order exempts from the requirements of Paragraph VI certain acquisitions. Paragraph VIII.B. requires Alleghany to file annual reports respecting its compliance with the Order. Paragraph IX provides that the Commission shall have access to specified records and officers and personnel of Alleghany. Paragraph X requires that Alleghany provide prior notice of any changes that may affect compliance obligations arising out of the Order.[2] These Order provisions expire by their own terms on July 23, 2001, ten years after the Order became final.[3] Alleghany asserts that the purpose of the Order is to preserve competition in the provision of title plant/back plant information. Since Alleghany is no longer, directly or indirectly, in the title plant/back plant business, the prohibitions and requirements of the Order as to Alleghany serve no useful purpose. According to Alleghany, the Order now places responsibility upon Alleghany for the actions or inaction of other firms that Alleghany, since the spin-off, no longer controls.[4]

The changes of fact alleged by Alleghany include the fact that Alleghany restructured itself by forming an independent publicly-traded corporation named Chicago Title Corporation ("Chicago Title"). Chicago Title includes Alleghany's title insurance and real estate related services business. On June 17, 1998, Alleghany spun-off Chicago Title ("Spin-Off").[5] The Spin-Off was accomplished through a pro rata distribution to Alleghany stockholders; specifically, three shares of Chicago Title stock were distributed for each share of

[2] 114 FTC 385 (1991). By an order issued June 27, 1996, the Commission reopened and modified the Order resulting in, among other things, certain modifications of the prior notice provisions contained in paragraph VI of the original Order. 121 FTC 934 (1996).

[3] Order ¶¶ VI, VII, VIII.B., IX, X.

[4] Petition at 5.

[5] Prior to the Spin-Off, Alleghany was the sole owner of Chicago Title and Trust Company ("CT&T"). CT&T is the sole owner of Chicago Title Insurance Company ("Chicago Title Insurance"), Ticor Title Insurance Company of California ("Ticor") and Security Union Title Insurance Company ("STI"). Chicago Title Insurance, Ticor and STI are engaged in the title plant/back plant business. Chicago Title is a newly formed holding company for these former Alleghany subsidiaries.

Alleghany common stock outstanding as of the record date of June 10, 1998. On the effective date of the Spin-Off, the largest individual stockholder of Alleghany held no more than 12.5% of the total amount of Alleghany stock outstanding. None of the executive officers of Chicago Title holds any present position with Alleghany. The Board of Directors of Chicago Title consists of fourteen directors. Although certain of these Board members hold positions with Alleghany, the substantial majority of the Board has no connection with Alleghany. Only two directors are executive officers of Alleghany, and one of those directors is also a director of Alleghany. Two other directors are also directors of Alleghany and a third is an executive officer of Alleghany Asset Management, Inc. ("AAM"), an Alleghany subsidiary which has never been in the business of title insurance. The remaining directors are either officers of Chicago Title or outside directors unaffiliated in any way with Alleghany.[6]

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 modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. 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 it inequitable or harmful to competition.[7]

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so

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[6] *See* Petition at 2-5; ¶¶ 3-11 Hart Affidavit; ¶¶ 1-6 Adams Affidavit. Prior to the Spin-Off, AAM was a subsidiary of CT&T which conducted the financial services business of CT&T. CT&T distributed the stock of AAM to Alleghany because Alleghany chose to retain the financial services business, while it spun off the title insurance and real estate services business. While Alleghany and Chicago Title have entered into certain administrative agreements to define their ongoing relationship, and to allocate responsibility for past obligations and certain obligations that might arise in the future, these agreements do not give Alleghany responsibility for management of Chicago Title or its subsidiaries. Petition at 4.

[7] S. Rep. No. 96-500, 96th Cong., 1st Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter"). *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.[8]

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order."[9] If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether 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 petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.[10] However, if the Commission denies relief, it must provide a sufficient explanation of its reasons for the denial.[11]

Upon consideration of Alleghany's request and other information, the Commission finds pursuant to Section 2.51 of the Commission's Rules of Practice and Procedure, that changed conditions of fact warrant reopening and modification of the Order to set aside the aforementioned provisions as to Alleghany. As a result of the Spin-Off, Alleghany is no longer engaged in the title plant/back plant business which gave rise to the Order and has stated that it has no present intent to re-enter that business in the future. In addition, Alleghany is not in a position to oversee the management of Chicago Title. Therefore, there are no longer competitive concerns that would justify the need for prior notice for any acquisition that Alleghany

[8] Alleghany has based its request upon changed conditions of fact and not the public interest standard for reopening and modifying orders.

[9] S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify).

[10] *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

[11] *United States v. Louisiana-Pacific Corp.*, 754 F.2d 1445 (9th Cir. 1985).

may wish to make of a title plant/back plant business. In relieving Alleghany of its compliance obligations under the aforementioned paragraphs, the Commission notes that Chicago Title, as a successor corporation, remains bound by the terms of the Order for its duration and that Chicago Title has submitted an affidavit specifically acknowledging that it is bound by the Order as successor.[12]

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened and that the Commission's Order be, and it hereby is, modified to relieve Alleghany of its compliance obligations under Paragraphs VI, VII, VIII.B., IX and X as of the effective date of this order.

[12] Petition at 6; ¶ 6 Adams Affidavit.

IN THE MATTER OF

LAFARGE, S.A., 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 C-3852. Complaint, Feb. 12, 1999--Decision, Feb. 12, 1999

This consent order, among other things, prohibits the respondents from entering into any contract or agreement relating to the acquisition by Lafarge of any of the Holnam Acquisition Assets, in which the amount of any payment made after the closing of the acquisition is calculated by reference to or dependent upon the quantity of cement produced or sold by Lafarge in any market in the states of Washington or Oregon.

Participants

For the Commission: *Joseph Lipinsky, John Kirkwood, Patricia Hensley, Shane Woods, Maxine Stansell, Virginia Davidson, Robert Schroeder, Charles Harwood, Kenneth Libby, Daniel Ducore, William Baer, Daniel O'Brien, J. Elizabeth Callison* and *Roger Boner.*

For the respondents: *Richard Favretto, Mayer, Brown & Platt,* Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Lafarge, S.A., through an entity it controls, Lafarge Corporation (collectively "respondents"), has entered into an agreement to acquire cement production assets of Holnam, Inc., that the agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that the acquisition, if consummated, would result in a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

A. THE RESPONDENTS

1. Respondent Lafarge, S.A., is a corporation organized, existing and doing business under and by virtue of the laws of France with its principal executive offices located at 61 rue des Belles Feuilles, F-

75782 Paris, France. Lafarge, S.A., is an international corporation engaged in the manufacture and sale of building materials: cement, aggregates, concrete and concrete admixtures.

2. Respondent Lafarge Corporation ("Lafarge") is a corporation controlled by Lafarge, S.A., with its principal executive offices located at 11130 Sunrise Valley Drive, Reston, Virginia. Lafarge is one of North America's largest suppliers of cement for residential, commercial, institutional and public works construction. Lafarge operates 14 cement plants in the United States and Canada and had sales of $1.6 billion in 1996.

3. Holnam, Inc. ("Holnam"), headquartered in Dundee, MI, is the number one supplier of cement for residential, commercial, institutional and public works construction in the United States. It operates 19 cement plants in North America and had sales of $983 million in 1996. Holnam is a wholly-owned subsidiary of Holderbank Financiere Glaris, Ltd., a Swiss-based holding company.

4. At all times relevant herein, respondents have been and are now engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. 12, and are corporations 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.

B. THE PROPOSED ACQUISITION

5. On February 4, 1998, Lafarge and Holnam signed a Letter of Intent setting out the principal elements of a proposed transaction, whereby Lafarge would acquire Holnam's Seattle, Washington cement plant and related assets.

C. RELEVANT MARKET

6. The relevant line of commerce in which to analyze the effects of Lafarge's proposed acquisition of Holnam's Seattle cement plant and related assets is the manufacture, marketing and sale of portland cement.

7. Portland cement is the essential binding ingredient in concrete. Portland cement is a construction raw material that users mix with water and aggregates (crushed stone, sand, or gravel) to form concrete. Portland cement is a closely controlled chemical combination of calcium (normally from limestone), silicon, aluminum, iron and small amounts of other ingredients. It is made by quarrying, crushing and grinding the raw materials, burning them in

huge kilns at extremely high temperatures and finely grinding the resulting marble-size pellets (called "clinker") with gypsum into an extremely fine, usually gray, powder. Portland cement produced by one manufacturer is virtually indistinguishable from that manufactured by another.

8. The relevant geographic market in which to analyze the effects of Lafarge's proposed acquisition of Holnam's Seattle cement plant and related assets is the Puget Sound area of the state of Washington. This area, whose commercial center is the city of Seattle, consists of the portion of Washington state south from the Canadian border to the area just south of the state capital of Olympia (roughly halfway between Seattle and Portland, Oregon) and east from the Pacific Ocean to the Cascade mountains, plus two adjacent counties just east of the Cascade Mountains. The 13 counties in this market west of the Cascades are Clallum, Grays Harbor, Island, Jefferson, King, Kitsap, Mason, Pierce, San Juan, Skagit, Snohomish, Thurston, and Whatcom, and the two counties east of the mountains are Chelan and Kittitas.

D. MARKET STRUCTURE

9. The Puget Sound market for portland cement is highly concentrated with only five suppliers -- Lafarge, Holnam, Ash Grove Cement Company, CBR Cement Corporation and Lone Star Northwest. The first four companies operate cement plants in or contiguous to the Puget Sound market. The fifth company, Lone Star Northwest, which is also a large user of cement, does not operate a cement plant in this area; instead, it imports cement into the market from Asia and South America and purchases cement from other suppliers in the market. Based on 1997 sales, the acquisition would increase the Herfindahl-Hirschman Index by 329 points from 2260 to 2589.

E. CONDITIONS OF ENTRY

10. Entry under any of the three methods that an entrant could use to enter the Puget Sound cement market -- building a cement plant, building a rail terminal or building a deep-sea importing terminal -- would not be timely, likely or sufficient to offset reductions in competition resulting from the acquisition.

11. The minimum viable scale of a cement plant likely precludes new entry. The prevailing cement production technology demands large-scale production, relative to market size, in order to operate efficiently. This technology has but a single use -- *i.e.*, the production of cement. It cannot economically be shifted toward another use. Therefore, all returns on investment must be derived from cement sales. Because economic entry would require that a new producer capture a significant market share from existing producers, and because the costs of such entry would be sunk, such entry is inherently risky. Current overcapacity, as well as announced expansions by existing producers, serve as additional deterrents to new entry.

12. *De novo* entry into the Puget Sound cement market by building a rail terminal is also very unlikely. Cement producers that are not currently in the Puget Sound market are at least 800 miles away. If these producers shipped cement to Puget Sound via rail, they would encounter a freight cost of approximately $20 per ton. This cost, which is not faced by the current suppliers, would put the new entrant at a severe cost disadvantage. Moreover, these producers are currently operating their cement production plants at full capacity and selling this production near their plants. For these reasons, the price of cement would need to rise substantially from existing levels before another producer would find building a rail terminal economically attractive.

13. In order to enter the Puget Sound market via a deep-sea terminal, the entrant needs a terminal that can receive deep-drafting ocean-going vessels. Currently, and for the foreseeable future (more than two years), the commercial ports in the Puget Sound area do not have such sites available. Thus, *de novo* entry via a deep-sea terminal is unlikely.

F. EFFECTS OF THE PROPOSED ACQUISITION

14. The effects of the acquisition, if consummated, may be to substantially lessen competition in the Puget Sound cement market. Absent the proposed acquisition, Holnam likely would significantly increase the supply of cement to the market resulting in a decrease in cement prices. As originally structured, the proposed acquisition contains a contractual provision that imposes a significant cost penalty on Lafarge for quantities of cement produced at the Holnam cement plant in excess of the amount Holnam currently supplies to

the market. The proposed acquisition thus would give Lafarge the incentive to unilaterally restrict the output of cement at the Holnam plant in order to avoid the additional contractual cost. This would prevent any increase in supply of cement to the market and thus avoid a significant decrease in the price of cement in the Puget Sound market.

G. VIOLATIONS CHARGED

15. Lafarge's agreement to acquire Holnam's Seattle cement plant and related assets violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and the proposed acquisition would, if consummated, violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Lafarge Corporation, a corporation controlled by Lafarge, S.A. (collectively "Lafarge"), of the Seattle cement plant and related assets of Holnam, Inc. ("Holnam"), and respondents having been furnished with a copy of a draft of complaint which, if issued by the Commission, would charge respondents with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that 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, 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 Lafarge, S.A., is a corporation organized, existing and doing business under and by virtue of the laws of France with its principal executive offices located at 61 rue des Belles Feuilles, F-75782 Paris, France.

2. Respondent Lafarge Corporation is a corporation controlled by Lafarge, S.A., with its principal executive offices located at 11130 Sunrise Valley Drive, Reston, Virginia.

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

I.

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

A. "*Respondents*" or "*Lafarge*" means Lafarge Corporation and Lafarge, S.A., their directors, officers, employees, agents, representatives, predecessors, successors, and assigns; their subsidiaries, divisions, groups and affiliates controlled by Lafarge Corporation and Lafarge, S.A., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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

C. "*Holnam Acquisition Assets*" means the cement plant in Seattle, Washington, the cement distribution terminal in Vancouver, Washington, and the rock quarry in Twin Rivers, Washington, owned by Holnam, Inc., which has its office and principal place of business located at 6211 Ann Arbor Road, Dundee, Michigan; and the rock quarry on Texada Island, British Columbia, and the cement distribution terminal in New Westminster, British Columbia, owned by Holnam West Materials, Ltd., a subsidiary of Holnam, Inc.

II.

It is further ordered, That respondents shall not enter into any contract, agreement, or understanding, relating to the acquisition by Lafarge of any or all of the Holnam Acquisition Assets, in which the

amount of any payment by Lafarge or Holnam made after the closing of the acquisition is calculated by reference to, affected by, or dependent upon, directly or indirectly, the quantity of cement produced or sold by Lafarge in any market in the states of Washington or Oregon.

III.

It is further ordered, That, within thirty (30) days after the date this order becomes final or within thirty (30) days after the date on which respondents consummate the acquisition of any or all of the Holnam Acquisition Assets, whichever is later, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they have complied with paragraph II of this order. Respondents shall include in their compliance report, among other things, a full description of the efforts made to comply with paragraph II of the order.

IV.

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

V.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondents shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondents relating to any matters contained in this order; and

B. Upon five days' notice to respondents and without restraint or interference from them, to interview officers, directors, or employees of respondents.

IN THE MATTER OF

MERCK & CO., INC., 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 C-3853. Complaint, Feb. 18, 1999--Decision, Feb. 18, 1999

This consent order, among other things, requires Merck & Co., Inc., a leading pharmaceutical manufacturer, and its subsidiary to maintain and make available an open formulary, containing information concerning the relative costs of drugs, and the respondents shall appoint or reappoint an independent committee with the authority to maintain an open formulary. In addition, the consent order prohibits Merck and Medco from sharing proprietary or other non-public information.

Participants

For the Commission: *Karen Berg, Veronica Kayne, Michael McNeely, Naomi Licker, Roberta Baruch, Willard Tom, William Baer, Charissa Wellford, J. Elizabeth Callison, Leslie Farber* and *Geary Gessler.*

For the respondents: *Michael Sohn, Arnold & Porter*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Merck & Co., Inc. ("Merck"), a corporation subject to the jurisdiction of the Commission, acquired Medco Containment Services, Inc., a corporation, now respondent Merck-Medco Managed Care, L.L.C. ("Medco"), a limited liability company subject to the jurisdiction of the Commission, that such acquisition violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and 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, as amended, 15 U.S.C. 45, stating its charges as follows:

PARAGRAPH 1. Respondent Merck & Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office located at One Merck Drive, Whitehouse Station, New Jersey.

PAR. 2. Respondent Merck is engaged in the development, production and sale of pharmaceutical products, including Mevacor and Zocor, which are "HMG-CoA reductase inhibitors" used for the treatment of high cholesterol, and Prinivil and Vasotec, which are "angiotensin converting enzyme inhibitors" ("ACE Inhibitors") used for the treatment of hypertension, high blood pressure, and heart disease.

PAR. 3. Respondent Merck-Medco Managed Care, L.L.C., is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office located at 100 Summit Avenue, Montvale, New Jersey.

PAR. 4. Respondent Medco provides pharmacy benefit management ("PBM") services to corporations, insurance companies, labor unions, Blue Cross Blue Shield organizations, federal and state employee plans, health maintenance organizations, and other members of the healthcare industry.

PAR. 5. On November 18, 1993, Merck acquired all the outstanding stock of Medco Containment Services, Inc., now doing business as Merck-Medco Managed Care, L.L.C., for approximately $6.6 billion.

PAR. 6. At all times relevant herein, respondents Merck and Medco have been, and are now, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are "corporations" whose businesses are in or affecting commerce as "corporation" and "commerce" are defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 7. A relevant line of commerce within which to analyze the effects of this acquisition is the provision of pharmacy benefit management ("PBM") services by national full-service PBM firms, and any narrower markets contained therein. Other relevant lines of commerce within which to analyze the effects of this acquisition are the development, manufacture and sale of pharmaceutical products in specific therapeutic categories, and narrower markets contained therein (including, but not limited to, the markets for HMG-CoA reductase inhibitors and angiotensin converting enzyme inhibitors).

PAR. 8. A relevant section of the country within which to analyze the effects of this acquisition is the United States.

PAR. 9. The relevant market for PBM services by national full-service PBM firms, and the relevant markets for pharmaceutical products in specific therapeutic categories, are moderately to highly concentrated.

PAR. 10. There are substantial entry barriers into the relevant markets. Even if new entry were to occur, it would take a long time, during which time substantial harm to competition could occur.

PAR. 11. As part of its PBM services, Medco maintains drug formularies, which are listings, by therapeutic category, of ambulatory drug products that are approved for use by the U.S. Food & Drug Administration, and which are used by pharmacies, physicians, third-party payors, and other persons, to guide in the prescribing and dispensing of pharmaceuticals. Merck pharmaceutical products are included on Medco's formularies. Medco also provides other PBM services, including claims processing, drug utilization review, pharmacy network administration, mail service, and related services. Medco negotiates with pharmaceutical manufacturers, including Merck, concerning placement of drugs on Medco's formularies, rebates, discounts, prices to be paid for pharmaceutical products purchased pursuant to pharmacy benefit plans managed by Medco, and similar matters. Medco thereby influences the prices of pharmaceutical products and the availability of such products under the Medco pharmacy benefit plans.

PAR. 12. The effects of Merck's acquisition of Medco may be substantially to lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) Products of manufacturers other than Merck are likely to be foreclosed from Medco's formularies;
(b) Reciprocal dealing, coordinated interaction, interdependent conduct, and tacit collusion among Merck and other vertically integrated pharmaceutical companies will be enhanced;
(c) Medco will be eliminated as an independent negotiator of pharmaceutical prices with manufacturers;
(d) Incentives of other manufacturers to develop innovative pharmaceuticals will be diminished; and

(e) Pharmaceutical prices are likely to increase and the quality of the pharmaceuticals available to consumers is likely to diminish.

PAR. 13. Merck's acquisition of Medco violates 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 ("Commission") having initiated an investigation of the acquisition by respondent Merck and Company, Inc., of respondent Merck-Medco Managed Care, LLC, and the respondents 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 respondents with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that 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 comments received, 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 Merck & Company, Inc., ("Merck") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at One Merck Drive, Whitehouse Station, New Jersey.

2. Respondent Merck-Medco Managed Care, LLC, ("Medco") is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 100 Summit Avenue, Montvale, New Jersey.

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

I.

It is ordered, That the following definitions shall apply herein:

A. "*Merck*" means Merck & Co., Inc., its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Merck & Co., Inc., other than Medco or any other supplier of PBM Services owned or controlled by Merck; and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. "*Medco*" means Merck-Medco Managed Care, L.L.C., its managers, directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Medco other than Merck; all other suppliers of PBM Services owned or controlled by Merck; and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

C. "*Respondents*" means both Merck and Medco.

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

E. "*Formulary*" means a listing, by therapeutic category, of branded and generic ambulatory drug products that are approved for use by the U.S. Food & Drug Administration ("FDA"), which listing is made available to pharmacies, physicians, third-party payors, or other persons involved in the healthcare industry, to guide in the prescribing or dispensing of pharmaceuticals. An "Open Formulary"

is a formulary that allows the inclusion of any ambulatory prescription drug product approved by the FDA for use in the United States, which the P&T Committee (defined below) determines is appropriate for inclusion in such formulary. For purposes of this order, an Open Formulary may provide truthful information stating or indicating the benefits of drugs on the formulary.

F. "*Pharmacy Benefit Management Services*" or "*PBM Services*" means services provided by a pharmacy benefits manager, such as formulary services, negotiation of rebates or discounts from pharmaceutical manufacturers, prescription claims processing, and drug utilization review.

G. "*Formulary Services*" means the provision, development, establishment, management or maintenance of a formulary by a pharmacy benefits manager. For purposes of this order, "management" of a formulary includes the negotiation and administration of rebate or discount agreements with pharmaceutical manufacturers for drugs included on a formulary.

H. "*Merck Non-Public Information*" means information not in the public domain that is provided to Merck by a supplier of PBM Services in connection with the supply of PBM Services and that directly or indirectly discloses actual, relative or proposed prices, discounts, rebates, other trade terms (including, but not limited to, returned goods arrangements, delivery arrangements, performance levels and guarantees) or similar terms or conditions of sale of such supplier of PBM Services.

I. "*Medco Non-Public Information*" means information not in the public domain that is provided to Medco by a manufacturer of prescription drug products in connection with the supply of prescription drug products and that directly or indirectly discloses actual, relative or proposed prices, discounts, rebates, other trade terms (including, but not limited to, returned goods arrangements, delivery arrangements, and payment terms or schedules) or similar terms or conditions of sale of such manufacturer of prescription drug products.

J. "*Auditors*" means 1) those employees of Merck whose primary responsibility is systematically inspecting, substantiating, and reporting on: the reliability and integrity of Merck's information; its compliance with laws and regulations; the safeguarding of its assets; the economical and efficient use of its resources; and the accomplishment of its established objectives and goals; and who regularly work

in the organizational subdivision of Merck with company-wide responsibility for performing these functions, and 2) employees of independent firms retained by Merck to perform one or more of these functions.

K. "*Pharmacy and Therapeutics Committee*" or "*P&T Committee*" means a group of healthcare professionals, such as doctors, pharmacists, and pharmacologists, appointed for the purpose of evaluating prescription drug products for inclusion on a formulary.

II.

It is ordered, That:

A. Within sixty (60) days from the date this order becomes final, Merck shall cause Medco to, and Medco shall, maintain, disclose the availability of, and make available an Open Formulary. Such Open Formulary shall provide information concerning the relative costs of drugs listed on such formulary and such information shall be truthful and accurate. As of the date this order becomes final, the Medco "Universal Formulary," a copy of which is attached hereto as Appendix A, shall be deemed an Open Formulary that complies with this paragraph II.A.

B. Within thirty (30) days from the date this order becomes final, Merck shall cause Medco to, and Medco shall, appoint or reappoint an independent P&T Committee with the authority and responsibility to maintain an Open Formulary as required by paragraph II.A above. Such P&T Committee shall make all decisions concerning the inclusion of drugs on such Open Formulary, the exclusion of drugs from such Open Formulary, and the clinical and therapeutic advice and evaluation appearing in such Open Formulary, and shall operate according to the following provisions:

1. Such P&T Committee shall consist of at least seven (7) members, all of whom shall be physicians, pharmacists, pharmacologists, or other healthcare professionals.

2. A majority of the P&T Committee shall consist of persons who are not employees, officers, directors, or agents of, and who have no financial interest in: (a) Merck, (b) Medco, or (c) any other person who has an ownership interest in Merck or Medco; provided, however, that Medco may pay P&T Committee members reasonable and customary consulting fees and/or honoraria for their services.

Any person who meets the criteria set forth in this subparagraph shall be deemed an "independent" member of the P&T Committee.

3. Each independent member of the P&T Committee shall have one vote on each decision of the P&T Committee.

4. All members of the P&T Committee who are employees, officers, directors, or agents of, or who have a financial interest in, Merck, Medco, or any other person who has an ownership interest in Merck or Medco, shall not be entitled to vote on decisions of the P&T Committee.

5. All independent members of the P&T Committee shall be appointed for two-year terms, except that the initial terms for approximately one-half of the independent members may be for fewer than two years if necessary to ensure that approximately one-half of the independent members' terms expire each year. At the expiration of their terms, or upon the occurrence of a vacancy, members may be reappointed, or new members may be appointed, by a majority of the then-appointed independent members of the P&T Committee.

6. No independent member of the P&T Committee may be removed except for cause by vote of a majority of the independent members of the P&T Committee.

7. In performing its responsibilities in maintaining the Open Formulary, the P&T Committee shall utilize only criteria relating to safety, efficacy, FDA approved indications, side effects, contra-indications, pharmacokinetics, patient compliance, physician follow-up requirements, effect on emergency room visits and hospitalizations, laboratory tests, cost, and similar objective factors. Such P&T Committee shall give no preference to the products of Merck, or of any other person with an ownership interest in Medco, except on the basis of such objective criteria.

8. Merck shall cause Medco to, and Medco shall, cover the reasonable costs and expenses of the P&T Committee, and Merck shall cause Medco to, and Medco shall, indemnify the P&T Committee against any losses or claims of any kind that might arise out of its performance of functions under this order, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith.

9. Medco shall maintain written records, for five (5) years from the date thereof, sufficient to show the basis and rationale for all P&T

Committee decisions relating to the exclusion of any products from the Open Formulary required by paragraph II.A.

C. Merck shall cause Medco to, and Medco shall, accept all discounts, rebates or other concessions offered solely in connection with the Open Formulary by any manufacturer, seller or distributor of pharmaceutical products included by the P&T Committee on the Open Formulary, and Merck shall cause Medco to, and Medco shall, ensure that all such discounts, rebates, or concessions are truthfully and accurately reflected in the information concerning the relative costs of drugs listed on such Open Formulary.

D. Nothing in this order shall preclude Medco from offering any formulary other than the Open Formulary to any customer.

E. Merck shall cause Medco to, and Medco shall, provide a copy of this order to each member of the P&T Committee on or before the date of each such person's appointment to such P&T Committee or on or before the date this order becomes final.

III.

It is further ordered, That:

A. Merck shall not provide, disclose, or otherwise make available to Medco any Merck Non-Public Information; and

B. Medco shall not provide, disclose, or otherwise make available to Merck any Medco Non-Public Information; provided, however:

1. For the purpose of obtaining legal advice, Medco may provide Medco Non-Public Information to lawyers for Merck, on condition that such lawyers for Merck shall not disclose such Medco Non-Public Information to any other person at Merck not expressly permitted to receive the information under this Section III.B. and shall not use such information for any purpose other than providing legal advice;

2. For the purpose of obtaining legal advice, Merck may provide Merck Non-Public Information to lawyers for Medco, on condition that such lawyers for Medco shall not disclose such Merck Non-Public Information to any other person at Medco not expressly permitted to receive the information under this Section III.B. and shall not use such information for any purpose other than providing legal advice; and

3. Medco may disclose to Merck auditors Medco Non-Public Information to the extent necessary to enable Merck auditors to perform their auditing duties in the ordinary course of business, on condition that such auditors shall not use such Non-Public Information for any other purpose and shall not disclose such Non-Public Information to any other person at Merck not expressly permitted to receive the information under this Section III.B.

IV.

It is further ordered, That Merck shall retain all documents and shall cause Medco to separately retain all documents, and Medco shall retain all documents, that relate to (A) the exclusion of any prescription drug product from the Open Formulary required by paragraph II.A above, (B) any preference or ranking accorded to any prescription drug product on the Open Formulary required by paragraph II.A above, or (C) statements or indications of discounts, rebates, or other concessions, as described in paragraph II.C above, for a period of five (5) years from the date such document is created or received.

V.

It is further ordered, That Merck and Medco shall disclose the availability of the Open Formulary as follows:

A. Merck shall cause Medco to, and Medco shall, disclose the availability of the Open Formulary to all persons who currently have an agreement with Medco concerning PBM Services or concerning the inclusion of pharmaceuticals on a formulary, by providing to each such person a written communication containing the following statement not later than ten (10) days after initiation of contact between Medco and such person regarding renewal or extension of such person's existing agreement with Medco:

> Medco maintains an Open Formulary that allows, subject to the determination of an independent Pharmacy and Therapeutics Committee, the inclusion of any ambulatory prescription drug product approved by the FDA for use in the United States. This Open Formulary will be provided to you upon request.

B. For a period of five (5) years from the date this order becomes final, Merck shall cause Medco to, and Medco shall, provide in writing the statement set forth in paragraph V.A above to each prospective customer of Medco at the time of Medco's response to such prospective customer's request for proposal, or at the time of Medco's initial written formulary proposal to such prospective customer, whichever occurs first.

VI.

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

VII.

It is further ordered, That:

A. Within thirty (30) days after the date this order becomes final, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they have complied and are complying with paragraph II.B of this order.

B. Within sixty (60) days after the date this order becomes final, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they have complied and are complying with paragraph II.A of this order.

C. One (1) year from the date this order becomes final, annually thereafter on the anniversary of the date this order becomes final until the order terminates, and at other times as the Commission may require, respondents shall file verified written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this order.

D. Respondents shall include in their compliance reports a copy of the Open Formulary required by paragraph II.A above, and all written communications, internal memoranda, and reports and recommendations concerning compliance with the order.

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondents shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondents relating to any matters contained in this order; and

B. Upon five days' notice to respondents and without restraint or interference from them, to interview officers, directors, or employees of respondents in the presence of counsel.

IX.

It is further ordered, That this order shall terminate on February 18, 2006.

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IN THE MATTER OF

SUMMIT TECHNOLOGY, INC.

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

Docket 9286. Complaint, March 24, 1998--Decision, Feb. 23, 1999

This consent order, among other things, prohibits the Massachusetts-based marketer of laser equipment for eye surgery from entering into, enforcing or maintaining any contract, agreement, joint venture or other combination with VISX, Inc., to fix, maintain or control any price or the terms or conditions associated with the purchase, license or use of any product, device or technology that uses a laser to perform any medical procedure, including ophthalmic surgery.

Participants

For the Commission: *Michael McNeely, Veronica Kayne, Chul Pak, Dana Abrahamsen, Jeremy Cubert, Joshua Newberg, Jacqueline Berman, Beverly Dodson, David von Nirschl, Daniel Ducore, William Baer, Louis Silvia* and *Curtis Wagner.*

For the respondent: *Michael Sohn* and *Mark Merley, Arnold & Porter*, 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, having reason to believe that Summit Technology Inc. ("Summit"), a corporation, and VISX, Inc. ("VISX"), a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

BACKGROUND

1. Respondent Summit is a corporation organized, existing, and doing business under and by virtue of the laws of Massachusetts with its office and principal place of business located at 21 Hickory Drive, Waltham, Massachusetts.

2. Respondent VISX is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware with its office and principal place of business located at 3400 Central Expressway, Santa Clara, California.

3. Respondents maintain, and have maintained, a substantial course of business, including the acts and practices alleged herein, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. Photorefractive keratectomy ("PRK") is a form of eye surgery used to correct vision disorders. PRK uses specialized, computer-guided laser equipment to reshape the cornea.

5. Before VISX and Summit pooled their patents, each firm owned or controlled numerous patents related to PRK.

6. VISX and Summit are the only firms whose laser equipment has received marketing approval from the United States Food and Drug Administration ("FDA") for performing PRK. As a result, VISX and Summit are the only two firms legally able to market laser equipment to be used for PRK in the United States.

7. Except to the extent that VISX and Summit have restrained competition as alleged herein, they have been, and are now, in competition with each other in connection with the sale or lease of PRK equipment and the licensing of technology related to PRK.

THE PATENT POOL

8. On or about June 3, 1992, pursuant to a series of agreements hereinafter collectively referred to as the "PPP Agreement," VISX and Summit pooled most of their existing, as well as certain future, patents related to PRK in a newly created partnership, called Pillar Point Partners ("PPP"). VISX and Summit have pooled at least 25 patents, containing more than 500 method and apparatus claims, in PPP ("PPP Patents"). Notwithstanding these patents, in the absence of the PPP Agreement, VISX and Summit could have and would have competed with one another in the sale or lease of PRK equipment by using their respective patents, licensing them, or both. In addition, VISX and Summit would have engaged in competition with each other in connection with the licensing of technology related to PRK.

9. Under the PPP Agreement, PPP has the right to license the PPP Patents to persons engaged in the business of manufacturing PRK equipment, and VISX and Summit each have relinquished the right to unilaterally license to any such person any patent that either firm contributed to PPP.

10. Under the PPP Agreement, VISX and Summit each have the unilateral right and power to prevent PPP from licensing any of the

PPP Patents to other persons engaged in the business of manufacturing PRK equipment.

11. Under the PPP Agreement, PPP has licensed back to VISX and Summit all of the PPP Patents. Also under the PPP Agreement, VISX and Summit each may sell, lease or otherwise make available PRK equipment covered by the PPP Patents to laser users and may sublicense those users to perform PRK and related procedures.

12. With certain exceptions, under the PPP Agreement, VISX and Summit each must pay a fee to PPP each time any laser user performs a PRK procedure under any PPP Patents sublicensed by Summit or VISX. Under the PPP Agreement, the level of this Per-Procedure Fee can range from $30 to $250, and is set at the higher of the amounts separately proposed by VISX and Summit. Since receiving FDA approval to market their lasers, VISX and Summit have set this Per-Procedure Fee at $250. Since receiving FDA approval to market their lasers, VISX and Summit each has charged its sublicensees a $250 per-procedure fee, with certain minor exceptions. Under the PPP Agreement, all third party manufacturers that might be licensed by PPP would be required to pay this Per-Procedure Fee to PPP.

13. As a result of their agreement with respect to the Per-Procedure Fee under the PPP Agreement, VISX and Summit charged consumers significantly more than they would have been charged in the absence of the agreement. Based on the number of procedures performed in 1996, it is likely that this overcharge exceeded $10.5 million. Based on estimates for procedures performed in 1997, it is likely that this overcharge exceeded $30 million.

FRAUD AND INEQUITABLE CONDUCT

14. VISX is the firm that resulted from the November 26, 1990, acquisition of the former VISX, Inc. ("Old VISX"), by Taunton Technologies, Inc. ("Taunton"). After that acquisition, VISX caused four interference proceedings that were pending before the United States Patent and Trademark Office ("PTO") to be resolved. In each instance, VISX resolved a dispute between Old VISX and Taunton over patents and patent applications related to PRK, and each culminated in the grant or retention of patents that VISX later contributed to PPP. VISX then prosecuted patent applications that had been the subject of two of the interferences.

15. One of the interferences referred to in paragraph 14 was between Dr. Francis A. L'Esperance, Jr., and Dr. Stephen Trokel

("Trokel-L'Esperance Interference"). The Trokel-L'Esperance Interference arose in the following manner: On May 19, 1987, the PTO issued to Dr. L'Esperance U.S. Patent No. 4,665,913 ("'913 patent"), which contained claims covering methods for performing PRK. That patent was held by Taunton. On December 15, 1983, Dr. Trokel filed an application for a patent that contained claims conflicting with claims in the '913 patent. Dr. Trokel assigned his rights under that application to Old VISX. On the basis of conflicts between the '913 patent and Dr. Trokel's application, the PTO declared the Trokel-L'Esperance interference on September 30, 1988. VISX resolved the Trokel-L'Esperance Interference by telling the PTO that Dr. Trokel had priority with respect to the claimed invention at issue in that interference. Subsequently, partially in reliance on VISX's determination of priority, a new patent, U.S. Patent No. 5,108,388, covering that claimed invention, was issued to Dr. Trokel.

16. During the prosecution of Dr. Trokel's patent, VISX, through its attorneys and on behalf of Dr. Trokel, withheld from the PTO, articles, patents, and patent applications that VISX, its attorneys and Dr. Trokel knew were material prior art. During the course of the Trokel-L'Esperance Interference, VISX, through its attorneys and on behalf of Dr. Trokel, was aware of the following material that constituted prior art: U.S. Patent application 894,520 [Blum]; U.S. Patent 4,784,135, [Blum]; German Patent DE 3,148,748 [Karp]; Keates et al., "Carbon Dioxide Laser Beam Control for Corneal Surgery," 12 Ophthalmic Surgery 117 (Feb. 1981); L. Girard, "Advanced Techniques in Ophthalmic Microsurgery," Volume Two *Corneal Surgery*, C.V. Mosby Company 1981.

17. Three of the interferences referred to in paragraph 14 were between Dr. L'Esperance and Dr. Charles Munnerlyn ("Munnerlyn-L'Esperance Interferences"). The Munnerlyn-L'Esperance Interferences arose in the following manner: The PTO had issued Dr. L'Esperance three patents that included claims covering methods for preparing the cornea before PRK is performed. Each of these patents were held by Taunton. On August 5, 1987, Dr. Munnerlyn filed an application for a patent related to PRK. Dr. Munnerlyn assigned his rights under that application to Old VISX. On August 1, 1989, based on conflicts between Dr. L'Esperance's three patents and Dr. Munnerlyn's patent application, the PTO declared the Munnerlyn-L'Esperance Interferences. VISX resolved one of the Munnerlyn-

L'Esperance Interferences by telling the PTO that Dr. Munnerlyn had priority with respect to the claimed invention at issue in that interference. Subsequently, partially in reliance on VISX's determination of priority, a new patent, U.S. Patent No. 5,163,934, covering that claimed invention, was issued to Dr. Munnerlyn. VISX resolved the other two Munnerlyn-L'Esperance Interferences by telling the PTO that Dr. L'Esperance had priority with respect to the claimed inventions at issue in those interferences, and he retained the claims in those two patents.

18. During the course of the interferences referred to in paragraph 14, Dr. L'Esperance intentionally did the following:

a. Fabricated, back-dated, and falsified his scientific records. In particular, in 1984 or thereafter, Dr. L'Esperance fabricated and falsified an entry in his scientific notebook dated August 15, 1980, which contains a detailed description of PRK, including citations to medical books. He actually wrote this notebook page in 1984 or later, and he and his adult son each signed the notebook page and falsified the dates of their signatures.

b. In response to a motion seeking the inspection of his scientific papers by an expert in altered documents, Dr. L'Esperance, through his attorneys, made misleading statements to the PTO about the authenticity of his scientific notebook.

c. Fabricated, back-dated, and falsified a diary page dated January 22, 1983 to establish when he had conceived of the inventions at issue in the Munnerlyn-L'Esperance Interferences. He did so in 1989 and included information on the diary page that was not known to him in 1983. His attorneys made false statements to the PTO by failing to fully inform it about the fabrication, back-dating, and falsification of the diary page.

19. During the course of the Trokel-L'Esperance Interference and the Munnerlyn-L'Esperance Interferences, and in resolving those interferences after the merger of Old VISX and Taunton, VISX knowingly and willfully misled the PTO about Dr. L'Esperance's fraudulent conduct, failed to disclose that conduct to the PTO and deceived the PTO about the bases for its resolution of the interferences and the true inventor of the inventions at issue.

20. The actions of Dr. Trokel, Dr. L'Esperance and VISX alleged in paragraphs 14-19 constituted inequitable conduct and willful fraud on the PTO.

21. VISX has collected royalties on, and brought lawsuits and threatened to bring lawsuits to enforce, one or more of the patents described in paragraphs 14-20.

THE RELEVANT MARKETS

22. The sale or lease of PRK equipment, including the licensing of patents for use in performing PRK, is a relevant line of commerce in which to analyze the effects of respondents' conduct.

23. The licensing of technology related to PRK is a relevant line of commerce in which to analyze the effects of respondents' conduct.

24. A relevant geographic area in which to analyze the effects of respondents' conduct is the United States.

VIOLATIONS OF SECTION FIVE OF THE FTC ACT

Count I

25. The acts and practices of respondents as alleged herein constitute a contract, combination or conspiracy in restraint of commerce, and have had, and continue to have, the purpose, effect, tendency and capacity to, among other things:

a. Raise, fix, stabilize and maintain the price that physicians must pay to perform PRK procedures;

b. Raise the cost of, prevent entry into and deter the sale or leasing of PRK equipment and the licensing of technology related to PRK; and

c. Deprive consumers of the benefits of competition in the sale and leasing of PRK equipment and the licensing of technology related to PRK.

26. The acts and practices of respondents as alleged herein were and are to the prejudice and injury of the public, will continue in the absence of the relief herein requested, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

Count II

27. The acts and practices of respondents as alleged herein constitute the willful acquisition and maintenance of a monopoly, or a conspiracy or attempt to monopolize, and had the purpose, effect, tendency and capacity to, among other things:

a. Create, maintain or have a dangerous probability of creating, a monopoly in the sale or leasing of PRK equipment and the licensing of technology related to PRK;

b. Raise, fix, stabilize and maintain the price that physicians must pay to perform PRK procedures;

c. Raise the cost of, prevent entry into and deter the sale or leasing of PRK equipment and the licensing of technology related to PRK; and

d. Deprive consumers of the benefits of competition in the sale and leasing of PRK equipment and the licensing of technology related to PRK.

28. The acts and practices of respondents as alleged herein were and are to the prejudice and injury of the public, will continue in the absence of the relief herein requested, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

Count III

29. The acts and practices of respondent VISX as alleged herein, which constitute the acquisition of a patent or patents by inequitable conduct in violation of Section 5 of the Federal Trade Commission Act, or by fraud in violation of Section 5 of the Federal Trade Commission Act, before the PTO, and the enforcement thereof, have had, and continue to have, the purpose, effect, tendency and capacity to, among other things:

a. Unreasonably restrain trade in the sale or leasing of PRK equipment and the licensing of technology related to PRK;

b. Raise, stabilize and maintain the price of PRK equipment and procedures;

c. Raise the cost of, deter and prevent entry into the sale or leasing of PRK equipment and the licensing of technology related to PRK; and

c. Deprive consumers of the benefits of competition in the sale or leasing of PRK equipment and the licensing of technology related to PRK.

30. The acts and practices of respondent VISX as alleged herein were and are to the prejudice and injury of the public, will continue in the absence of the relief herein requested, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

SCHEDULE A
SUMMIT PRK PATENTS CONTRIBUTED TO PPP

PATENT NUMBER
4, 856, 513
4, 941, 093
4, 973, 330
4. 994, 058
5, 019, 074
5, 423, 801
5, 324, 281

SCHEDULE B
VISX PRK PATENTS CONTRIBUTED TO PPP

PATENT NUMBER
4, 665, 913
4, 669, 466
4, 718, 418
4, 721, 379
4, 729, 372
4, 732, 148
4, 770, 172
4, 773, 414
4, 798, 204
4, 903, 695
4, 911, 711
5,108, 388
5, 163, 934
5, 188, 631
5, 207, 668
5, 219, 343
5, 219, 344
5, 312, 320

DECISION AND ORDER

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

Summit, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by Summit 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 Summit that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

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

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

1. Respondent is a corporation organized, existing, and doing business under and by virtue of the laws of Massachusetts with its office and principal place of business located at 21 Hickory Drive, Waltham, Massachusetts.

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

ORDER

I.

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

A. The term "*PPP*" means Pillar Point Partners, the partnership formed between Summit Partner, Inc., and VISX Partner, Inc., on or about June 3, 1992.

B. The term "*Summit*" or "*respondent*" means Summit Technology, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, partnerships (including but not limited to Summit Partner, Inc.) and affiliates controlled by Summit Technology, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. The term "*VISX*" means VISX, Incorporated, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, partnerships (including but not limited to VISX Partner, Inc.) and affiliates controlled by VISX, Incorporated, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. The term "*Commission*" means the Federal Trade Commission.

E. The term "*person*" means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.

F. The term "*Formation Agreement*" means the agreement established in the document entitled "Formation Agreement Dated June 3, 1992," which was made and entered into on or about the 3rd day of June 1992, among Summit Technology, Inc., a Massachusetts corporation; VISX, Inc., a Delaware corporation; Summit Partner, Inc., a Delaware corporation; and VISX Partner, Inc., a Delaware corporation.

G. The term "*General Partnership Agreement*" means the agreement established in the document entitled "General Partnership Agreement of Pillar Point Partners Dated June 3, 1992," which was made and entered into on or about the 3rd day of June 1992, by and between Summit Partner, Inc., a Delaware corporation, and VISX Partner Inc., a Delaware corporation.

H. The term "*Per-Procedure Fee*" means any payment for the use of any product, device, method, patent, intellectual property, or technology, which payment depends in any way on the amount of use of, including the number of procedures performed using, the product, device, method, patent, intellectual property, or technology.

I. The term "*PRK*" means photorefractive keratectomy, an excimer laser-based form of eye surgery used to correct refraction disorders.

J. The term "*PRK equipment*" means any laser or other device that could be used in connection with performing PRK.

K. The term "*PPP Patents*" means all patents that have been contributed to PPP pursuant to Articles 2.3 and 2.4 of the Formation Agreement and Article 6.2 of the General Partnership Agreement, and all patents that have been contributed to PPP since June 3, 1992. The term "PPP Patents" includes but is not limited to all patents listed in Schedule A and Schedule B of this order.

L. The term "*Settlement and Dissolution Agreement*" means the June 4, 1998 Settlement and Dissolution Agreement between Summit Technology, Inc. and VISX, Incorporated. The Settlement and Dissolution Agreement is appended to this order in redacted form as Appendix I.

II.

It is further ordered, That respondent, directly or indirectly, or through any person or other device, in or in connection with activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, cease and desist, except as provided in paragraph III of this order or in the Settlement and Dissolution Agreement, from entering into, adhering to, participating in, enforcing or maintaining any contract, agreement, understanding, joint venture, pool, partnership, cross-license or other combination with VISX:

A. (1) To fix, construct, stabilize, standardize, raise, maintain, or otherwise affect or control any price, royalty or fee for, any aspect of any price, royalty or fee for, or the terms or conditions associated with, the purchase, license or use of any product, device, method, patent, intellectual property, or technology that uses or is used in conjunction with, or claims, covers, embodies or incorporates in whole or in part the use of, a laser to perform any medical procedure, including but not limited to ophthalmic surgery; or

(2) To establish, require, charge, collect or pay any Per-Procedure Fee;

B. (1) To restrict the right or ability of respondent or VISX to sell or license any product, device, method, patent, intellectual property, or technology that uses or is used in conjunction with, or claims, covers, embodies or incorporates in whole or in part the use of, a laser

to perform any medical procedure, including but not limited to ophthalmic surgery; or

(2) To grant respondent or VISX the right or ability to prevent the sale or license by respondent or VISX of any product, device, method, patent, intellectual property, or technology that uses or is used in conjunction with, or claims, covers, embodies or incorporates in whole or in part the use of, a laser to perform any medical procedure, including but not limited to ophthalmic surgery.

Provided, however, that nothing in this order shall prevent respondent from entering into or maintaining any contract, agreement, understanding, joint venture, pool, partnership, cross-license or other combination with VISX with respect to patents other than PPP Patents, if respondent notifies the Commission in writing at least forty-five (45) days prior to entering into, forming or participating in such contract, agreement, understanding, joint venture, pool, partnership, cross-license or other combination. Such notification shall include (1) a description of the patent or patents subject to or affected by the contract, agreement, understanding, joint venture, pool, partnership, cross-license or other combination, including a copy of each such patent, and (2) a copy of the document or documents that memorialize all of the terms and conditions of the contract, agreement, understanding, joint venture, pool, partnership, cross-license or other combination, unless such document or documents do not exist at the time of the notification, in which case respondent shall include a summary of the terms and conditions.

III.

It is further ordered, That respondent shall, no later than twenty (20) days from the date this order becomes final, license to VISX the patents that respondent contributed to, or agreed to contribute to, PPP, including but not limited to all patents listed in Schedule A of this order, and any divisions, reissues, re-examinations, continuations, continuations in part, renewals, extensions and additions thereof. Such license(s) shall be royalty-free and non-exclusive as set forth in the Settlement and Dissolution Agreement.

IV.

It is further ordered, That respondent shall take no action inconsistent with the dissolution of PPP or the disposition of the PPP Patents as set forth in the Settlement and Dissolution Agreement. Consistent with the Settlement and Dissolution Agreement, PPP may wind up its affairs, defend or settle litigation in which it is or becomes a defendant and complete the defense of any such litigation.

V.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final, respondent shall distribute by first-class mail a copy of this order (not including Appendix I) and the complaint to any person that requested a license to use any of the PPP Patents in the manufacture, assembly or sale of PRK equipment since June 3, 1992.

B. (1) Respondent shall allow any person ("Customer") with which respondent entered into any agreement that includes an obligation to pay a Per-Procedure Fee to license any of the PPP Patents ("Agreement Containing License") between June 3, 1992 and June 5, 1998, to stop using the laser system covered by the Agreement Containing License, without any penalty or continuing obligation to respondent under the Agreement Containing License or any other agreement with respondent, other than obligations already incurred for goods, assets or services previously provided by respondent, including any installment purchase or lease payments under any existing agreement for the purchase or lease of a laser system sold or leased by respondent.

(2) Provided, however, that any further use or disposition of the laser system shall continue to be governed by the Agreement Containing License and any other agreements relating to the use of the laser system, unless the Agreement Containing License or any other agreements are modified by mutual agreement of the Customer and respondent.

(3) Provided further that nothing in this paragraph V.B. shall be interpreted to prevent respondent from seeking any remedy against a Customer that continues to use any intellectual property, good, asset or service that was the subject of the Agreement Containing License

or any other agreements relating to the use of the laser system without complying with such agreement.

(4) Within twenty (20) days after the date this order becomes final, respondent shall distribute by first-class mail a copy of this order (not including Appendix I), the complaint, and a letter containing the following statement to any person to which respondent then licenses any of the PPP Patents under an Agreement Containing License that was entered between June 3, 1992 and June 5, 1998:

Summit and VISX have agreed to dissolve the Pillar Point Partners arrangement and have agreed with the FTC to an Order concerning Pillar Point Partners. The Order, among other things, prohibits Summit from agreeing with VISX on a Per-Procedure Fee.

You have entered into an agreement with Summit to license one or more of the Pillar Point Partners Patents (the "Agreement Containing License"). Under the Order with the FTC, Summit is obliged to give you the opportunity to stop using the laser system covered by the Agreement Containing License, without any penalty or continuing obligation to Summit under the Agreement Containing License or any other agreement with Summit, except as provided below.

Please note that the Order does not affect obligations you have already incurred for goods, assets or services previously provided by Summit, including any installment purchase or lease payments under any existing agreement for the purchase or lease of a laser system sold or leased to you by Summit.

Please note further that any further use or disposition of the laser system by you shall continue to be governed by the Agreement Containing License and any other agreements relating to the use of the laser system, unless the Agreement Containing License or any other agreements are modified by mutual agreement between you and Summit.

(5) Respondent shall refrain from taking any action to prevent or impede:

(a) Any person covered by paragraph V.B.(1) of this order from entering or attempting to enter into an agreement for the purchase, sale, license, use, lease, option, or other disposition of any product manufactured or assembled for use in PRK; or

(b) Any person from exercising any right it may have under paragraph V.B. of this order.

VI.

It is further ordered, That:

A. For a period of ten (10) years after the date this order becomes final, respondent shall distribute by first-class mail a copy of this

order (not including Appendix I) and the complaint in this matter to any person that requests a license of any of respondent's PPP Patents.

B. Respondent shall file within sixty (60) days after the date this order becomes final, annually thereafter for ten (10) years on the anniversary of the date this order became final, and at such other times as the Commission may require, a verified written report setting forth in detail the manner and form in which it has complied and is complying with the order.

C. Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in its structure, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of the order.

D. For a period of ten (10) years after the date this order becomes final, respondent shall notify the Commission in writing forty-five (45) days prior to forming or participating in the formation of, or joining or participating in, any exclusive patent licensing arrangements, patent pool arrangements, partnerships or joint ventures if the arrangement, partnership or joint venture (1) involves United States patents that relate to the use, manufacture, marketing or sale of PRK equipment; and (2) includes any person engaged in the research, development, marketing or sale of PRK equipment. Such notification shall include a copy of the document or documents that memorialize all of the terms and conditions of the licensing arrangements, patent pool arrangements, partnerships or joint ventures, unless such document or documents do not exist at the time of the notification, in which case respondent shall include a summary of the terms and conditions.

E. For the purpose of determining or securing compliance with this order, respondent shall permit any duly authorized representative of the Commission: (1) access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and (2) upon five business days' notice to respondent, and without restraint or interference from it, to interview officers, directors, or employees of respondent in the presence of counsel representing said officers, directors or employees.

VII.

It is further ordered, That this order will terminate upon the expiration of the last to expire of the PPP Patents.

SCHEDULE A
SUMMIT PPP PATENTS

PATENT NUMBER
4, 856, 513
4, 941, 093
4,973,330
4. 994, 058
5, 019, 074
5, 423, 801
5, 324, 281

SCHEDULE B
VISX PPP PATENTS

PATENT NUMBER
4, 665, 913
4, 669, 466
4, 718, 418
4, 721, 379
4, 729, 372
4, 732, 148
4, 770, 172
4, 773, 414
4, 798, 204
4, 903, 695
4, 911, 711
5,108, 388
5, 163, 934
5, 188, 631
5, 207, 668
5, 219, 343
5, 219, 344
5, 312, 320
5,711,762

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8. [CONTINGENT LIABILITIES]

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IN THE MATTER OF

VISX, INC.

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

Docket 9286. Complaint, March 24, 1998--Decision, Feb. 23, 1999*

This consent order, among other things, prohibits the California-based marketer of laser equipment for eye surgery from entering into, enforcing or maintaining any contract, agreement, joint venture or other combination with Summit Technology, Inc., to fix, maintain or control any price or the terms or conditions associated with the purchase, license or use of any product, device or technology that uses a laser to perform any medical procedure, including ophthalmic surgery.

Participants

For the Commission: *Michael McNeely, Veronica Kayne, Chul Pak, Dana Abrahamsen, Jeremy Cubert, Joshua Newberg, Jacqueline Berman, Beverly Dodson, David von Nirschl, Daniel Ducore, Louis Silvia* and *Curtis Wagner*.

For the respondent: *Susan Creighton* and *Ron Shulman, Wilson, Sonsini, Goodrich & Rosati*, Palo Alto, CA. and *Joseph Simons, Rogers & Wells*, Washington, D.C.

DECISION AND ORDER

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

VISX, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by VISX of all the jurisdictional facts set forth in paragraphs two and three of the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by VISX that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than the jurisdictional facts set forth in paragraphs two and three of the complaint, are true 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

[1] * Complaint previously published at 127 FTC 208 (1999).

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 days, and having duly considered the comment filed thereafter by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware with its office and principal place of business located at 3400 Central Expressway, Santa Clara, California.

2. The Federal Trade Commission has jurisdiction of the subject matter set forth in Counts I and II of the complaint in this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

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

A. The term "*PPP*" means Pillar Point Partners, the partnership formed between Summit Partner, Inc., and VISX Partner, Inc., on or about June 3, 1992.

B. The term "*VISX*" or "*respondent*" means VISX, Incorporated, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, partnerships (including but not limited to VISX Partner, Inc.) and affiliates controlled by VISX, Incorporated, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. The term "*Summit*" means Summit Technology, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, partnerships (including but not limited to Summit Partner, Inc.) and affiliates controlled by Summit Technology, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. The term "*Commission*" means the Federal Trade Commission.

E. The term "*person*" means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.

F. The term "*Formation Agreement*" means the agreement established in the document entitled "Formation Agreement Dated June 3, 1992," which was made and entered into on or about the 3rd day of June 1992, among Summit Technology, Inc., a Massachusetts corporation; VISX, Inc., a Delaware corporation; Summit Partner, Inc., a Delaware corporation; and VISX Partner, Inc., a Delaware corporation.

G. The term "*General Partnership Agreement*" means the agreement established in the document entitled "General Partnership Agreement of Pillar Point Partners Dated June 3, 1992," which was made and entered into on or about the 3rd day of June 1992, by and between Summit Partner, Inc., a Delaware corporation, and VISX Partner Inc., a Delaware corporation.

H. The term "*Per-Procedure Fee*" means any payment for the use of any product, device, method, patent, intellectual property, or technology, which payment depends in any way on the amount of use of, including the number of procedures performed using, the product, device, method, patent, intellectual property, or technology.

I. The term "*PRK*" means photorefractive keratectomy, an excimer laser-based form of eye surgery used to correct refraction disorders.

J. The term "*PRK equipment*" means any laser or other device that could be used in connection with performing PRK.

K. The term "*PPP Patents*" means all patents that have been contributed to PPP pursuant to Articles 2.3 and 2.4 of the Formation Agreement and Article 6.2 of the General Partnership Agreement, and all patents that have been contributed to PPP since June 3, 1992. The term "PPP Patents" includes but is not limited to all patents listed in Schedule A and Schedule B of this order.

L. The term "*Settlement and Dissolution Agreement*" means the June 4, 1998 Settlement and Dissolution Agreement between Summit Technology, Inc. and VISX, Incorporated. The Settlement and Dissolution Agreement is appended to this order in redacted form as Appendix I.

II.

It is further ordered, That respondent, directly or indirectly, or through any person or other device, in or in connection with activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, cease and desist, except as

provided in paragraph III of this order or in the Settlement and Dissolution Agreement, from entering into, adhering to, participating in, enforcing or maintaining any contract, agreement, understanding, joint venture, pool, partnership, cross-license or other combination with Summit:

A. (1) To fix, construct, stabilize, standardize, raise, maintain, or otherwise affect or control any price, royalty or fee for, any aspect of any price, royalty or fee for, or the terms or conditions associated with, the purchase, license or use of any product, device, method, patent, intellectual property, or technology that uses or is used in conjunction with, or claims, covers, embodies or incorporates in whole or in part the use of, a laser to perform any medical procedure, including but not limited to ophthalmic surgery; or

(2) To establish, require, charge, collect or pay any Per-Procedure Fee;

B. (1) To restrict the right or ability of respondent or Summit to sell or license any product, device, method, patent, intellectual property, or technology that uses or is used in conjunction with, or claims, covers, embodies or incorporates in whole or in part the use of, a laser to perform any medical procedure, including but not limited to ophthalmic surgery; or

(2) To grant respondent or Summit the right or ability to prevent the sale or license by respondent or Summit of any product, device, method, patent, intellectual property, or technology that uses or is used in conjunction with, or claims, covers, embodies or incorporates in whole or in part the use of, a laser to perform any medical procedure, including but not limited to ophthalmic surgery.

Provided, however, that nothing in this order shall prevent respondent from entering into or maintaining any contract, agreement, understanding, joint venture, pool, partnership, cross-license or other combination with Summit with respect to patents other than PPP Patents, if respondent notifies the Commission in writing at least forty-five (45) days prior to entering into, forming or participating in such contract, agreement, understanding, joint venture, pool, partnership, cross-license or other combination. Such notification shall include (1) a description of the patent or patents subject to or affected by the contract, agreement, understanding, joint venture, pool, partnership, cross-license or other combination, including a copy of

each such patent, and (2) a copy of the document or documents that memorialize all of the terms and conditions of the contract, agreement, understanding, joint venture, pool, partnership, cross-license or other combination, unless such document or documents do not exist at the time of the notification, in which case respondent shall include a summary of the terms and conditions.

III.

It is further ordered, That respondent shall, no later than twenty (20) days from the date this order becomes final, license to Summit the patents that respondent contributed to, or agreed to contribute to, PPP, including but not limited to all patents listed in Schedule B of this order, and any divisions, reissues, re-examinations, continuations, continuations in part, renewals, extensions and additions thereof. Such license(s) shall be royalty-free and non-exclusive as set forth in the Settlement and Dissolution Agreement.

IV.

It is further ordered, That respondent shall take no action inconsistent with the dissolution of PPP or the disposition of the PPP Patents as set forth in the Settlement and Dissolution Agreement. Consistent with the Settlement and Dissolution Agreement, PPP may wind up its affairs, defend or settle litigation in which it is or becomes a defendant and complete the defense of any such litigation.

V.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final, respondent shall distribute by first-class mail a copy of this order (not including Appendix I) and the complaint to any person that requested a license to use any of the PPP Patents in the manufacture, assembly or sale of PRK equipment since June 3, 1992.

B. (1) Respondent shall allow any person ("Customer") with which respondent entered into any agreement that includes an obligation to pay a Per-Procedure Fee to license any of the PPP Patents ("Agreement Containing License") between June 3, 1992 and June 5, 1998, to stop using the laser system covered by the Agreement Containing License, without any penalty or continuing obligation to respondent under the Agreement Containing License or

any other agreement with respondent, other than obligations already incurred for goods, assets or services previously provided by respondent, including any installment purchase or lease payments under any existing agreement for the purchase or lease of a laser system sold or leased by respondent.

(2) Provided, however, that any further use or disposition of the laser system shall continue to be governed by the Agreement Containing License and any other agreements relating to the use of the laser system, unless the Agreement Containing License or any other agreements are modified by mutual agreement of the Customer and respondent.

(3) Provided further that nothing in this paragraph V.B. shall be interpreted to prevent respondent from seeking any remedy against a Customer that continues to use any intellectual property, good, asset or service that was the subject of the Agreement Containing License or any other agreements relating to the use of the laser system without complying with such agreement.

(4) Within twenty (20) days after the date this order becomes final, respondent shall distribute by first-class mail a copy of this order (not including Appendix I), the complaint, and a letter containing the following statement to any person to which respondent then licenses any of the PPP Patents under an Agreement Containing License that was entered between June 3, 1992 and June 5, 1998:

VISX and Summit have agreed to dissolve the Pillar Point Partners arrangement and have agreed with the FTC to an Order concerning Pillar Point Partners. The Order, among other things, prohibits VISX from agreeing with Summit on a Per-Procedure Fee.

You have entered into an agreement with VISX to license one or more of the Pillar Point Partners Patents (the "Agreement Containing License"). Under the Order with the FTC, VISX is obliged to give you the opportunity to stop using the laser system covered by the Agreement Containing License, without any penalty or continuing obligation to VISX under the Agreement Containing License or any other agreement with VISX, except as provided below.

Please note that the Order does not affect obligations you have already incurred for goods, assets or services previously provided by VISX, including any installment purchase or lease payments under any existing agreement for the purchase or lease of a laser system sold or leased to you by VISX.

Please note further that any further use or disposition of the laser system by you shall continue to be governed by the Agreement Containing License and any other agreements relating to the use of the laser system, unless the Agreement Containing License or any other agreements are modified by mutual agreement between you and VISX.

(5) Respondent shall refrain from taking any action to prevent or impede:

(a) Any person covered by paragraph V.B.(1) of this order from entering or attempting to enter into an agreement for the purchase, sale, license, use, lease, option, or other disposition of any product manufactured or assembled for use in PRK; or

(b) Any person from exercising any right it may have under paragraph V.B. of this order.

VI.

It is further ordered, That:

A. For a period of ten (10) years after the date this order becomes final, respondent shall distribute by first-class mail a copy of this order (not including Appendix I) and the complaint in this matter to any person that requests a license of any of respondent's PPP Patents.

B. Respondent shall file within sixty (60) days after the date this order becomes final, annually thereafter for ten (10) years on the anniversary of the date this order became final, and at such other times as the Commission may require, a verified written report setting forth in detail the manner and form in which it has complied and is complying with the order.

C. Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in its structure, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of the order.

D. For a period of ten (10) years after the date this order becomes final, respondent shall notify the Commission in writing forty-five (45) days prior to forming or participating in the formation of, or joining or participating in, any exclusive patent licensing arrangements, patent pool arrangements, partnerships or joint ventures if the arrangement, partnership or joint venture (1) involves United States patents that relate to the use, manufacture, marketing or sale of PRK equipment; and (2) includes any person engaged in the research, development, marketing or sale of PRK equipment. Such notification shall include a copy of the document or documents that memorialize all of the terms and conditions of the licensing arrangements, patent

pool arrangements, partnerships or joint ventures, unless such document or documents do not exist at the time of the notification, in which case respondent shall include a summary of the terms and conditions.

E. For the purpose of determining or securing compliance with this order, respondent shall permit any duly authorized representative of the Commission: (1) access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and (2) upon five business days' notice to respondent, and without restraint or interference from it, to interview officers, directors, or employees of respondent in the presence of counsel representing said officers, directors or employees.

VII.

It is further ordered, That this order will terminate upon the expiration of the last to expire of the PPP Patents.

SCHEDULE A
SUMMIT PPP PATENTS

PATENT NUMBER
4, 856, 513
4, 941, 093
4,973,330
4. 994, 058
5, 019, 074
5, 423, 801
5, 324, 281

SCHEDULE B
VISX PPP PATENTS

PATENT NUMBER
4, 665, 913
4, 669, 466
4, 718, 418
4, 721, 379
4, 729, 372
4, 732, 148
4, 770, 172
4, 773, 414
4, 798, 204
4, 903, 695
4, 911, 711
5,108, 388
5, 163, 934
5, 188, 631
5, 207, 668
5, 219, 343
5, 219, 344
5, 312, 320
5,711,762

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8. [CONTINGENT LIABILITIES]

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IN THE MATTER OF

COLUMBIA RIVER PILOTS

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

Docket C-3854. Complaint, March 1, 1999--Decision, March 1, 1999

This consent order, among other things, prohibits Columbia River Pilots ("COLRIP"), an association of marine pilots in Oregon, from imposing any restrictions or penalties on its members who leave the association to compete with COLRIP, unless the pilots have been members of COLRIP for less than five years or have failed to give COLRIP 90 days notice of their intention to leave. The consent order also prohibits the respondent from allocating customers with any competing pilotage group, limiting any competing pilotage group's size, or restricting exclusive dealing contracts or rate proposals. In addition, the consent order requires the respondent to amend its constitution, bylaws and standard of conduct to conform to the requirements of this order.

Participants

For the Commission: *Shane Woods, John Kirkwood, Robert Schroeder, Charles Harwood, Anne Schenof, Roberta Baruch, William Baer, Denis Breen* and *John Simpson.*

For the respondent: *Kevin Davis*, Portland, OR.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Columbia River Pilots (hereafter "respondent") has violated the provisions of Section 5 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, hereby issues this complaint, stating its charges as follows:

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

(A) "*Columbia and Willamette River Pilotage Ground*" or "*the Grounds*" is one of the pilotage grounds designated by the State of Oregon, and refers specifically to the Columbia and Willamette Rivers and their tributaries from the lowermost dock or wharf at the Port of Astoria to the head of navigation.

(B) "*Marine pilot*" means an individual licensed by the State of Oregon to assist the master of a vessel on the Grounds.

PAR. 2. Respondent is an unincorporated association whose members are marine pilots or corporations owned by marine pilots. Respondent is organized and does business under the laws of the State of Oregon, and has its offices at 13225 N. Lombard, Portland, Oregon.

PAR. 3. Respondent is engaged in the business of facilitating the provision of services by marine pilots, including, but not limited to, dispatching marine pilots and collecting and distributing marine pilots' fees. In addition, respondent is licensed by the Oregon Board of Maritime Pilots to provide training to individuals seeking to become marine pilots.

PAR. 4. Respondent's acts and practices, including the acts and practices alleged herein, are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

MARINE PILOTAGE ON THE GROUNDS

PAR. 5. In order to operate on the Grounds, large commercial vessels engaged in foreign trade are required by the State of Oregon to obtain the assistance of a licensed marine pilot. To obtain a marine pilot's license for the Grounds, an individual is required by the State to complete a multi-year training program overseen by Oregon's Board of Maritime Pilots ("the Board") and administered by pilot organizations licensed by the Board to provide training. Oregon law limits the number of pilots but does not limit the number of pilot organizations licensed for the Grounds. Oregon law also expressly protects competition in marine pilotage by prohibiting the Board from passing any rule that significantly reduces competition among licensees or pilot organizations existing on January 1, 1991, without first finding the rule is essential to safety.

PAR. 6. The Board sets the fees that may be charged for pilotage services; and those fees, once set, are not subject to competition. Before the Board sets fees for pilotage, individuals and businesses providing, purchasing or otherwise having an interest in pilotage services may submit competing rate proposals for the Board to consider.

PAR. 7. Service competition among marine pilots may affect the cost of pilotage and shipping because marine pilots make decisions concerning, among other things, the number of tug boats used to move a vessel, the number of hours before and after high tide when a vessel may be moved, and the amount of product that may be loaded onto a vessel.

RESPONDENT'S MONOPOLY

PAR. 8. From approximately the 1950's to late 1989, and since late 1995, respondent has been the only pilot organization on the Grounds, and every marine pilot has been a member of respondent.

PILOTAGE COMPETITION ON THE GROUNDS

PAR. 9. On October 25, 1989, two of respondent's approximately 40 marine pilots resigned from respondent and formed Lewis & Clark Pilotage, Inc. ("L&C"). L&C signed an exclusive contract with ConAgra, Inc., the owner of one of the largest grain elevators on the West Coast. Vessels calling at ConAgra's facility accounted for about 10% of the pilotage revenues on the Grounds, approximately twice the revenues earned by L&C's pilots when they were with respondent.

PAR. 10. The competition produced by L&C's entry had immediate benefits for purchasers of pilotage services and purchasers of shipping services. Within months, L&C's improved service enabled ConAgra to increase the rate at which it funneled grain through its elevators by more than 10%.

PAR. 11. Respondent responded by adopting practices similar to those of L&C -- dispatching pilots more quickly, and moving longer and deeper vessels, under a broader range of conditions, with fewer tugs. These practices served to reduce shipping costs for respondent's customers.

RESPONDENT'S ACTIONS TO MAINTAIN ITS MONOPOLY

PAR. 12. After L&C's formation, respondent protected its near-monopoly by:

(a) Interpreting its existing pension plan to deny any accrued pension benefits to any member who resigns and then competes with respondent.

(b) Modifying its conditions for membership to require that any marine pilot resigning from respondent must refrain from piloting on

the Grounds for six months. Under Oregon law, the pilot then would be required to obtain additional training before resuming pilotage. At the time that respondent imposed this new condition, respondent was the dominant provider of such training.

(c) Modifying its conditions for membership to require that any member who resigns and then competes with respondent must pay respondent $200,000.

(d) Supporting modification of the stock purchase agreement for a corporation whose shareholders are members of respondent to require that a pilot terminating his membership for any reason other than death, disability, or retirement forfeit his right to profit from any increased value of his stock in the corporation.

PAR. 13. The acts or practices described in paragraph twelve were not justified on efficiency grounds.

PAR. 14. L&C was unable to obtain significant business beyond its exclusive contract with ConAgra. On January 8, 1991, L&C filed an antitrust suit against respondent.

PAR. 15. On December 22, 1991, respondent and L&C settled their lawsuit. The settlement agreement substantially restored respondent's monopoly by prohibiting L&C from seeking or accepting business from any of respondent's existing customers, from hiring more than one additional marine pilot, from entering into any new exclusive dealing contracts, from proposing any dispatch or rotation rule without respondent's permission, and from proposing or supporting any rate structure that did not have the "essential features" of the existing rate structure.

PAR. 16. Respondent and L&C submitted the settlement agreement to the Oregon Board of Maritime Pilots for its approval. The Board neither approved nor disapproved of the settlement, nor did it make any findings concerning whether the settlement is essential to safety.

PAR. 17. Respondent's new rules protected respondent from additional competition, either from L&C or from any other pilot group, by imposing penalties so prohibitive that no other pilot would leave respondent to compete with it. The settlement agreement also significantly limited L&C's ability to compete. At the end of 1994, one of L&C's founders retired from pilotage, leaving L&C with one pilot. After L&C's remaining founder retired in 1995, L&C went out of business; and respondent regained its monopoly.

NATURE AND EFFECTS OF RESPONDENT'S CONDUCT

PAR. 18. By engaging in the acts and practices described in paragraph twelve, and by acting on its own and as a combination of and in conspiracy with its members, respondent has unreasonably restrained competition in and has monopolized the market for marine pilotage on the Columbia and Willamette River Pilotage Ground. Respondent's settlement agreement described in paragraph fifteen also constituted an agreement that unreasonably restrained competition on the Grounds.

PAR. 19. The purpose, effect, tendency or capacity of respondent's acts and practices described in paragraphs twelve and fifteen is and has been to monopolize the market for marine pilotage on the Grounds, to restrict competition in that market, and to make it more difficult for new competition to develop in that market, thus depriving consumers of more efficient and less expensive pilotage and shipping services.

PAR. 20. The conspiracies, acts and practices described in paragraphs twelve and fifteen constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Such conspiracies, acts and practices, or the effects thereof, are occurring or may recur in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of respondent Columbia River Pilots ("COLRIP"), and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined it had reason to believe that the respondent has violated the said Act, 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, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. COLRIP is an unincorporated association whose members are marine pilots or corporations owned by marine pilots. Respondent is organized and does business under the laws of the State of Oregon, and has its offices at 13225 N. Lombard, Portland, Oregon.

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

ORDER

I.

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

A. "*COLRIP*" means Columbia River Pilots, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by COLRIP, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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

C. "*Columbia and Willamette River Pilotage Ground*" or "*the Grounds*" is one of the pilotage grounds designated by the State of Oregon, and refers specifically to the Columbia and Willamette Rivers and their tributaries from the lowermost dock or wharf at the Port of Astoria to the head of navigation.

D. "*Marine pilot*" means an individual licensed by the State of Oregon to assist the master of a vessel on the Grounds, but does not include a pilot trainee or apprentice.

II.

It is further ordered, That COLRIP, directly, indirectly, or through any corporate or other device, in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, cease and desist from:

A. Imposing any restrictions or penalties of any kind on COLRIP marine pilots who leave COLRIP, or who notify COLRIP of their intention of leaving COLRIP, to provide pilotage in competition with COLRIP; provided, however, that this subparagraph does not apply to restrictions or penalties on marine pilots who have been members of COLRIP for less than five (5) years, nor does this subparagraph apply to restrictions or penalties that are imposed on a marine pilot for failure to give at least ninety (90) days' advance notice of departure from COLRIP;

B. Entering into, or attempting to enter into, any agreement or understanding (other than agreements or understandings with COLRIP members, trainees or apprentices limited to performance of their pilotage duties with COLRIP and to the term of their membership, apprenticeship or training program with COLRIP), either express or implied, with any other provider or potential provider of marine pilotage on the Columbia and Willamette River Pilotage Ground:

(1) To divide, apportion or otherwise allocate customers, routes or any other aspect of the market for marine pilotage;

(2) To limit the number of marine pilots associated with any provider or potential provider of marine pilotage or otherwise restrict the amount of marine pilotage any provider or potential provider of marine pilotage may provide;

(3) To restrict the ability of any other provider or potential provider of marine pilotage to enter into exclusive dealing contracts with any customer; or

(4) To restrict the ability of any provider or potential provider of marine pilotage to submit proposals, recommendations or any other communication to the Oregon Board of Maritime Pilots.

III.

It is further ordered, That COLRIP shall, within sixty (60) days after the date on which this order becomes final, amend its constitution, bylaws, standards of conduct, codes of ethics, membership rules, and any other statements of policy or agreements, to conform to the requirements of paragraph II of this order.

IV.

It is further ordered, That COLRIP, directly, indirectly, or through any corporate or other device, in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, shall not prevent any COLRIP marine pilot from recommending or otherwise supporting an applicant for a Certificate as a Pilot Apprentice Trainee or an applicant for a marine pilot license. Nothing in this paragraph is intended to interfere with COLRIP's right to recommend certain applicants over others, nor to interfere with COLRIP's obligation as a training organization to evaluate the performance of apprentices and trainees and to make recommendations about licensure.

V.

It is further ordered, That COLRIP shall:

A. Within thirty (30) days after the date on which this order becomes final, distribute a copy of the complaint, the order, and the notice set out in Appendix A to the order, to each of its officers, members, marine pilot trainees, and employees, and a copy of the complaint, the order, and the notice set out in Appendix B to the order, to the Columbia River Steamship Operators Association; and

B. For a period of ten (10) years after the date on which this order becomes final, furnish a copy of the complaint, the order, and the notice set out in Appendix A to the order, to any new officers at the time they are elected, any new members at the time they become members, any new marine pilot trainees at the time they become trainees, and any new employees at the time they are hired.

VI.

It is further ordered, That COLRIP shall:

A. Sixty (60) days after the date on which this order becomes final, annually for the next ten (10) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, file a verified written report with the Commission setting forth in detail the manner and form in which the respondent has complied and is complying with paragraphs II, III, IV and V of this order;

B. For a period of ten (10) years from the date this order becomes final, notify the Commission at least thirty (30) days prior to any proposed change in respondent COLRIP, such as dissolution, assignment or sale resulting in the emergence of a successor, or the creation or dissolution of subsidiaries or any other change that may affect its compliance obligations arising out of this order; and

C. For a period of ten (10) years after the date on which this order becomes final, notify the Commission within thirty (30) days after the respondent forms, participates in the formation of, or joins any joint venture for the provision of marine pilotage on the Columbia and Willamette River Pilotage Ground. This paragraph does not require notification when a marine pilot joins COLRIP as a member of COLRIP.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to any facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent in the presence of counsel.

VIII.

It is further ordered, That this order shall terminate on March 1, 2019.

APPENDIX A

APPENDIX B

IN THE MATTER OF

ASOCIACION DE FARMACIAS REGION DE ARECIBO, INC., ET AL.

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

Docket C-3855. Complaint, March 2, 1999--Decision, March 2, 1999

This consent order, among other things, prohibits an association of approximately 125 pharmacies operating in northern Puerto Rico and one of its officers from jointly negotiating prices or other terms for pharmacies and jointly boycotting, threatening to boycott, or refusing to provide pharmacy goods and services to any payer or provider.

Participants

For the Commission: *Gary Schorr, Steven Osnowitz, Michael Kades, Patricia Allen, David Pender, Anne Schenof, Daniel Ducore, William Baer, Louis Silvia* and *Peter Gulyn.*

For the respondents: *Eric Tulla,* San Juan, Puerto Rico.

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 Asociacion de Farmacias de Region Arecibo ("respondent AFRA") and Ricardo L. Alvarez Class ("respondent Alvarez") have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. This complaint concerns the respondents' agreement to set the price and other terms and conditions under which they would participate in "the Reform," the Puerto Rican program established under the Puerto Rico Health Insurance Administration Act of 1993, Act No. 72, Article II, to provide care to Puerto Rico's indigents. The Government of Puerto Rico established the Reform in order to provide high quality health care, including pharmacy goods and services, to its indigents.

RESPONDENTS

PAR. 2. Respondent AFRA is a nonprofit corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its principal place of business at Suite 336, GPO Box 3016, Manati, Puerto Rico.

PAR. 3. Respondent Alvarez is an owner of Empresas Alvasie, which operates Farmacia Elda in Manati, Puerto Rico. He served as AFRA's President from its inception until March 1997, and is currently AFRA's treasurer. Respondent Alvarez's principal place of business is located at Barrio Cantera Carr. #2, Km. 44.5, Manati, Puerto Rico.

JURISDICTION

PAR. 4. Respondent AFRA exists and operates in substantial part for the pecuniary benefit of its members. By virtue of its purposes and activities, respondent AFRA is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

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

THE REFORM

PAR. 6. The government of Puerto Rico established the Reform in order to ensure that all island residents have access to quality health care, including pharmacy services, regardless of financial condition and capacity to pay. The Reform is financed by the Commonwealth, Federal Medicaid funds, other applicable Federal funds, contributions by employers and individual employees, and income from privatization funds (such as leases and sales of government-owned health care facilities). To date, the Reform has been implemented throughout much of Puerto Rico, although it is not yet in place in San Juan and its environs, or Ponce. The reform currently covers approximately 1.1 million individuals, 29% of Puerto Rico's total population. When fully operational, the Reform is expected to cover approximately 2 million individuals, over 50% of Puerto Rico's population.

PAR. 7. The law implementing the Reform created the Administración de Seguros de Salud ("ASES"), a public corporation, and charged it with implementing and administering the Reform. ASES divided Puerto Rico into seven regions. With respect to each region, ASES solicits bids from payers to administer the Reform, and to organize and provide services for beneficiaries. ASES then selects one payer per region. That payer then contracts with health care providers, including hospitals, physicians, pharmacies, and dentists.

PAR. 8. After reviewing bids from several payers, ASES selected Triple-S to administer the North Region of the Reform upon the Reform's inception in the Region on April 1, 1995. The North Region consists of the municipalities of Arecibo, Barceloneta, Camuy, Ciales, Florida, Hatillo, Lares, Manati, Morovis, Quebradillas, Utuado, and Vega Baja. The combined population of these municipalities is approximately 434,000, of which 260,000, are beneficiaries under the Reform.

AFRA'S MEMBERSHIP

PAR. 9. All of respondent AFRA's members are pharmacies located in the North Region of the Reform. During the time period during which the acts and practices described in paragraphs fourteen through twenty-one below took place, respondent AFRA's membership included the vast majority of pharmacies operating in the North Region. For much of this time period, respondent AFRA had approximately 125 members, constituting approximately 80% of the pharmacies in the North Region, and at least 64% of the pharmacies in each municipality in the Region.

PAR. 10. Except to the extent that competition has been restrained as alleged herein, some or all of the members of respondent AFRA have been, and are now, in competition among themselves and with other pharmacies in the North region.

PAR. 11. Except to the extent that competition has been restrained as alleged herein, respondent Alvarez, through his ownership of Empresas Alvasie, which operates Farmacia Elda, has been, and is now, in competition with at least some of AFRA's member pharmacies and other pharmacies in the North region.

PAR. 12. Absent agreements among competing pharmacies on the price and other terms upon which they will provide services to third-party payers, competing pharmacies decide individually whether

to enter into contracts with third-party payers, and on the terms and conditions under which they are willing to enter into such contracts.

ANTICOMPETITIVE CONDUCT

PAR. 13. In engaging in the acts and practices described in paragraphs fourteen through twenty-one below, respondent AFRA has acted as a combination of its members and has conspired with at least some of its members including respondent Alvarez.

PAR. 14. Respondent AFRA was formed on November 22, 1994, as a vehicle for its members to deal concertedly with third party payers. Pursuant to a provision in its Articles of Incorporation, and upon agreement of its members, AFRA negotiated on behalf of its members with health plans. In furtherance of this agreement, in December 1994, each AFRA member signed an agreement designating AFRA as its bargaining agent.

PAR. 15. Respondent Alvarez was instrumental in the formation and activities of respondent AFRA. As respondent AFRA's President from its inception until March 1997, respondent Alvarez directed respondent AFRA's efforts to set price and other terms and conditions for participation in the Reform, and provided the leadership necessary to unite otherwise competing pharmacies.

PAR. 16. From approximately January 1995 to the present, respondent AFRA, under the leadership of respondent Alvarez, conspired to fix the terms and conditions, including terms of financial compensation, under which its members would contract with Triple-S and thereby participate in the Reform.

PAR. 17. Beginning in January 1995, respondent AFRA negotiated on behalf of its members with Triple-S the terms and conditions of member participation in the Reform. Specifically, respondent AFRA sought to increase compensation for its members, and to require Triple-S to contract with all its members that sought to do so. Respondent Alvarez was respondent AFRA's principal spokesperson and negotiator in discussions with Triple-S.

PAR. 18. On January 13, 1995, respondent AFRA's members met to discuss the payment terms pursuant to which they would participate in the Reform. Respondent AFRA's members prepared a proposed dispensing fee schedule. Respondent Alvarez exhorted respondent AFRA's members to refuse to sign contracts with Triple-S until advised to do so by respondent AFRA, and directed delegates

from each municipality to spread the word to pharmacies in their respective towns not to sign contracts with Triple-S.

PAR. 19. On January 15, 1995, respondent Alvarez and other AFRA members met with Triple-S, and presented AFRA's proposed dispensing fee schedule. Thereafter, Triple-S raised the dispensing fee for generic pharmaceuticals by one dollar, and AFRA members agreed that they would provide services when the Reform began in the North Region on April 1, 1995.

PAR. 20. In March 1996, Triple-S announced a new price schedule that lowered reimbursement to AFRA's member pharmacies. In response, respondent Alvarez requested a meeting with Triple-S, at which he demanded that Triple-S rescind the new price schedule. When Triple-S refused to rescind the price schedule, respondent Alvarez enlisted AFRA's attorneys to contact Triple-S and threaten legal action. Thereafter, Triple-S raised the dispensing fee paid to pharmacies in the North Region, but kept its new price schedule for pharmaceuticals in place.

PAR. 21. In May 1996, respondent AFRA's members, under respondent Alvarez's leadership and guidance, threatened to withhold services under the Reform as of June 10, 1996, because Triple-S had refused to accede to all of its demands concerning the terms of pharmacy compensation. Specifically, although Triple-S had agreed to raise the dispensing fee paid to pharmacies as demanded by respondent AFRA, Triple-S remained unwilling to comply with respondent AFRA's demands to raise its price schedule for pharmaceuticals. Upon receiving the boycott threat, Triple-S acceded to respondent AFRA's demands and raised the prices it paid to pharmacies for pharmaceuticals, thus averting the threatened boycott. The new fee schedule implemented by Triple-S amounted to a 22% increase over the level of prices paid to AFRA's members under the March 1996 fee schedule. Respondent Alvarez organized and presided over the meeting at which AFRA's members voted to threaten to boycott Triple-S, and composed the letter in which respondent AFRA communicated the boycott threat to Triple-S.

PAR. 22. The individual members of respondent AFRA have not integrated their businesses in any economically significant way, nor have they created any efficiencies that might justify the acts and practices described in paragraphs fourteen through twenty-one.

EFFECTS

PAR. 23. The purpose, tendency, effects, or capacity of respondents' acts and practices as described in paragraphs fourteen through twenty-one are and have been to restrain trade unreasonably and hinder competition in the provision of pharmacy goods and services in the North Region of the Reform in Puerto Rico, in the following ways, among others:

(a) To restrain competition among pharmacies;

(b) To fix the compensation and other terms and conditions upon which pharmacies would deal with Triple-S and participate in the Reform, thereby raising the cost of pharmacy goods and services to be furnished to beneficiaries of the Reform;

(c) To deprive the Commonwealth of Puerto Rico, payers, and consumers of the benefits of competition among pharmacies.

PAR. 24. The combination or conspiracy and the acts and practices of respondents AFRA and Alvarez, as herein alleged, constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The violation or the effects thereof, as herein alleged, will continue or recur in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the respondents, named in the caption above, and the respondents having been furnished thereafter with a copy of the draft complaint which the Bureau of Competition 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, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all of the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purpose only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by 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 the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent 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 AFRA is a nonprofit corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its principal place of business located at Suite 336, GPO Box 3016, Manati, Puerto Rico.

2. Respondent Alvarez, an individual, is an owner of Empresas Alvasie which operates Farmacia Elda in Manati, Puerto Rico, and is AFRA's former President and current Treasurer. Respondent Alvarez's principal place of business is located at Barrio Cantera Carr. #2, Km. 44.5, Manati, Puerto Rico.

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

ORDER

I.

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

A. "*AFRA*" means Asociacion de Farmacias Region de Arecibo, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by the Asociacion de Farmacias Region de Arecibo, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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

C. "*Payer*" means any person that purchases, reimburses for, or otherwise pays for all or part of any health care services for itself or for any other person. Payer includes, but is not limited to, any health insurance company; preferred provider organization; prepaid hospital, medical, or other health service plan; health maintenance organization; government health benefits program; employer or other person

providing or administering self-insured health benefits programs; and patients who purchase health care for themselves.

D. "*Person*" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

E. "*Provider*" means any person that supplies health care goods or services to any other person, including, but not limited to, physicians, pharmacies, dentists, hospitals, and clinics.

F. "*Participating pharmacy*" means any pharmacy that is a member of AFRA.

G. "*Qualified risk-sharing joint arrangement*" means an arrangement to provide services in which (1) the arrangement does not restrict the ability, or facilitate the refusal, of pharmacy providers participating in the arrangement to deal with payers individually or through any other arrangement, and (2) all pharmacy providers participating in the arrangement share substantial financial risk from their participation in the arrangement through: (a) the provision of services to payers at a capitated rate; (b) the provision of services for a predetermined percentage of premium or revenue from payers; (c) the use of significant financial incentives (*e.g.*, substantial withholds) for its participating providers, as a group, to achieve specified cost-containment goals; or (d) the provision of a complex or extended course of treatment that requires the substantial coordination of care by different types of providers offering a complementary mix of services, for a fixed, predetermined payment, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors.

H. "*Qualified clinically-integrated joint arrangement*" means an arrangement to provide services in which (1) the arrangement does not restrict the ability, or facilitate the refusal, of pharmacy providers participating in the arrangement to deal with payers individually or through any other arrangement, and (2) all pharmacy providers participating in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the pharmacies participating in the arrangement, in order to control costs and ensure quality of the services provided through the arrangement.

I. "*Reimbursement*" means any payment, whether cash or non-cash, or other benefit received for the provision of pharmacy goods and services.

II.

It is further ordered, That each respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of pharmacy goods and services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, cease and desist from:

A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding to:

1. Negotiate on behalf of any participating pharmacies with any payer or provider;

2. Deal or refuse to deal with, or boycott or threaten to boycott, any payer or provider;

3. Determine any terms, conditions, or requirements upon which pharmacies deal with any payer or provider, including, but not limited to, terms of reimbursement; or

4. Restrict the ability of participating pharmacies to deal with payers individually or through any arrangement outside AFRA.

B. Encouraging, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited if the person were subject to this order.

Provided that nothing in this order shall be construed to prohibit any agreement or conduct by either respondent that is reasonably necessary to form, facilitate, manage, operate, or participate in:

(a) A qualified risk-sharing joint arrangement; or

(b) A qualified clinically integrated joint arrangement, if the applicable respondent has provided the prior notification(s) as required by this paragraph (b). Such prior notification must be filed with the Secretary of the Commission at least thirty (30) days prior to forming; facilitating; managing; operating; participating in; or taking any action, other than planning, in furtherance of any joint arrangement requiring such notice ("first waiting period"), and shall include for such arrangement the identity of each participant, the location or

area of operation, a copy of the agreement and any supporting organizational documents, a description of its purpose or function, a description of the nature and extent of the integration expected to be achieved and the anticipated resulting efficiencies, an explanation of the relationship of any agreement on reimbursement to furthering the integration and achieving the expected efficiencies, and a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from such agreement(s). If, within the first waiting period, a representative of the Commission makes a written request for additional information, the applicable respondent shall not form; facilitate; manage; operate; participate in; or take any action, other than planning, in furtherance of such joint arrangement until thirty (30) days after substantially complying with such request for additional information ("second waiting period") or such shorter waiting period as may be granted by letter from the Bureau of Competition. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

Provided further that nothing in this order shall be construed to prohibit respondent Alvarez from negotiating with any payer or provider on behalf of pharmacies that he:

(a) Owns; or

(b) Operates pursuant to a contract, provided that respondent Alvarez submits written notification and a copy of the contract to the Commission within ten (10) days of entering into any such contract and refrains from negotiations with any payer or provider for at least thirty (30) after providing such notice.

Provided further that nothing contained in this order shall be construed to prevent any respondent or respondents from engaging in the bona fide exercise of 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.

III.

It is further ordered, That respondent AFRA shall:

A. Within thirty (30) days after the date on which this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint, as well as certified Spanish translations thereof to each person who, at any time since November 22, 1994, has been an officer, director, manager, employee, or participating pharmacy in AFRA.

B. Within thirty (30) days after the date on which this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint, as well as certified Spanish translations thereof to each payer or provider who, at any time since November 22, 1994, has communicated with AFRA concerning any desire, willingness, or interest in contracting for pharmacy goods and services with AFRA members.

C. For a period of five (5) years after the date this order becomes final:

1. Distribute by first-class mail a copy of this order and the accompanying complaint, as well as certified Spanish translations thereof, to each new AFRA member within thirty (30) days of his or her initial participation, and

2. Annually publish in any official annual report or newsletter sent to all participating pharmacies, a copy of this order and the complaint, as well as certified Spanish translations thereof, with such prominence as is given to regularly featured articles. If no such annual report or newsletter is sent to participating pharmacies, AFRA shall annually, on the anniversary of the date this order becomes final as to AFRA, distribute a copy of this order and the complaint, as well as certified Spanish translations thereof, by first-class mail, or at a formal meeting of AFRA, to all participating pharmacies.

IV.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final, each respondent 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, and has complied with paragraphs II and III of this order.

B. One (1) year from the date this order becomes final, annually for the next five (5) years on the anniversary of the date this order becomes final, and at other times as the Commission may require,

each respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraphs II and III of this order.

V.

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

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, each respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in the possession or under the control of that respondent relating to any matter contained in this order; and

B. Upon five business days' notice to a respondent and without restraint or interference from that respondent, to interview that respondent, or officers, directors, employees, or other representatives of that respondent.

VII.

It is further ordered, That this order shall terminate on March 2, 2019.

IN THE MATTER OF

NEW VISION INTERNATIONAL, INC., ET AL.

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

Docket C-3856. Complaint, March 3, 1999--Decision, March 3, 1999

This consent order, among other things, prohibits an Arizona-based multi-level marketing company, that sells nutritional supplements, its affiliated company and their officers from making unsubstantiated advertising claims for a combination of supplements they called "God's Recipe," that the respondents promote in the prevention, treatment, cure or mitigation of Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder or their symptoms. Also, the consent order prohibits the misrepresentation of testimonials or endorsements for the product.

Participants

For the Commission: *Matthew Gold*, *Sylvia Kundig*, and *Jeffrey Klurfeld.*

For the respondents: *Barry Cutler* and *Julia Oas, Baker & Hostetler*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that New Vision International, Inc., and NVI Promotions, L.L.C., corporations, and Jason P. Boreyko and Benson K. Boreyko, individually and as officers of the corporations, ("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:

1. Respondent New Vision International, Inc. ("New Vision") is an Arizona corporation with its principal office or place of business at 7762 East Gray Road, Suite 500, Scottsdale, AZ.

2. Respondent NVI Promotions, L.L.C., is an Arizona corporation with its principal office or place of business at 7762 East Gray Road, Suite 500, Scottsdale, AZ.

3. Respondent Jason P. Boreyko is an officer of the corporate respondents. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporations, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of the corporations.

4. Respondent Benson K. Boreyko is an officer of the corporate respondents. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporations, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of the corporations.

5. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed nutritional supplement products, and audiotapes and other promotional materials for these products, and have engaged in the recruitment of distributors for the products. The respondents have dominated, controlled, furnished the means, instrumentalities, services and facilities for and/or condoned or approved the acts and practices referred to below.

6. Respondents have developed a multilevel marketing plan to sell New Vision products through distributors to consumers. The marketing plan allows distributors to earn money by selling the products at a suggested mark-up to consumers. Distributors also recruit and train other individuals to be distributors in the respondents' marketing plan. Distributors earn money based on purchases from New Vision made by these recruits and others who they, in turn, recruit to be distributors.

7. Respondents have established the marketing plan, and recruited distributors, for the purpose of promoting, selling, or otherwise distributing New Vision products. Among other things, New Vision provides each new distributor with a sales kit that contains brochures, order forms, and other materials identifying New Vision, that are intended to be, and are, used by distributors in their sales efforts. NVI Promotions, L.L.C., sells promotional materials, including brochures, audiotapes, and custom printed cassette labels, to New Vision distributors. These promotional materials are intended to be, and are, used by distributors in their sales and recruitment efforts.

8. Respondents have advertised, promoted, offered for sale, sold, and distributed various nutritional supplements, including: (a) "PC Grape Seed Extract with an Herbal Blend;" (b) "Essential Minerals;" and (c) "Multi-Enzymes with Alfalfa/Barley Sprouts." In some of their promotional materials, respondents collectively refer to these products as "God's Recipe," and tout them as a natural alternative to the prescription drug Ritalin for children suffering from Attention Deficit Disorder or Attention Deficit/Hyperactivity Disorder ("ADD/ADHD"). These products are "'foods' and/or 'drugs'," within

the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

9. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

10. Respondents have disseminated or have caused to be disseminated advertisements for God's Recipe, including but not necessarily limited to the attached Exhibits A through D. These advertisements contain the following statements:

A. "The problem: Johnny isn't staying up with the rest of the children, he's getting into fights at recess and he's just not listening. The teacher has seen it hundreds of times: ADD (Attention Deficit Disorder) - the most common form of treatment: Ritalin. Parents trusting the advice of well-meaning professionals are unknowingly starting their children on a cycle of chemical dependency. Is there an alternative? The good news is yes, and this tape will outline what has become known as 'God's recipe' as well as letting you hear from some doctors on this very subject. God's recipe is made up of three very exciting, natural health products. The three products you'll hear about on this tape are colloidal minerals, OPC grape seed extract containing ginkgo biloba, and a multi-enzyme product. This combination is making a huge difference in the lives of thousands of children and is a natural approach that works....

One out of every three is going to drop out of school and if they carry this into adulthood, the national statistics are that one out of every ten will attempt suicide, so my recommendation is a couple of ounces of colloidal minerals each day for these children. We believe that the anti-oxidant is very important to help clean up the free radical damage that is going on inside their little brains and we combine that with ginkgo biloba and then we think that the multi-enzymes to help them metabolize that sugar that they're going to get -- we just can't seem to eliminate enough of it -- is very important....

I've learned a lot tonight and I very much appreciate your being willing to share all of this. I think one of the things that I'd like to kind of end with here is as Zoanne said, "Thank God." And it seems to me that we have properly titled what we're doing and the success of this formulation, this combination of natural nutritional supplements with eight, 10, 15 calls I get a day and the hundreds and hundreds of parents and children now that are benefitting from this, we really can, I think, in good consciousness call it God's recipe. And what most of us are doing is two ounces of these colloidal minerals spread during the day, maybe first thing in the morning and then sometime mid to late afternoon, 40 milligrams of this Proanthocyanidin, preferably one that comes from grape seed extract in combination with Ginkgo Biloba and we think that you should take those roughly at the same time that you take the mineral supplementation and then lastly, because there is no question that sugar is a major culprit in ADHD and ADD, we need to eliminate sugar as much as possible from all of our diets, but particularly from the diets of those that are very sensitive and impacted negatively by sugar and in order to help ease the problem of the sugar that we are unable to eliminate, these multi-

enzyme capsules are phenomenal because as Dr. Chris has told us tonight, they assist mightily in metabolizing the sugar and getting that whole digestive process and the reaction of digesting sugar under control so that we don't get the mood swings and the metabolic swings. So we call that God's recipe. Hopefully, with the information that you have been kind enough to share with us tonight, the recipe will spread and the resultant blessing will occur to as many people as possible. So, I would just say, again, thank you."

(Exhibit A, Transcript of tape entitled "God's Recipe - The Natural Alternative to Ritalin.")

B. "Former Executive VP with Days Inn of America wants to rid the world of Ritalin, substitute good nutrition and dietary supplements in its place...

I attended a lecture by Dr. Kris Van Oeveren last year, at which time he stated that in his practice, he often dealt with children who were ADHD. In many cases (but not all), it was his opinion that these children were unable to adequately process sugar or glucose, and if you added a good multi-enzyme supplement (one containing sufficient gluco-amylase) to their diets, that the problems would disappear, or as a minimum, be greatly reduced....

Having watched my son suffer through the anguish and destruction of being on Ritalin for six years of his life, I was absolutely dumbstruck! I thought, "Are you trying to tell me that I could have avoided putting my son (and my family) through that nightmare from hell by simply giving him a 100% natural supplement? I don't believe it!" But the guilt and sadness of those memories with my son and the family during his formative years of ages six through twelve would not let this stunning disclosure subside from my consciousness. I decided to test this idea with friends from Memphis, who had a son, on Ritalin, and not doing well at all. In fact. he was the same age as my son when our drug odyssey began....

Back to my friends in Tennessee. They agreed to have their son's pediatrician monitor the reduction of Ritalin over a 30 day period, combined with the addition of certain natural nutritional supplements. At the end of this test period, they reported that the Ritalin was no longer being taken and that there had been no negative changes in behavior....

Now, hundreds and perhaps many thousands of cases later, parents are hearing glowing reports of their children's outstanding performances in the academic environment as well as the social environments in which they are asked to participate. In fact. while I have no certified statistical evidence to support this conclusion other than anecdotal, I have not had a single report back to me that even one single child has had to return to Ritalin after trying a combination of three natural nutritional supplements which I call 'God's Recipe.'"

(Exhibit B, "Well Being Journal," Vol V, No. 4, July/August 1996 (Included in "Attention Deficit Hyperactivity Disorder" pamphlet.))

C. "**God's Recipe**

1.) 2 ounces of Colloidal Minerals.

2.) 40 milligrams of highly effective antioxidant - OPC capsule combined with Ginkgo Biloba.

3.) Multi-enzyme capsule with every meal and with every significant snack, as well as the elimination of as much sugar as possible from the diet.

* See back page for more information

[Back Page]

Information on our "God's Recipe" Products

1.) Colloidal Minerals

These are minerals in a delicious liquid form that children of all ages really enjoy. The minerals are extremely easy for the body to absorb as they are extracted from plant source deposits of vegetation origin. In fact, the absorption rate in the body of these minerals is much greater than elemental minerals taken in tablet form. There are over 60 minerals in every 32 ounce bottle.

2.) Antioxidant with Ginkgo Biloba:

This antioxidant is OPC and is derived from the original patented grape seed extract. It has 50 times more antioxidant potency than vitamin E, and 20 times more than vitamin C. In combination with Ginkgo Biloba and other herbs, it can have a very positive impact on one's health.

3.) Multi-Enzymes

As the basis of all metabolic activity, enzymes are the driving force of our body's more than **150,000** biochemical reactions. Enzymes are very important for effectively metabolizing sugars, an activity of critical importance to ADHD control. A balanced blend of enzymes and minerals maximizes the assimilation of nutrients.

WHEN TO TAKE GOD'S RECIPE

Take one ounce of Colloidal Minerals and 1 capsule (20 milligrams) of the Antioxidant with Ginkgo Biloba first thing in the morning, and both <u>again</u> mid-to-late afternoon. Take 1 capsule of Multi-Enzymes with each meal and with each significant snack. Eliminate sugar throughout the day and evening.

We wish you and your family the best. If you have any questions, or would like to place an order, please call us at:..."

(Exhibit C, Excerpted from "Attention Deficit Hyperactivity Disorder" pamphlet.)

D. "<u>GOD'S RECIPE TESTIMONIALS</u>

Good evening Mr. James: This is Shondra W. I had talked to you about a month ago to get information from you about how I could get my son off of Ritalin. And I just wanted you to know that I have had him completely off Ritalin for the past five days and I couldn't be more pleased with the way he is doing, he is doing so well. He is such a pleasure to be with now. And he is feeling better himself, he doesn't even want foods with sugar. And I just wanted to tell you 'Thank You and I really appreciate all of your help. (Shondra W, Texas)

Dear Max: We started about four and a half months ago and this has been the greatest four and a half months my son and I have ever had, ever. My son is 6 ½ years old. He was being brought to my work by the school principle because he was such a severe discipline problem that he was under consideration to be 'kicked out' of first grade. I was accused by the school of not being strict enough with my son, not disciplining him enough. It was right after that meeting with the school teachers and counselors that I started him on the program (God's Recipe) and we have had perfect behavior since then. He won an award pin for his perfect behavior and he

won an all expense paid vacation from the principle for perfect behavior for four straight months. His teacher says that she wishes that she could get this (God's Recipe) for every kid in class. This is the best thing that has ever happened to us. I thank God that we have this. I really, really do! (Zoanne, California)"
(Exhibit D, Excerpted from "Attention Deficit Hyperactivity Disorder" pamphlet.)

11. Through the means described in paragraph ten, respondents have represented, expressly or by implication, that:

A. God's Recipe can cure, prevent, treat or mitigate Attention Deficit Disorder or its symptoms.

B. God's Recipe can cure, prevent, treat or mitigate Attention Deficit Hyperactivity Disorder or its symptoms.

C. God's Recipe is an effective alternative treatment to the prescription drug Ritalin for Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder.

D. Testimonials from consumers appearing in the advertisements for God's Recipe reflect the typical or ordinary experience of members of the public whose children have used the product.

12. Through the means described in paragraph ten, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph eleven, at the time the representations were made.

13. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph eleven, at the time the representations were made. Therefore, the representation set forth in paragraph twelve was, and is, false or misleading.

14. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

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EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBIT C

EXHIBIT D

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, 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 of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 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, 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.a. Respondent New Vision International, Inc. ("New Vision") is an Arizona corporation with its principal office or place of business at 7762 East Gray Road, Suite 500, Scottsdale, AZ.

1.b. Respondent NVI Promotions, L.L.C., is an Arizona corporation with its principal office or place of business at 7762 East Gray Road, Suite 500, Scottsdale, AZ.

1.c. Respondent Jason P. Boreyko is an officer of the corporate respondents. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporations. His principal office or place of business is the same as that of the corporations.

1.d. Respondent Benson K. Boreyko is an officer of the corporate respondents. Individually or in concert with others, he formulates,

directs, or controls the policies, acts, or practices of the corporations. His principal office or place of business is the same as that of the corporations.

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

ORDER

DEFINITIONS

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

1. "*God's Recipe*" shall mean the following New Vision products, as sold or advertised in combination: "OPC Grape Seed Extract with an Herbal Blend," "Essential Minerals," and "Multi-Enzymes with Alfalfa/Barley Sprouts."

2. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

3. Unless otherwise specified, "*respondents*" shall mean New Vision International, Inc., and NVI Promotions, L.L.C., corporations, their successors and assigns and their officers; Jason P. Boreyko and Benson K. Boreyko, individually and as officers of the corporations; and each of the above's agents, representatives and employees.

4. "*Drug*" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55.

5. "*Food*" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55.

6. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondents, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of "God's Recipe," or any food,

drug or dietary supplement, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that:

A. Such products can cure, prevent, treat or mitigate Attention Deficit Disorder or its symptoms;

B. Such products can cure, prevent, treat or mitigate Attention Deficit Hyperactivity Disorder or its symptoms; or

C. Such products are an effective alternative treatment to the prescription drug Ritalin for Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder;

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time the representation is made, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation; or

B. Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

1. What the generally expected results would be for users of the product, or

2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

III.

It is further ordered, That respondents, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any food, drug or dietary supplement, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, regarding:

A. The safety of such product; or

B. The ability of such product to treat, cure, alleviate the symptoms of, prevent, or reduce the risk of developing any disease or disorder;

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

IV.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

V.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

VI.

It is further ordered, That respondents, and their successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that came into their possession from a distributor or any other source that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VII.

It is further ordered, That respondents New Vision International, Inc., and NVI Promotions, L.L.C., and their successors and assigns, shall, for a period of five (5) years from the date of service of this order, deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VIII.

It is further ordered, That respondents New Vision International, Inc., and NVI Promotions, L.L.C., and their successors and assigns, shall:

A. Deliver a dated and signed notification letter in the form set forth in Appendix A to this order to each independent distributor who receives compensation from New Vision International, Inc., any time during the three (3) months immediately following the date of service of this order. Such notification shall be inserted into the envelope containing the compensation check to be mailed to the independent distributors; and

B. For a period of five (5) years from the date of service of this order, deliver a dated and signed notification letter in the form set forth in Appendix B to this order to each future independent distributor within thirty (30) days after the person assumes such a position. Respondent New Vision shall be in compliance with this

subparagraph with respect to notifying future independent distributors if such notification letter is included in each starter kit provided to each future distributor.

IX.

It is further ordered, That respondents New Vision International, Inc., and NVI Promotions, L.L.C., and their successors and assigns, shall:

A. Institute a reasonable program of continuing surveillance adequate to reveal whether the representations of each of respondents' independent distributors conform to the requirements of this order. Such program must include, at a minimum, the following:

1. A requirement that all independent distributors submit advertising to respondents for pre-approval;

2. A mechanism for suspending or terminating business dealings with any independent distributor who fails to submit advertising for pre-approval;

3. A reminder once every six months of the requirement that all advertising must be submitted for pre-approval. Such reminder shall be delivered to each independent distributor who will receive compensation from respondents any time during the month immediately following the date of service of this order, and once during each sixth month thereafter. Such reminder may be inserted into envelopes containing compensation checks, product shipments or company mailings ; and

4. A monthly search of the World Wide Web for independent distributor advertising. Such a search shall use a commercial search engine, and include the search terms "New Vision" and the brand names of each of respondents' products.

B. Promptly investigate any complaint about any independent distributor and maintain records of any such complaint, investigation and disposition of the complaint for five (5) years from the date of the complaint, such records to be furnished to the Commission upon request.

C. Discontinue dealing with any independent distributor once respondents have actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such distributor is making

a representation prohibited by any part of this order, unless, upon notification by respondents, such distributor immediately ceases making any such representation. If respondents obtain actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such distributor has not permanently ceased making any representation prohibited by any part of this order, respondents must immediately discontinue dealing with such distributor.

X.

It is further ordered, That respondents Jason P. Boreyko and Benson K. Boreyko, for a period of five (5) years after the date of issuance of this order, shall each notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XI.

It is further ordered, That respondents New Vision International, Inc., and NVI Promotions, L.L.C., and their successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XII.

It is further ordered, That respondents, and their successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

XIII.

This order will terminate on March 3, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A Any Part in this order that terminates in less than twenty (20) years;
B. This order's application to any respondent that is not named as a defendant in such complaint; and
C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

APPENDIX A

[date]

Dear Team Member:

New Vision believes that the best way to promote its products is in strict accordance with federal and state laws. To maintain the integrity of the New Vision program and to ensure compliance with the law, including the Federal Trade Commission Act and the Food, Drug and Cosmetic Act, New Vision has adopted policies and procedures that it will strictly enforce. New Vision would like to remind you of a few of the policies and procedures set forth in the "Team Member Policies and Procedures" section of your Life Planner.

1. No Team Member may make any claim regarding the therapeutic or curative properties of New Vision products, except those officially approved by New Vision. Therefore, unless officially approved in writing by New Vision, no Team Member may make any claims, in advertising, promotional materials, labeling, or presentations to prospective members, that New Vision products are useful in the prevention, diagnosis or cure of any disease or disorder.

2. All advertising for New Vision products must be pre-approved by New Vision. Therefore, no Team Member may promote New Vision Products via the use, production, or sale of any sales aid, tapes, third-party literature, or any other materials unless those items have been either provided by New Vision or approved, in writing, by New Vision.

New Vision has implemented company policies, rules, regulations and compensation plan requirements (as found in the Team Member Kit) to prevent improper, abusive or illegal acts. Any violation of the Company's policies and procedures, especially those related to advertising and promoting the product or the compensation plan, will be grounds for an immediate suspension or termination of the Team Member's relationship with New Vision.

[signature]

APPENDIX B

[date]

Dear New Team Member:

New Vision believes that the best way to promote its products is in strict accordance with federal and state laws. To maintain the integrity of the New Vision program and to ensure compliance with the law, including the Federal Trade Commission Act and the Food, Drug and Cosmetic Act, New Vision has adopted policies and procedures that it will strictly enforce. New Vision would like to underscore for you a few of the policies and procedures set forth in the "Team Member Policies and Procedures" section of your Life Planner.

1. No Team Member may make any claim regarding the therapeutic or curative properties of New Vision products, except those officially approved by New Vision. Therefore, unless officially approved in writing by New Vision, no Team Member may make any claims, in advertising, promotional materials, labeling, or presentations to prospective members, that New Vision products are useful in the prevention, diagnosis or cure of any disease or disorder.

2. All advertising for New Vision products must be pre-approved by New Vision. Therefore, no Team Member may promote New Vision Products via the use, production, or sale of any sales aid, tapes, third-party literature, or any other materials unless those items have been either provided by New Vision or approved, in writing, by New Vision.

New Vision has implemented company policies, rules, regulations and compensation plan requirements (as found in the Team Member Kit) to prevent improper, abusive or illegal acts. Any violation of the Company's policies and procedures, especially those related to advertising and promoting the product or the compensation plan, will be grounds for an immediate suspension or termination of the Team Member's relationship with New Vision.

[signature]

IN THE MATTER OF

MAX F. JAMES

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

Docket C-3857. Complaint, March 3, 1999--Decision, March 3, 1999

This consent order, among other things, prohibits Max F. James, a distributor for New Vision International, Inc., (a multi-level marketing company that advertises and sells a combination of supplements called "God's Recipe") from making unsubstantiated advertising claims that the supplements can prevent, treat, cure or mitigate Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder or their symptoms. Also, the consent order prohibits the misrepresentation of testimonials or endorsements for the product.

Participants

For the Commission: *Matthew Gold, Sylvia Kundig,* and *Jeffrey Klurfeld.*

For the respondent: *Claude Wild, III* and *James Prochnow, Patton Boggs,* Denver, CO.

COMPLAINT

The Federal Trade Commission, having reason to believe that Max F. James ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

1. Max F. James resides at 1857 Ridgeview Drive, Roseville, CA.

2. Respondent is an "Executive Diamond Team Leader" distributor for New Vision International, Inc. ("New Vision"). Respondent has advertised, labeled, offered for sale, sold, and distributed nutritional supplement products, and audiotapes and other promotional materials for these products, and has engaged in the recruitment of distributors for the products. The respondent has furnished the means, instrumentalities, services and facilities for and/or condoned or approved the acts and practices referred to below.

3. Respondent has been a distributor in a multilevel marketing plan to sell New Vision products to consumers. The marketing plan allows distributors to earn money by selling the products at a suggested mark-up to consumers. Respondent has also recruited and

trained other individuals to be distributors in the multilevel marketing plan. Respondent earned additional money based on purchases from New Vision made by these recruits and others who they, in turn, recruit to be distributors.

4. Respondent has advertised, promoted, offered for sale, sold, and distributed various nutritional supplements, including: (a) "PC Grape Seed Extract with an Herbal Blend;" (b) "Essential Minerals;" and (c) "Multi-Enzymes with Alfalfa/Barley Sprouts." In some of his promotional materials, respondent collectively referred to these products as "God's Recipe," and touted them as a natural alternative to the prescription drug Ritalin for children suffering from Attention Deficit Disorder or Attention Deficit/Hyperactivity Disorder ("ADD/ADHD"). These products are "'foods' and/or 'drugs'," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

6. Respondent has disseminated or has caused to be disseminated advertisements for God's Recipe, including but not necessarily limited to the attached Exhibits A through D. These advertisements contain the following statements:

A. "The problem: Johnny isn't staying up with the rest of the children, he's getting into fights at recess and he's just not listening. The teacher has seen it hundreds of times: ADD (Attention Deficit Disorder) - the most common form of treatment: Ritalin. Parents trusting the advice of well-meaning professionals are unknowingly starting their children on a cycle of chemical dependency. Is there an alternative? The good news is yes, and this tape will outline what has become known as 'God's recipe' as well as letting you hear from some doctors on this very subject. God's recipe is made up of three very exciting, natural health products. The three products you'll hear about on this tape are colloidal minerals, OPC grape seed extract containing ginkgo biloba, and a multi-enzyme product. This combination is making a huge difference in the lives of thousands of children and is a natural approach that works....

One out of every three is going to drop out of school and if they carry this into adulthood, the national statistics are that one out of every ten will attempt suicide, so my recommendation is a couple of ounces of colloidal minerals each day for these children. We believe that the anti-oxidant is very important to help clean up the free radical damage that is going on inside their little brains and we combine that with ginkgo biloba and then we think that the multi-enzymes to help them metabolize that sugar that they're going to get -- we just can't seem to eliminate enough of it -- is very important....

I've learned a lot tonight and I very much appreciate your being willing to share all of this. I think one of the things that I'd like to kind of end with here is as Zoanne said, "Thank God." And it seems to me that we have properly titled what we're doing and the success of this formulation, this combination of natural nutritional supplements with eight, 10, 15 calls I get a day and the hundreds and hundreds of parents and children now that are benefitting from this, we really can, I think, in good consciousness call it God's recipe. And what most of us are doing is two ounces of these colloidal minerals spread during the day, maybe first thing in the morning and then sometime mid to late afternoon, 40 milligrams of this Proanthocyanidin, preferably one that comes from grape seed extract in combination with Ginkgo Biloba and we think that you should take those roughly at the same time that you take the mineral supplementation and then lastly, because there is no question that sugar is a major culprit in ADHD and ADD, we need to eliminate sugar as much as possible from all of our diets, but particularly from the diets of those that are very sensitive and impacted negatively by sugar and in order to help ease the problem of the sugar that we are unable to eliminate, these multi-enzyme capsules are phenomenal because as Dr. Chris has told us tonight, they assist mightily in metabolizing the sugar and getting that whole digestive process and the reaction of digesting sugar under control so that we don't get the mood swings and the metabolic swings. So we call that God's recipe. Hopefully, with the information that you have been kind enough to share with us tonight, the recipe will spread and the resultant blessing will occur to as many people as possible. So, I would just say, again, thank you."

(Exhibit A, Transcript of tape entitled "God's Recipe - The Natural Alternative to Ritalin.")

B. "[Max F. James] Former Executive VP with Days Inn of America wants to rid the world of Ritalin, substitute good nutrition and dietary supplements in its place...

I attended a lecture by Dr. Kris Van Oeveren last year, at which time he stated that in his practice, he often dealt with children who were ADHD. In many cases (but not all), it was his opinion that these children were unable to adequately process sugar or glucose, and if you added a good multi-enzyme supplement (one containing sufficient gluco-amylase) to their diets, that the problems would disappear, or as a minimum. be greatly reduced....

Having watched my son suffer through the anguish and destruction of being on Ritalin for six years of his life, I was absolutely dumbstruck! I thought, "Are you trying to tell me that I could have avoided putting my son (and my family) through that nightmare from hell by simply giving him a 100% natural supplement? I don't believe it!" But the guilt and sadness of those memories with my son and the family during his formative years of ages six through twelve would not let this stunning disclosure subside from my consciousness. I decided to test this idea with friends from Memphis, who had a son, on Ritalin, and not doing well at all. In fact, he was the same age as my son when our drug odyssey began....

Back to my friends in Tennessee. They agreed to have their son's pediatrician monitor the reduction of Ritalin over a 30 day period, combined with the addition of certain natural nutritional supplements. At the end of this test period, they

reported that the Ritalin was no longer being taken and that there had been no negative changes in behavior....

Now, hundreds and perhaps many thousands of cases later, parents are hearing glowing reports of their children' outstanding performances in the academic environment as well as the social environments in which they are asked to participate. In fact, while I have no certified statistical evidence to support this conclusion other than anecdotal, I have not had a single report back to me that even one single child has had to return to Ritalin after trying a combination of three natural nutritional supplements which I call 'God's Recipe.'"

(Exhibit B, "Well Being Journal," Vol V, No. 4, July/August 1996 (Included in "Attention Deficit Hyperactivity Disorder" pamphlet.))

C. "**God's Recipe**

1.) 2 ounces of Colloidal Minerals.

2.) 40 milligrams of highly effective antioxidant - OPC capsule combined with Ginkgo Biloba.

3.) Multi-enzyme capsule with every meal and with every significant snack, as well as the elimination of as much sugar as possible from the diet.

* See back page for more information

[Back Page]

Information on our "God's Recipe" Products

1.) Colloidal Minerals

These are minerals in a delicious liquid form that children of all ages really enjoy. The minerals are extremely easy for the body to absorb as they are extracted from plant source deposits of vegetation origin. In fact, the absorption rate in the body of these minerals is much greater than elemental minerals taken in tablet form. There are over 60 minerals in every 32 ounce bottle.

2.) Antioxidant with Ginkgo Biloba:

This antioxidant is OPC and is derived from the original patented grape seed extract. It has 50 times more antioxidant potency than vitamin E, and 20 times more than vitamin C. In combination with Ginkgo Biloba and other herbs, it can have a very positive impact on one's health.

3.) Multi-Enzymes

As the basis of all metabolic activity, enzymes are the driving force of. our body's more than **150,000** biochemical reactions. Enzymes are very important for effectively metabolizing sugars, an activity of critical importance to ADHD control. A balanced blend of enzymes and minerals maximizes the assimilation of nutrients.

WHEN TO TAKE GOD'S RECIPE

Take one ounce of Colloidal Minerals and 1 capsule (20 milligrams) of the Antioxidant with Ginkgo Biloba first thing in the morning, and both again mid-to-late afternoon. Take 1 capsule of Multi-Enzymes with each meal and with each significant snack. Eliminate sugar throughout the day and evening.

We wish you and your family the best. If you have any questions, or would like to place an order, please call us at:..."

(Exhibit C, Excerpted from "Attention Deficit Hyperactivity Disorder" pamphlet.)

D. "GOD'S RECIPE TESTIMONIALS

'Good evening Mr. James: This is Shondra W. I had talked to you about a month ago to get information from you about how I could get my son off of Ritalin. And I just wanted you to know that I have had him completely off Ritalin for the past five days and I couldn't be more pleased with the way he is doing, he is doing so well. He is such a pleasure to be with now. And he is feeling better himself, he doesn't even want foods with sugar. And I just wanted to tell you 'Thank You and I really appreciate all of your help.' (Shondra W, Texas)

'Dear Max: We started about four and a half months ago and this has been the greatest four and a half months my son and I have ever had, ever. My son is 6 ½ years old. He was being brought to my work by the school principle because he was such a severe discipline problem that he was under consideration to be 'kicked out' of first grade. I was accused by the school of not being strict enough with my son, not disciplining him enough. It was right after that meeting with the school teachers and counselors that I started him on the program (God's Recipe) and we have had perfect behavior since then. He won an award pin for his perfect behavior and he won an all expense paid vacation from the principle for perfect behavior for four straight months. His teacher says that she wishes that she could get this (God's Recipe) for every kid in class. This is the best thing that has ever happened to us. I thank God that we have this. I really, really do!' (Zoanne, California)"

(Exhibit D, Excerpted from "Attention Deficit Hyperactivity Disorder" pamphlet.)

7. Through the means described in paragraph six, respondent has represented, expressly or by implication, that:

A. God's Recipe can cure, prevent, treat or mitigate Attention Deficit Disorder or its symptoms.

B. God's Recipe can cure, prevent, treat or mitigate Attention Deficit Hyperactivity Disorder or its symptoms.

C. God's Recipe is an effective alternative treatment to the prescription drug Ritalin for Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder.

D. Testimonials from consumers appearing in the advertisements for God's Recipe reflect the typical or ordinary experience of members of the public whose children have used the product.

8. Through the means described in paragraph six, respondent has represented, expressly or by implication, that he possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph seven, at the time the representations were made.

9. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in

paragraph seven, at the time the representations were made. Therefore, the representation set forth in paragraph eight was, and is, false or misleading.

10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Section 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

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324 Complaint

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EXHIBIT A

EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBIT C

324 Complaint

EXHIBIT D

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 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that 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, 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 Max F. James resides at 1857 Ridgeview Drive, Roseville, CA.

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

1. "*God's Recipe*" shall mean the following New Vision products, either collectively or individually: "OPC Grape Seed Extract with an Herbal Blend," "Essential Minerals," and "Multi-Enzymes with Alfalfa/Barley Sprouts."

2. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

3. "*Clearly and prominently*" shall mean as follows:

A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. Provided, however, that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation.

B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.

C. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

4. Unless otherwise specified, "*respondent*" shall mean Max F. James, and his agents, representatives and employees.

5. "*Drug*" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55.

6. "*Food*" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55.

7. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of "God's Recipe," or any food, drug or dietary supplement, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that:

A. Such products can cure, prevent, treat or mitigate Attention Deficit Disorder or its symptoms;

B. Such products can cure, prevent, treat or mitigate Attention Deficit Hyperactivity Disorder or its symptoms; or

C. Such products are an effective alternative treatment to the prescription drug Ritalin for Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder;

unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time the representation is made, respondent possesses and relies upon competent and reliable evidence, which when

appropriate must be competent and reliable scientific evidence, that substantiates the representation; or

B. Respondent discloses, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

1. What the generally expected results would be for users of the product, or

2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

III.

It is further ordered, That respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any food, drug or dietary supplement, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, regarding:

A. The safety of such product; or

B. The ability of such product to treat, cure, alleviate the symptoms of, prevent, or reduce the risk of developing any disease or disorder;

unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

IV.

Nothing in this order shall prohibit respondent from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

V.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and

Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

VI.

It is further ordered, That respondent, and his successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that came into his possession from a distributor or any other source that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in his possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VII.

It is further ordered, That respondent shall deliver a copy of this order, or a summary in the form set forth as Appendix A to this order, to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order, or a summary in the form set forth as Appendix A to this order, to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VIII.

It is further ordered, That respondent, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone

number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

IX.

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

X.

This order will terminate on March 3, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;
B. This order's application to any respondent that is not named as a defendant in such complaint; and
C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

APPENDIX A

Dear Agent, Representative, or Employee:

The Federal Trade Commission ("FTC") has conducted an investigation to determine whether Max James may have engaged in acts or practices which violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, including, but not limited to, false and unsubstantiated product claims for New Vision products. As a result of its investigation, the FTC has alleged that Mr. James (herein referred to as "respondent"), has made false and unsubstantiated representations in connection with the advertising, promotion, offering for sale, sale and distribution of a combination of three New Vision products known as "God's Recipe."

As a result of recent negotiations with the FTC, the respondent has agreed to a consent order ("order") with the FTC. The order is for settlement purposes only and does not constitute an admission of violations of law by Mr. James. Pursuant to the order, the respondent has agreed not to make certain claims for God's Recipe, or any other food, drug or dietary supplement, unless he can substantiate those claims.

Specifically, the order prohibits respondent from representing that God's Recipe, or any other food, drug or dietary supplement:

1. Can cure, prevent, treat or mitigate Attention Deficit Disorder or its symptoms;
2. Can cure, prevent, treat or mitigate Attention Deficit Hyperactivity Disorder or its symptoms; or
3. Is an effective alternative treatment to the prescription drug Ritalin for Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder;

unless respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

The order also prohibits respondent, when advertising any food, drug or dietary supplement, from making any representation regarding the safety of such a product, or the ability of such product to treat, cure, alleviate the symptoms of, prevent, or reduce the risk of developing any disease or disorder, unless respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

The order also prohibits respondent from claiming that user testimonials or endorsements represent the typical or ordinary experience of members of the public who use the product, unless respondent possesses and relies upon competent and reliable evidence that substantiates the representation, or respondent discloses either (1) what the generally expected results would be for users of the product; or (2) the limited applicability of the endorser's experience to what consumers may generally expect to achieve; that is, that consumers should not expect to experience similar results.

The order specifies that respondent may make any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration. The order further specifies that respondent may make any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

In addition to the above provisions, the order requires that respondent provide a copy of this notice to each of his current and future agents, representatives and employees who have responsibilities with regard to the order's requirements.

If you have any questions or would like a copy of the order, you can contact me at [ ].

Very truly yours,

[respondent's name]

IN THE MATTER OF

ALLIED DOMECQ SPIRITS & WINE AMERICAS, INC., ET AL.

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

Docket C-3858. Complaint, March 5, 1999--Decision, March 5, 1999

This consent order, among other things, prohibits two Michigan-based corporations, that advertise and distribute alcohol beverages, from misrepresenting the alcohol content, through numerical or descriptive terms, of any alcohol product.

Participants

For the Commission: *Richard Kelly, Janet Evans, C. Lee Peeler* and *Janis Pappalardo*.

For the respondents: *Theodore Voorhees, Covington & Burling*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Allied Domecq Spirits & Wine Americas, Inc. and Allied Domecq Spirits & Wine USA, Inc. d/b/a Hiram Walker, corporations ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Allied Domecq Spirits & Wine Americas, Inc. is a Delaware corporation with its principal office or place of business at 3000 Town Center, Southfield, MI.

2. Respondent Allied Domecq Spirits & Wine USA, Inc. d/b/a Hiram Walker is a Michigan corporation with its principal office or place of business at 3000 Town Center, Southfield, MI. Allied Domecq Spirits & Wine USA, Inc. d/b/a Hiram Walker is a wholly-owned subsidiary of Allied Domecq Spirits & Wine Americas, Inc.

3. Respondents have advertised, offered for sale, sold, and distributed beverage alcohol products to the public, including Kahlua White Russian, a pre-mixed cocktail. Kahlua White Russian is a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

5. Respondents disseminated or caused to be disseminated advertisements for Kahlua White Russian, including but not necessarily limited to the attached Exhibits A and B. These advertisements contain the following statement: "LOW ALCOHOL BEVERAGE."

6. Through the means described in paragraph five, respondents represented, expressly or by implication, that the Kahlua White Russian is a low alcohol beverage.

7. In truth and in fact, the Kahlua White Russian is not a low alcohol beverage. It has a significant alcohol content, 11.8 proof (5.9% alcohol by volume), equal to or greater than numerous other alcohol beverages. For example, a Kahlua White Russian has substantially more alcohol ounce for ounce than many beers, malt liquors and wine coolers. For some people, drinking as few as two or three Kahlua White Russians will begin to impair normal functions, such as driving.

Therefore, the representation set forth in paragraph six was false or misleading.

8. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT A

EXHIBIT B

EXHIBIT B

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, 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 the respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Allied Domecq Spirits & Wine Americas, Inc. is a Delaware corporation with its principal office or place of business at 3000 Town Center, Southfield, MI.

2. Respondent Allied Domecq Spirits & Wine USA, Inc. d/b/a Hiram Walker is a Michigan corporation with its principal office or place of business at 3000 Town Center, Southfield, MI. Allied Domecq Spirits & Wine USA, Inc. d/b/a Hiram Walker is a wholly-owned subsidiary of Allied Domecq Spirits & Wine Americas, 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 this order, the following definitions shall apply:

1. Unless otherwise specified, "*respondents*" shall mean Allied Domecq Spirits & Wine Americas, Inc. and Allied Domecq Spirits & Wine USA, Inc. d/b/a Hiram Walker, corporations, their successors and assigns, and their officers, agents, representatives, and employees.

2. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of beverage alcohol products in or affecting commerce shall not, in any manner, expressly or by implication:

A. Represent that any beverage alcohol product containing 5.9% alcohol by volume is a low alcohol beverage; or

B. Misrepresent, through numerical or descriptive terms, or any other means, the amount of alcohol contained in any beverage alcohol product.

Provided, however, that a statement of alcohol percent by volume shall not violate this order if it is within the tolerances identified for such beverage in 27 CFR 4.36(b)(1) and (2) (wines containing 7 percent or more alcohol); 27 CFR 5.37(b) (distilled spirits); 27 CFR 7.71(c)(1) and (2) (malt beverages); and 27 CFR 24.257(a)(4) (wine beverages containing less than 7 percent alcohol); and provided, further, that nothing in this order shall prohibit respondents from making any representation about the amount of alcohol contained in any beverage alcohol product that is specifically required in advertising for such product by regulation or order promulgated by the Bureau of Alcohol Tobacco and Firearms pursuant to the Federal Alcohol Administration Act.

II.

It is further ordered, That respondents Allied Domecq Spirits & Wine Americas, Inc. and Allied Domecq Spirits & Wine USA, Inc. d/b/a Hiram Walker and their successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by Part I of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

Provided, however, that Subparts A & B of this Part shall not apply to representations of alcohol percent by volume content or proof required or permitted in advertising by the Bureau of Alcohol, Tobacco and Firearms.

III.

It is further ordered, That respondents Allied Domecq Spirits & Wine Americas, Inc. and Allied Domecq Spirits & Wine USA, Inc. d/b/a Hiram Walker and their successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having direct or supervisory responsibilities with respect to the creation or approval of advertising that is the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

It is further ordered, That respondents Allied Domecq Spirits & Wine Americas, Inc. and Allied Domecq Spirits & Wine USA, Inc. d/b/a Hiram Walker and their successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondents Allied Domecq Spirits & Wine Americas, Inc. and Allied Domecq Spirits & Wine USA, Inc. d/b/a Hiram Walker and their successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

VI.

This order will terminate on March 5, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;
B. This order's application to any respondent that is not named as a defendant in such complaint; and
C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent(s) did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

BECK'S NORTH AMERICA, INC.

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

Docket C-3859. Complaint, March 5, 1999--Decision, March 5, 1999

This consent order, among other things, prohibits a Connecticut-based corporation, that advertises and distributes Beck's Beer, from disseminating advertisements that depicts a person consuming alcohol beverages on a boat while engaging in activities that pose a substantial risk of serious injury from falling overboard.

Participants

For the Commission: *Janet Evans, Richard Kelly, C. Lee Peeler*, and *Dennis Murphy*.

For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Beck's North America, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Beck's North America, Inc. is a Delaware corporation with its principal office or place of business at 57 Old Post Road No. 2, Greenwich, Connecticut.

2. Respondent has advertised, labeled, offered for sale, sold and distributed products to the public, including Beck's Beer. Beck's Beer is a liquid beverage consisting of 5% alcohol by volume (10 proof).

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

4. Respondent has disseminated or caused to be disseminated advertisements for Beck's Beer, including but not necessarily limited to the attached television advertisements, Exhibits A and B. Exhibits A and B depict a number of passengers in various places on a sailing boat at sea. On the deck of the boat is a large bucket of ice, filled with bottles of Beck's Beer. Almost all of the passengers are holding bottles of beer, with one passenger standing precariously on the

bowsprit (a spar extending almost horizontally off the bow of the boat), and others sitting on the edge of the bow; no one is wearing a life jacket.

5. Through the visual depictions described in paragraph four, respondent has depicted boating passengers as drinking Beck's beer while engaged in activities that require a high degree of alertness and coordination to avoid falling overboard. This conduct is inconsistent with the Beer Institute's own Advertising and Marketing Code and may also violate federal and state boating safety laws. The risks associated with such activities while boating are greatly increased by the consumption of alcohol. In the boating environment, even low and moderate blood alcohol levels sufficiently affect coordination and balance to place boat passengers at increased risk of falling overboard and thus drowning, and many persons are unaware of this increased risk. As many as one-half of all boating fatalities are alcohol-related, including an average of 60 recreational boat fatalities annually from falling overboard while drinking. Respondent's depiction of this activity in its advertisements is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. Respondent's practice was an unfair act or practice.

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

Commissioner Swindle dissenting.

EXHIBIT A-1

Beck's TV Spot #1

Depictions	Verbal
• Ocean with green-sailed schooner in view.	Music starts.
• Close up on schooner.	Music continues throughout commercial.
• Close up: unseen people toast with two bottles of Beck's.	Man's voice: "Here's to adventure."
• Female passenger talking to viewer. Switch to another female passenger, holding a Beck's, riding piggy-back on standing male passenger. She touches the tip of her beer to the beer of another passenger.	Female voice: "Three weeks in the sun . . ." Music continues.
• Four passengers sitting/leaning on the edge of the bow, most holding beers and a fifth balancing on the bowsprit, waving a beer.	Female voice continues: "on a big German ship."
• Close up: two Beck's beers being removed from a cooler full of ice on deck.	Male voice: "Sponsored by . . ."
• Close up: a bottle of Beck's being opened with a bottle opener.	Male voice continues: "Beck's beer."
• Close up: a male passenger talking to the viewer.	Male voice: "I'm in!"
• Switch to two passengers sitting near rail, then to three others near the rail, most holding Beck's.	Male voice: "It's totally different!"
• Close up: male passenger talking.	Male voice: "Like the beer."
• Close up: hand slamming Beck's bottle on wet surface.	Male narrator's voice: "Beck's . . ."

• Close up: glass with Beck's logo filled with foaming beer.	Voice continues: "truly distinctive."
• A couple sitting/reclining in boat, lifting Beck's to the viewer.	Voice continues: "Totally refreshing."
• Four passengers sitting/reclining in stern, water behind them, holding Beck's, while fifth passenger takes their photo.	Female voice: "I wanted a great experience . . ."
• Close up on a female passenger talking to viewer.	Voice continues: "I got it!"
• Waves coming up on ship. SUPER: BECK'S America's Favorite German Beer Imported by DriBeck Importers, Greenwich, Connecticut	Narrator's voice: "Beck's, America's Favorite German Beer"

EXHIBIT A-2

Beck's TV Spot #1
(VIDEOTAPE AD)

EXHIBIT B-1

Beck's TV Spot #2

Descriptions	Verbal
• Ocean with green-sailed schooner in view.	Music starts.
• Close ups of schooner, sails.	Music continues throughout rest of commercial.
• Close up of female passenger talking to viewer.	Female voice: "Wanna Have some Fun?"
• Couple playing; switch to three passengers dancing/playing while their photo is taken on upper deck, framed against sky; passengers holding beers in background.	Female voice: "Mix hot music . . ."
• Close up: male passenger talking.	Male voice: "cool people . . ."
• Four passengers sitting/leaning on the edge of the bow, most holding beers, and a fifth balancing on the bowsprit, waving a beer.	Male voice: "a big boat . . ."
• Couple sitting with backs to rail, toasting Beck's.	Male voice: "and a . . ."
• Two Beck's are removed from a cooler filled with ice and beers.	Male voice: "great . . ."
• Bottle of Beck's being opened with a bottle opener.	Male voice: "German Beer."
• Close up: female passenger talking to viewer.	Female voice: "With the right ingredients . . ."
• Scene of couple, blue sky in background, she waves beer; switch to four passengers sitting/reclining in stern, most holding beers.	Voice continues: "nothing's better!"
• Hand slams bottle of Beck's down on wet surface.	Male narrator voice: "Beck's . . ."

• Close up: glass with Beck's logo filled with foaming beer.	Voice continues: "truly distinctive . . ."
• A couple sitting/reclining in boat, lifting Beck's to the viewer.	Voice continues: "totally refreshing . . ."
• Close up: male passenger talking to viewer.	Male voice: "this is just the best!"
• Close up: waves coming up on ship. SUPER: BECK'S America's Favorite German Beer DriBeck Importers, Greenwich, Connecticut	Narrator: "Beck's, America's Favorite German Beer"

EXHIBIT B-2

Beck's TV Spot #2

(VIDEOTAPE AD)

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 the respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Beck’s North America, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business at 57 Old Post Road No. 2, Greenwich, Connecticut.

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 following definitions shall apply:

1. Unless otherwise specified, "*respondent*" shall mean Beck's North America, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.

2. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, shall not broadcast or otherwise disseminate, or assist others to broadcast or otherwise disseminate, the television advertisements attached to the complaint as Exhibits A and B or any other advertisement that depicts a person having consumed or consuming alcohol on a boat while engaging in activities that pose a substantial risk of serious injury from falling overboard or that depicts activities that would violate 46 U.S.C. 2302(c).

II.

It is further ordered, That respondent and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials depicting the use or presence of alcoholic beverages on any boat;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify or call into question the representation, or the basis relied on for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

III.

It is further ordered, That respondent and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

It is further ordered, That respondent and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

VI.

This order will terminate on March 5, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;
B. This order's application to any respondent that is not named as a defendant in such complaint; and
C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Commissioner Swindle dissenting.

STATEMENT OF COMMISSIONER MOZELLE W. THOMPSON

The Commission has now voted to accord final approval to the consent agreement with Beck's North America, Inc. ("Beck's") in Docket Number C-3859 on grounds that Beck's disseminated or caused to be disseminated unfair television advertisements. I joined in that vote. I also believe, however, that the advertisements at issue were deceptive. The Commission has defined deceptive advertising as "that which contains a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[1] In my view, the Beck's television advertisements fit this definition.

[1] *See Cliffdale Associates, Inc.*, 103 FTC 110, 176 (1984) Appeal dismissed sub nom., *Kovan v. FTC*, No. 84-5337 (11th Cir. Oct. 10, 1984) (Deception Statement).

First, I believe the advertisements imply to reasonable targeted consumers that consuming alcohol while boating is appropriate and/or safe. In fact, the actors begin one advertisement by stating "Wanna have some fun? Mix hot music, cool people, [a] big boat and a great German beer." Unfortunately, the advertisement does not disclose that consuming alcohol while boating poses a heightened danger not only to the boat operator, but also to passengers. It also fails to disclose that such behavior may violate applicable Federal boating laws.[2] Second, as evidenced by the actors and the language portrayed in the advertisement, I believe that the message is targeted at a youthful audience. Accordingly, it can be justifiably inferred that a reasonable youthful consumer could easily be deceived by not appreciating the danger of imitating the behavior featured in the television advertisements.

For these reasons, I would find that the Beck's advertisements were deceptive as well as unfair under Section 5 of the FTC Act.

STATEMENT OF COMMISSIONER ORSON SWINDLE

In August 1998, the Commission released a proposed complaint against Beck's North America, Inc. in connection with its dissemination of advertisements showing young adults drinking beer on a boat and engaging in dangerous activities, such as standing on the bowsprit. The proposed complaint challenged the ads as unfair acts or practices in or affecting commerce in violation of Section 5 of the FTC Act. At the same time, the Commission also accepted for public comment a consent agreement that would prohibit Beck's from disseminating these specific ads or any others depicting a person consuming alcohol on a boat while engaged in activities that increase the risk of falling overboard or violate federal boating safety laws. Although I voted to accept the consent agreement for comment, I now dissent from the issuance of the complaint and final consent order because, upon further reflection, I conclude that the requirements for unfairness are not met.

I continue to believe that the ads, which are inconsistent with the Beer Institute's Advertising and Marketing Code and may violate

[2] This problem has become so serious that the U. S. Coast Guard has recently launched a new campaign to better inform the public of the dangers of mixing boating and alcohol.

federal and state boating safety laws, are ill-conceived and unwise. They are, however, directed at young adults who by any reasonable standard should have the ability to exercise their own judgment when undertaking clearly risky activities. In a January 15, 1999, decision, the U.S. Court of Appeals for the D.C. Circuit rejected the view that certain types of advertising claims "have such an awesome impact on consumers as to make it virtually impossible for them to exercise any judgment ...." *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999), 1999 U.S. App. LEXIS 464, at * 16. The court further characterized *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91, 105 (1990), as rejecting the "paternalistic" assumption that an adult viewing a claim is "'no more discriminating than the audience for children's television.'" 1999 U.S. App. LEXIS 464, at * 16.

An unfair act or practice is one that is likely to cause substantial injury to consumers that is *not reasonably avoidable* by consumers themselves and is not outweighed by countervailing benefits to consumers or competition. 15 U.S.C. 45(n). In order for the Beck's advertisements to be unfair, they must be likely to cause consumers substantial injury, such as increasing the likelihood they will fall off a boat and drown, and this injury must be one that consumers cannot reasonably avoid by themselves. Unlike in other unfairness cases, where ads influenced children to engage in unsafe activities, in this case the consumers of Beck's products -- through the exercise of their own adult judgment -- surely can reasonably avoid any injury that they might suffer from the advertisements' depiction of dangerous activity. In other words, a reasonable adult could easily see that the conduct depicted in the ads is rather stupid and dangerous and would conclude that it would be unwise to engage in it.

This case calls attention to the ongoing debate over how far the government should go in trying to protect people from themselves. The Commission is seeking to protect people who may decide to act unreasonably by choosing to put themselves at risk of injury. Government cannot and should not shield people who knowingly choose to expose themselves to such risks.

I dissent.

IN THE MATTER OF

GENERAL SIGNAL POWER SYSTEMS, INC.

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

Docket C-3860. Complaint, March 11, 1999--Decision, March 11, 1999

This consent order, among other things, prohibits the Wisconsin-based company that manufactures, advertises and sells Uninterruptible Power Supplies ("UPS"), devices that protect computers or other appliances from damage resulting from power outages, from making any representations regarding the ability of its UPS, or similar products, to reduce computer or network downtime, or regarding the extent to which any such product reduces the number of calls for service, unless the company possesses and relies upon competent and reliable evidence to substantiate the claims.

Participants

For the Commission: *Matthew Gold, Linda Badger*, and *Jeffrey Klurfeld.*

For the respondent: *Donald Mulvihill, Cahill, Gordon & Reindel*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that General Signal Power Systems, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

1. Respondent General Signal Power Systems, Inc., is a Wisconsin corporation with its principal office or place of business at N. 9246 Highway 80, Necedah, Wisconsin.

2. Respondent, through its division, Best Power, has manufactured, advertised, labeled, offered for sale, sold, and distributed computer products to the public, including the "Patriot" and "Fortress" uninterruptible power systems. Uninterruptible power systems are devices that protect consumer appliances, such as personal computers, from damage resulting from power disturbances or power failures.

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

4. Respondent has disseminated or has caused to be disseminated advertisements for Patriot uninterruptible power systems and Fortress uninterruptible power systems, including but not necessarily limited to the attached Exhibits A through D. These advertisements contain the following statements and depictions:

A. "T¥his is#n't a mod+.em pr¢∞oblem. This is a power problem.

. . . .

The results are crashed networks and hard drives, faulty data transmissions, read/write errors, premature failure of components, system lockups, corrupted or lost data and more.

Best Power products are the answer. They *clean up dirty power* before it reaches your equipment. This can reduce your computer problems up to 80%.*

*A five-year power quality study conducted by Best Power's National Power Laboratory showed that the number of calls for computer service dropped 82% after installation of a UPS.

. . . .

Don't tolerate power problems. Call Best Power for your power protection answers."

(Exhibit A, print advertisement)

B. "80% of your downtime isn't hardware or software related. It just *looks* that way. It's actually power problems masquerading as hardware or software problems.

. . . .

Best Power products are your answer. If you have a blackout, they give you enough power to shutdown everything correctly. They also *clean up dirty power* before it reaches your equipment, which can reduce your computer problems by up to 80%.*

*A five-year power quality study conducted by Best Power's National Power Laboratory showed that the number of calls for computer service dropped 82% after installation of a UPS.

. . . .

Don't let power-related downtime affect your bottom line. Call Best Power for your power protection answers."

(Exhibit B, print advertisement)

C. "Today, millions of people will experience their worst nightmare. They will lose presentations and reports to a computer crash.

They will blame their software or hardware when a power problem is really responsible.

Power problems can also cause network and hard drive crashes, read/write errors, corruption or loss of data, faulty data transmissions, system lockups, premature failure of components and much more.

Best Power products are your answer. They *clean up dirty power,* which can reduce your computer problems up to 80%.*

*A five-year power quality study conducted by Best Power's National Power Laboratory showed that the number of calls for computer service dropped 82% after installation of a UPS.

. . . .

Don't take unnecessary risks. Call Best Power for your power protection answers."

(Exhibit C, print advertisement)

D. "6 days ago you had important data. 3 days ago you had a power spike. Now you have a problem.

Bad power can corrupt *all* the files on a UNIX system. And that's not all. Power problems can also cause network and hard drive crashes, read/write errors, corruption or loss of data, faulty data transmissions, system lockups, premature failure of components and much more.

Best Power products are your answer. They *clean up dirty power* before it reaches your equipment, which can reduce your computer and network downtime up to 80%.*

*A five-year power quality study conducted by Best Power's National Power Laboratory showed that the number of calls for computer service dropped 82% after installation of a UPS."

(Exhibit D, print advertisement)

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that:

A. Best Power products can reduce computer problems, such as crashed networks, crashed hard drives, faulty data transmissions, read/write errors, premature failure of components, system lockups, corrupted or lost data, by up to 80%.

B. Best Power products can reduce computer and network downtime up to 80%.

C. 80% of a typical computer's downtime is due to power problems, rather than to hardware or software problems.

D. A Patriot or Fortress UPS can reduce the number of calls for computer service by 82%.

6. Through the means described in paragraph four, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made.

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made. Therefore, the representation set forth in paragraph six was, and is, false or misleading.

8. Through the means described in paragraph four, respondent has represented, expressly or by implication, that a five-year power quality study conducted by Best Power's National Power Laboratory showed that the number of calls for computer service dropped 82% after installation of a UPS.

9. In truth and in fact, a five-year power quality study conducted by Best Power's National Power Laboratory did not show that the number of calls for computer service dropped 82% after installation of a UPS. Rather, the 82% figure cited in the advertisements was taken from a one-time customer survey. Therefore, the representation set forth in paragraph eight was, and is, false or misleading.

10. Through the means described in paragraph four, respondent has represented, expressly or by implication, that competent and reliable studies or surveys show that the number of calls for computer service dropped 82% after installation of an uninterruptible power source.

11. In truth and in fact, competent and reliable studies or surveys do not show that the number of calls for computer service dropped 82% after installation of an uninterruptible power source. For example, the consumer survey from which the 82% figure was taken only considered purchasers of UPSs that feature a ferroresonant transformer, which provides a much higher degree of protection from power disturbances than do the Patriot or Fortress model featured in the advertisements. Therefore, the representation set forth in paragraph ten was, and is, false or misleading.

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

EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBIT D

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 San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that 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, 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 General Signal Power Systems, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business located at N. 9246 Highway 80, Necedah, Wisconsin.

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

1. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, "*respondent*" shall mean General Signal Power Systems, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees.

3. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the Patriot or Fortress uninterruptible power systems, or any substantially similar product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about:

A. The ability of any such product to reduce computer and network downtime; or

B. The extent to which any such product reduces the number of calls for computer service,

unless, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

For purposes of this Part, "substantially similar product" shall mean any uninterruptible power supply.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study, or research.

III.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any computer-related product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the benefits, performance, or efficacy of such product, unless, at the time the representation is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

IV.

It is further ordered, That respondent, and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

V.

It is further ordered, That respondent, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VI.

It is further ordered, That respondent, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VII.

It is further ordered, That respondent, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

VIII.

This order will terminate on March 11, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;
B. This order's application to any respondent that is not named as a defendant in such complaint; and
C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

KONINKLIJKE AHOLD NV, 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 C-3861. Complaint, April 5, 1999--Decision, April 5, 1999

This consent order, among other things, permits Koninklijke Ahold nv ("Ahold"), a Dutch firm, to acquire Giant Food Inc. ("Giant"), a Maryland-based supermarket chain, and requires Ahold to divest ten supermarkets in eight geographic markets within 20 days after Ahold acquires Giant or four months after the date on which the companies sign the agreement containing consent order, whichever is earlier.

Participants

For the Commission: *James Fishkin, Richard Liebeskind, Phillip Broyles, Kenneth Libby, Daniel Ducore, William Baer, Daniel O'Brien, Malcolm Coate* and *Daniel Hosken.*

For the respondents: *Mark Gidley, White & Case*, and *Glenn Mitchell, Stein, Mitchell & Mezines*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that respondent Koninklijke Ahold nv ("Ahold") has entered into an agreement to acquire all of the Class AC voting securities of respondent Giant Food Inc. ("Giant") held by respondent The 1224 Corporation ("1224"), all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

DEFINITION

1. For the purposes of this complaint:

"*Supermarket*" means a full-line retail grocery store with annual sales of at least $2 million that carries a wide variety of food and

grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

KONINKLIJKE AHOLD NV

2. Respondent Ahold is a corporation organized, existing, and doing business under and by virtue of the laws of The Netherlands, with its office and principal place of business located at Albert Heijnweg 1, 1507 EH Zaandam, The Netherlands.

3. Respondent Ahold, through Ahold USA, Inc., BI-LO, Inc., Giant Food Stores, Inc., The Stop & Shop Companies, Inc., and Top's Market, Inc., its wholly-owned domestic subsidiaries, is, and at all times relevant herein has been, engaged in the operation of supermarkets in Connecticut, Georgia, Maryland, Massachusetts, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, and West Virginia. Ahold and its wholly-owned domestic subsidiaries operate approximately 880 supermarkets in these states under the BI-LO, Edwards, Finast, Giant, Martin's, Stop & Shop, and Top's trade names. Ahold had $14.29 billion in total United States sales for the fiscal year that ended on December 28, 1997.

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

GIANT FOOD INC.

5. Respondent Giant is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 6300 Sheriff Road, Landover, Maryland.

6. Respondent Giant is, and at all times relevant herein has been, engaged in the operation of supermarkets in Delaware, Maryland, New Jersey, Pennsylvania, Virginia, and the District of Columbia. Giant operates approximately 179 supermarkets under the Giant and Super G trade names. Giant had $4.23 billion in total sales for the fiscal year that ended on February 28, 1998.

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

THE 1224 CORPORATION

8. Respondent 1224 is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 6300 Sheriff Road, Landover, Maryland.

9. Respondent 1224 owns all of the Class AC voting stock of Giant, which elects five of the nine directors of Giant.

10. Respondent 1224 is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

ACQUISITION

11. On or about May 19, 1998, Ahold and 1224 entered into a Stock Purchase Agreement pursuant to which Ahold will acquire all of the Class AC voting stock of Giant from 1224 and all of the Class A non-voting common stock of Giant for $43.50 per share for cash. The Class AC voting stock elects five of the nine directors of Giant. Separately, Ahold is acquiring from J Sainsbury USA Holdings, Inc., a subsidiary of J Sainsbury, plc, a United Kingdom corporation, all of the Class AL voting stock of Giant, which elects four of the nine directors of Giant. The total value of the proposed acquisition of the Class AC and Class AL voting stock is approximately $105.4 million. The total value of the proposed acquisition of the Class A non-voting common stock is approximately $2.6 billion.

TRADE AND COMMERCE

12. The relevant line of commerce (*i.e.*, the product market) in which to analyze the acquisition described herein is the retail sale of food and grocery products in supermarkets.

13. Supermarkets provide a distinct set of products and services for consumers who desire to one-stop shop for food and grocery products. Supermarkets carry a full line and wide selection of both food and nonfood products (typically more than 10,000 different stock-keeping units ("SKUs")) as well as a deep inventory of those SKUs. In order to accommodate the large number of food and non-food products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

14. Supermarkets compete primarily with other supermarkets that provide one-stop shopping for food and grocery products. Supermarkets primarily base their food and grocery prices on the prices of food and grocery products sold at nearby supermarkets. Supermarkets do not regularly price-check food and grocery products sold at other types of stores and do not significantly change their food and grocery prices in response to prices at other types of stores. Most consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

15. Retail stores other than supermarkets that sell food and grocery products, such as neighborhood "mom & pop" grocery stores, convenience stores, specialty food stores *(e.g.*, seafood markets, bakeries, etc.), club stores, military commissaries, and mass merchants, do not effectively constrain prices at supermarkets. None of these stores offers a supermarket's distinct set of products and services that enable consumers to one-stop shop for food and grocery products.

16. The relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition described herein are the areas in and near the following cities and towns:

a. Bel Air, Maryland;
b. Eldersburg, Maryland;
c. Frederick, Maryland;
d. Westminster, Maryland;
e. Hilltown, Pennsylvania;
f. Norristown, Pennsylvania;
g. Warminster, Pennsylvania; and
h. Yardley, Pennsylvania.

MARKET STRUCTURE

17. The Bel Air, Maryland, Eldersburg, Maryland, Frederick, Maryland, Westminster, Maryland, Norristown, Pennsylvania, Warminster, Pennsylvania, and Yardley, Pennsylvania, relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios. The acquisition would substantially increase concentration in each market. Ahold and Giant would have a combined market share of near or greater than 35% in each geographic market. The post-acquisition HHIs in the geographic markets range from 3,008 to 6,716.

18. The Hilltown, Pennsylvania relevant market is highly concentrated. The market will remain highly concentrated as a result of this acquisition, and will be significantly more concentrated than it would have been but for this acquisition.

ENTRY CONDITIONS

19. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant markets.

ACTUAL COMPETITION

20. Ahold and Giant are actual and direct competitors in and near Bel Air, Maryland, Eldersburg, Maryland, Frederick, Maryland, Westminster, Maryland, Norristown, Pennsylvania, Warminster, Pennsylvania, and Yardley, Pennsylvania.

ACTUAL POTENTIAL COMPETITION

21. Ahold is an actual potential competitor against Giant in and near Hilltown, Pennsylvania. But for the acquisition, Ahold and Giant would have become direct competitors in the Hilltown, Pennsylvania, relevant market. The acquisition will eliminate that competition.

EFFECTS

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

a. By eliminating direct competition between supermarkets owned or controlled by Ahold and supermarkets owned or controlled by Giant;
b. By eliminating actual potential competition between supermarkets owned or controlled by Ahold and supermarkets owned or controlled by Giant;
c. By increasing the likelihood that Ahold will unilaterally exercise market power; and
d. By increasing the likelihood of, or facilitating, collusion or coordinated interaction,

each of which increases the likelihood that the prices of food, groceries or services will increase, and the quality and selection of food, groceries or services will decrease, in the relevant sections of the country.

VIOLATIONS CHARGED

23. The Stock Purchase Agreement between Ahold and 1224, pursuant to which Ahold will acquire all of the Class AC voting stock of Giant from 1224 and the Class A non-voting common stock of Giant, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and the proposed acquisition would, if consummated, violate 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 ("Commission") having initiated an investigation of the proposed acquisition by Koninklijke Ahold nv ("Ahold") of all of the voting securities of Giant Food Inc. ("Giant") held by The 1224 Corporation ("1224") (collectively, "respondents"), and respondents having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order,

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments received, 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 Ahold is a corporation organized, existing, and doing business under and by virtue of the laws of The Netherlands, with its office and principal place of business located at Albert Heijnweg 1, 1507 EH Zaandam, The Netherlands.

2. Respondent Giant is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 6300 Sheriff Road, Landover, Maryland.

3. Respondent 1224 is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 6300 Sheriff Road, Landover, Maryland.

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

ORDER

I.

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

A. "*Ahold*" means Koninklijke Ahold nv, its directors, officers, employees, agents, representatives, predecessors, successors, and

assigns; its subsidiaries, divisions, groups and affiliates controlled by Ahold, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Ahold, after consummation of the Acquisition, includes Giant.

B. "*Giant*" means Giant Food Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Giant, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. The class AC voting stock, which elects five of the nine directors of Giant, is owned by 1224.

C. "*1224*" means The 1224 Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by 1224, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. 1224 owns the class AC voting stock, which elects five of the nine directors of Giant.

D. "*Respondents*" means Ahold, Giant, and 1224 individually and collectively.

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

F. "*Acquisition*" means Ahold's acquisition of the outstanding voting securities of and merger with Giant pursuant to the Stock Purchase Agreement dated May 19, 1998.

G. "*Assets To Be Divested*" means the Supermarkets identified in Schedule A, Schedule B, Schedule C, Schedule D, and Schedule E of this order and all assets, leases, properties, permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the respondents' trade marks, trade dress, service marks, or trade names.

H. "*Supermarket*" means a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products,

including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

I. "*Fleming*" means Fleming Companies, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Oklahoma, with its principal place of business located at 6301 Waterford Boulevard, Oklahoma City, Oklahoma.

J. "*Fleming Agreement*" means the Purchase Agreement between Fleming and Ahold executed on September 12, 1998, and all subsequent amendments thereto, for the divestiture by respondents to Fleming of the Schedule A Assets To Be Divested.

K. "*Frederick County Foods*" means Frederick County Foods LLC, a limited liability corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal place of business located at 835 West Hillcrest Road, Hagerstown, Maryland.

L. "*Frederick County Foods Agreement*" means the Purchase Agreement between Frederick County Foods and Ahold executed on September 11, 1998, and all subsequent amendments thereto, for the divestiture by respondents to Frederick County Foods of the Schedule B Assets To Be Divested.

M. "*Richfood*" means Richfood Holdings, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its principal place of business located at 4860 Cox Road, Suite 300, Glen Allen, Virginia.

N. "*Food-A-Rama*" means Food-A-Rama, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its principal place of business located at 5483 Baltimore National Pike, Baltimore, Maryland. Food-A-Rama is a wholly-owned subsidiary of Richfood. Food-A-Rama operates supermarkets under the Metro Food Markets trade name.

O. "*Richfood Agreement*" means the Purchase Agreement between Food-A-Rama and Ahold executed on September 14, 1998, and all subsequent amendments thereto, for the divestiture by respondents to Richfood of the Schedule C Assets To Be Divested.

P. "*Safeway*" means Safeway Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 5918 Stoneridge Mall Road, Pleasanton, California.

Q. "*Safeway Agreement*" means the Purchase Agreement between Safeway and Giant executed on September 12, 1998, and all

subsequent amendments thereto, for the divestiture by respondents to Safeway of the Schedule D Assets To Be Divested.

R. "*Supervalu*" means Supervalu Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 11840 Valley View Road, Eden Prairie, Minnesota; and Supervalu Holdings, Inc. a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal place of business located at 11840 Valley View Road, Eden Prairie, Minnesota. Supervalu Holdings, Inc. is a wholly-owned subsidiary of Supervalu Inc.

S. "*Supervalu Agreement*" means the Purchase Agreement between Supervalu and Giant executed on September 14, 1998, and all subsequent amendments thereto, for the divestiture by respondents to Supervalu of the Schedule E Assets To Be Divested.

T. "*Acquirer(s)*" means Fleming, Frederick County Foods, Richfood, Safeway, Supervalu and/or any other entity or entities approved by the Commission to acquire the Assets To Be Divested pursuant to this order, individually and collectively.

U. "*Third Party Consents*" means all consents from any other person, including all landlords, that are necessary to effect the complete transfer to the Acquirer(s) of the Assets To Be Divested.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, the Schedule A Assets To Be Divested to Fleming, in accordance with the Fleming Agreement dated September 12, 1998 (which agreement shall not be construed to vary or contradict the terms of this order or the Asset Maintenance Agreement), no later than

1. Twenty (20) days after the date on which the Acquisition is consummated, or
2. Four (4) months after the date on which respondents sign the Agreement Containing Consent Order,

whichever is earlier.

Provided, however, that if respondents have divested the Schedule A Assets to Fleming pursuant to the Fleming Agreement prior to the date the order becomes final, and if, at the time the Commission

determines to make the order final, the Commission notifies respondents that Fleming is not an acceptable acquirer or that the Fleming Agreement is not an acceptable manner of divestiture, then respondents shall immediately rescind the transaction with Fleming and shall divest the Schedule A Assets within three (3) months of the date the order becomes final. Respondents shall divest the Schedule A Assets 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.

Respondents shall obtain all required Third Party Consents prior to the closing of the Fleming Agreement or any other agreement pursuant to which the Schedule A Assets To Be Divested are divested to an Acquirer.

B. Respondents shall divest, absolutely and in good faith, the Schedule B Assets To Be Divested to Frederick County Foods, in accordance with the Frederick County Foods Agreement dated September 11, 1998 (which agreement shall not be construed to vary or contradict the terms of this order or the Asset Maintenance Agreement; provided, however, that pursuant to the Frederick County Foods Agreement, respondents may assign their leasehold interests in the supermarkets to Supervalu, which shall sublease the Supermarkets to Frederick County Foods), no later than

1. Twenty (20) days after the date on which the Acquisition is consummated, or
2. Four (4) months after the date on which respondents sign the Agreement Containing Consent Order,

whichever is earlier.

Provided, however, that if respondents have divested the Schedule B Assets to Frederick County Foods pursuant to the Frederick County Foods Agreement prior to the date the order becomes final, and if, at the time the Commission determines to make the order final, the Commission notifies respondents that Frederick County Foods is not an acceptable acquirer or that the Frederick County Foods Agreement is not an acceptable manner of divestiture, then respondents shall immediately rescind the transaction with Frederick County Foods and shall divest the Schedule B Assets within three (3) months of the date the order becomes final. Respondents shall divest the Schedule B Assets 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.

Respondents shall obtain all required Third Party Consents prior to the closing of the Frederick County Foods Agreement or any other agreement pursuant to which the Schedule B Assets To Be Divested are divested to an Acquirer.

C. Respondents shall divest, absolutely and in good faith, the Schedule C Assets To Be Divested to Richfood, in accordance with the Richfood Agreement dated September 14, 1998 (which agreement shall not be construed to vary or contradict the terms of this order or the Asset Maintenance Agreement), no later than

1. Twenty (20) days after the date on which the Acquisition is consummated, or
2. Four (4) months after the date on which respondents sign the Agreement Containing Consent Order,

whichever is earlier.

Provided, however, that if respondents have divested the Schedule C Assets to Richfood pursuant to the Richfood Agreement prior to the date the order becomes final, and if, at the time the Commission determines to make the order final, the Commission notifies respondents that Richfood is not an acceptable acquirer or that the Richfood Agreement is not an acceptable manner of divestiture, then respondents shall immediately rescind the transaction with Richfood and shall divest the Schedule C Assets within three (3) months of the date the order becomes final. Respondents shall divest the Schedule C Assets 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.

Respondents shall obtain all required Third Party Consents prior to the closing of the Richfood Agreement or any other agreement pursuant to which the Schedule C Assets To Be Divested are divested to an Acquirer.

D. Respondents shall divest, absolutely and in good faith, the Schedule D Assets To Be Divested to Safeway, in accordance with the Safeway Agreement dated September 12, 1998 (which agreement shall not be construed to vary or contradict the terms of this order or the Asset Maintenance Agreement), no later than

1. Twenty (20) days after the date on which the Acquisition is consummated, or
2. Four (4) months after the date on which respondents sign the Agreement Containing Consent Order,

whichever is earlier.

Provided, however, that if respondents have divested the Schedule D Assets to Safeway pursuant to the Safeway Agreement prior to the date the order becomes final, and if, at the time the Commission determines to make the order final, the Commission notifies respondents that Safeway is not an acceptable acquirer or that the Safeway Agreement is not an acceptable manner of divestiture, then respondents shall immediately rescind the transaction with Safeway and shall divest the Schedule D Assets within three (3) months of the date the order becomes final. Respondents shall divest the Schedule D Assets 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.

Respondents shall obtain all required Third Party Consents prior to the closing of the Safeway Agreement or any other agreement pursuant to which the Schedule D Assets To Be Divested are divested to an Acquirer.

E. Respondents shall divest, absolutely and in good faith, the Schedule E Assets To Be Divested to Supervalu, in accordance with the Supervalu Agreement dated September 14, 1998 (which agreement shall not be construed to vary or contradict the terms of this order or the Asset Maintenance Agreement), no later than

1. Twenty (20) days after the date on which the Acquisition is consummated, or
2. Four (4) months after the date on which respondents sign the Agreement Containing Consent Order,

whichever is earlier.

Provided, however, that if respondents have divested the Schedule E Assets to Supervalu pursuant to the Supervalu Agreement prior to the date the order becomes final, and if, at the time the Commission determines to make the order final, the Commission notifies respondents that Supervalu is not an acceptable acquirer or that the Supervalu Agreement is not an acceptable manner of divestiture, then respondents shall immediately rescind the transaction with Supervalu

and shall divest the Schedule E Assets within three (3) months of the date the order becomes final. Respondents shall divest the Schedule E Assets 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.

Respondents shall obtain all required Third Party Consents prior to the closing of the Supervalu Agreement or any other agreement pursuant to which the Schedule E Assets To Be Divested are divested to an Acquirer.

F. The purpose of the divestitures is to ensure the continuation of the Assets To Be Divested as ongoing viable enterprises engaged in the Supermarket business and to remedy the lessening of competition resulting from the Acquisition alleged in the Commission's complaint.

III.

It is further ordered, That:

A. If respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested within the time required by paragraph II of this order, the Commission may appoint a trustee to divest the Assets To Be Divested. In the event that 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, respondents 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 the respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission 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. If respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written notice by the staff of the Commission to respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.

3. Within ten (10) days after appointment of the trustee, respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect each divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission or court approves the trust agreement described in paragraph III.B.3. to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the 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, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend the period for no more than two (2) additional periods.

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

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestitures

shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order; provided, however, if the trustee receives bona fide offers for an asset to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest such asset to the acquiring entity or entities selected by Ahold from among those approved by the Commission.

7. 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 the authority to employ, at the cost and expense of respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are 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 Ahold, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A. of this order.

10. 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 each divestiture required by this order.

11. The trustee may also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability and the viability and competitiveness of the Assets To Be Divested. In the event that any Acquirer is unable to take or keep possession of any Asset To Be Divested, the trustee may divest all other assets of the respondents in that relevant section of the country, as alleged in paragraph 16 of the complaint, to remedy the anticompetitive effects alleged in the complaint.

12. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.

13. The trustee shall report in writing to respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish each divestiture required by this order.

IV.

It is further ordered, That:

A. Pending divestiture of the Assets To Be Divested pursuant to this order, respondents shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the Assets To Be Divested, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of Assets To Be Divested except for ordinary wear and tear.

B. Respondents shall comply with all the terms of the Asset Maintenance Agreement attached to this order and made a part hereof as Appendix I. The Asset Maintenance Agreement shall continue in effect until such time as all Assets To Be Divested have been divested as required by this order.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Ahold shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without providing advance written notification to the Commission:

A. Acquire any ownership or leasehold interest in any facility that has operated as a Supermarket within six (6) months prior to the date of such proposed acquisition in Carroll, Frederick, or Harford counties in Maryland, or Bucks or Montgomery counties in Pennsylvania.

B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket or owned any interest in or operated any Supermarket within six (6) months prior to such proposed acquisition in Carroll, Frederick, or Harford counties in Maryland, or Bucks or Montgomery counties in Pennsylvania.

Provided, however, that advance written notification shall not apply to the construction of new facilities by Ahold or the acquisition of or leasing of a facility that has not operated as a Supermarket within six (6) months prior to Ahold's offer to purchase or lease.

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"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Ahold and not of any other party to the transaction. Ahold shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 CFR 803.20), Ahold shall not consummate the transaction until twenty days after substantially complying with such request. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

VI.

It is further ordered, That, for a period of ten (10) years commencing on the date this order becomes final:

A. Ahold shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the

Clayton Act, 15 U.S.C. 12(a)) that acquires any Supermarket, any leasehold interest in any Supermarket, or any interest in any retail location used as a Supermarket on or after January 1, 1998, in Carroll, Frederick, or Harford counties in Maryland, or Bucks or Montgomery counties in Pennsylvania, to operate a Supermarket at that site if such Supermarket was formerly owned or operated by Ahold.

B. Ahold shall not remove any fixtures or equipment from a property owned or leased by Ahold in Carroll, Frederick, or Harford counties in Maryland, or Bucks or Montgomery counties in Pennsylvania, that is no longer in operation as a Supermarket, except (1) prior to and as part of a sale, sublease, assignment, or change in occupancy of such Supermarket; or (2) to relocate such fixtures or equipment in the ordinary course of business to any other Supermarket owned or operated by Ahold.

VII.

It is further ordered, That:

A. Within thirty (30) days after the date respondents signed the Agreement Containing Consent Order and every thirty (30) days thereafter until respondents have fully complied with the provisions of paragraphs II, III, and IV of this order, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II, III, and IV of this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II, III, and IV of the order, including a description of all substantive contacts or negotiations for divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, Ahold shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order.

VIII.

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

IX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request with five (5) days' notice to respondents, respondents shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondents relating to any matters contained in this order; and

B. Without restraint or interference from respondents, to interview respondents or officers, directors, or employees of respondents in the presence of counsel.

X.

It is further ordered, That, upon consummation of the Acquisition, the obligations of respondent 1224 under this order shall terminate.

Schedule A
(Supermarket Divested to Fleming)

The following supermarket located in Harford County, Maryland:

1. Ahold store no. 114 operating under the "Martin's Food Market" trade name, which is located at 550 West McPhail Road, Bel Air, Maryland 21014.

Schedule B
(Supermarkets Divested to Frederick County Foods)

The following supermarkets located in Frederick County, Maryland:

1. Ahold store no. 40 operating under the "Martin's Food Market" trade name, which is located at 66 Waverly Drive in the Frederick Towne Mall Shopping Center, Frederick, Maryland 21701; and
2. Ahold store no. 96 operating under the "Martin's Food Market" trade name, which is located at 1305 West 7th Street in the Frederick Shopping Center, Frederick, Maryland 21701.

Schedule C
(Supermarket Divested to Richfood)

The following supermarket located in Carroll County, Maryland:

1. Ahold store no. 36 operating under the "Martin's Food Market" trade name, which is located at 551 Jermor Lane, Westminster, Maryland 21157.

Schedule D
(Supermarket Divested to Safeway)

The following supermarket located in Carroll County, Maryland:

1. Giant store no. 238 operating under the "Giant" trade name, which is located at 1313 Londontowne Boulevard in the Londontowne Square Shopping Center, Eldersburg, Maryland 21784.

Schedule E
(Supermarkets Divested to Supervalu)

The following supermarkets located in Bucks County, Pennsylvania:

1. Giant store no. 242 operating under the "Super G" trade name, which is located at 1601 Big Oak Road in the Oxford Oaks Shopping Center, Lower Makefield Township, Pennsylvania 19067; and
2. Giant store no. 249 operating under the "Super G" trade name, which is located at 942 West Street Road in the Towne Square Shopping Center, Warminster, Pennsylvania 18974.

The following supermarkets located in Montgomery County, Pennsylvania:

1. Giant store no. 237 operating under the "Super G" trade name, which is located at 1591 Bethlehem Pike in the Hilltown Crossings Shopping Center, Hilltown Township, Pennsylvania 19440; and
2. Giant store no. 243 operating under the "Super G" trade name, which is located at 2775 West Main Street in the Park-Ridge Shopping Center, Lower Providence Township, Pennsylvania 19403; and
3. Giant store no. 250 operating under the "Super G" trade name, which is located at 55 Germantown Pike in the Norriton Square Shopping Center, East Norriton Township, Pennsylvania 19401.

APPENDIX I

ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement ("Agreement") is by and between Koninklijke Ahold nv ("Ahold"), a corporation organized, existing, and doing business under and by virtue of the laws of The Netherlands, with its office and principal place of business located at Albert Heijnweg 1, 1507 EH Zaandam, The Netherlands; Giant Food Inc. ("Giant"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 6300 Sheriff Road, Landover, Maryland 20785; The 1224 Corporation ("1224"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 6300 Sheriff Road, Landover, Maryland 20785 (collectively "Proposed Respondents"); and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively "the Parties").

PREMISES

Whereas, Ahold, pursuant to a Stock Purchase Agreement dated May 19, 1998, agreed to acquire all of the class AC voting securities of Giant held by 1224, which will enable Ahold to elect five of the nine directors of Giant (hereinafter "the proposed Acquisition"); and

Whereas, the Commission is now investigating the proposed Acquisition to determine if it would violate any of the statutes the Commission enforces; and

Whereas, if the Commission accepts the attached Agreement Containing Consent Order ("Consent Order"), the Commission is required to place it on the public record for a period of sixty (60) days for public comment and may subsequently either withdraw such acceptance or issue and serve its Complaint and its Decision and final Order in disposition of the proceeding pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an agreement is not reached preserving the *status quo ante* of the Assets To Be Divested as defined in the attached Consent Order (hereinafter referred to as

"Assets" or "Supermarket(s)") during the period prior to their divestiture, any divestiture resulting from the Consent Order or from any other administrative proceeding challenging the legality of the proposed Acquisition might not be possible, or might produce a less than effective remedy; and

Whereas, the purpose of this Agreement and of the Consent Order is to preserve the Assets pending their divestiture pursuant to the terms of the Consent Order, in order to remedy any anticompetitive effects of the proposed Acquisition; and

Whereas, Proposed Respondents' entering into this Agreement shall in no way be construed as an admission by Proposed Respondents that the proposed Acquisition is illegal; and

Whereas, Proposed 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, in consideration of the Commission's agreement that at the time it accepts the Consent Order for public comment it will grant early termination of the Hart-Scott-Rodino waiting period, the Parties agree as follows:

TERMS OF AGREEMENT

1. Proposed Respondents agree to execute, and upon its issuance to be bound by, the attached Consent Order. The Parties further agree that each term defined in the attached Consent Order shall have the same meaning in this Agreement.

2. Proposed Respondents agree that from the date Proposed Respondents sign this Agreement until the earlier of the dates listed in subparagraphs 2.a. and 2.b., Proposed Respondents will comply with the provisions of this Agreement:

a. Three (3) business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. With respect to each Supermarket, the date on which the divestiture of such Supermarket, as required by the Consent Order, has been completed.

3. Proposed Respondents shall maintain the viability, marketability, and competitiveness of the Assets, and shall not cause the wasting or deterioration of the Assets, nor shall they cause the Assets to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber or otherwise impair the viability, marketability or competitiveness of the Assets. Proposed Respondents shall conduct or cause to be conducted the business of the Supermarkets in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve the existing relationships with each Supermarket's suppliers, customers, employees and others having business relations with the Supermarkets, in the ordinary course of the Supermarkets' business and in accordance with past practice. Proposed Respondents shall not terminate the operation of any Supermarket. Proposed Respondents shall continue to maintain the inventory of each Supermarket at levels and selections (*e.g.*, stock-keeping units) consistent with those maintained by such Proposed Respondent(s) at such Supermarket in the ordinary course of business consistent with past practice. Proposed Respondents shall use best efforts to keep the organization and properties of each of the Supermarkets intact, including current business operations, physical facilities, working conditions, and a work force of equivalent size, training, and expertise associated with each Supermarket. Included in the above obligations, Proposed Respondents shall, without limitation:

a. Maintain operations and departments and not reduce hours at each Supermarket;

b. Not transfer inventory from any Supermarket other than in the ordinary course of business consistent with past practice;

c. Make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations, in each case in a manner consistent with past practice;

d. Maintain each Supermarket's books and records;

e. Not display any signs or conduct any advertising (*e.g.*, direct mailing, point-of-purchase coupons) that indicates that any Proposed Respondent is moving its operations to another location, or that indicates a Supermarket will close;

f. Not conduct any "going out of business," "close-out," "liquidation" or similar sales or promotions at or relating to any Supermarket; and

g. Not change or modify in any material respect the existing advertising practices, programs and policies for any Supermarket, other than changes in the ordinary course of business consistent with past practice for supermarkets of the Proposed Respondents not being closed or relocated.

4. Should the Commission seek in any proceeding to compel Proposed Respondents to divest themselves of the Assets or to seek any other injunctive or equitable relief, Proposed Respondents shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has not sought to enjoin the proposed Acquisition. Proposed Respondents also waive all rights to contest the validity of this Agreement.

5. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with five (5) days' notice to Proposed Respondents and to their principal office(s), Proposed Respondents shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Proposed Respondents, 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 Proposed Respondents relating to compliance with this Agreement; and

b. To interview officers or employees of Proposed Respondents, who may have counsel present, regarding any such matters.

6. Upon consummation of the Acquisition, the obligations of Proposed Respondent 1224 under this Agreement shall terminate.

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

IN THE MATTER OF

JOHNSON WORLDWIDE ASSOCIATES, INC.

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

Docket C-3862. Complaint, April 6, 1999--Decision, April 6, 1999

This consent order, among other things, prohibits Johnson Worldwide Associates, Inc., the Wisconsin-based marketer of outdoor recreation products, including fishing line, from misrepresenting the extent to which any fishing product is made in the United States.

Participants

For the Commission: *Kent Howerton, Laura Koss,* and *Elaine Kolish.*

For the respondent: *Rebecca Fry, Foley & Lardner*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Johnson Worldwide Associates, Inc. ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Johnson Worldwide Associates, Inc. is a Wisconsin corporation with its principal office or place of business at 1326 Willow Road, Sturtevant, Wisconsin.

2. Respondent has advertised, labeled, offered for sale, sold, and distributed products to the public, including fishing line.

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

4. Respondent has disseminated or has caused to be disseminated packaging for its Spiderwire Super Mono Super Monofilament ("Super Mono") fishing line, including but not necessarily limited to the attached Exhibit A. The front panel of this packaging contains the following statement:

"MADE IN THE USA of American and Japanese components."

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that its Super Mono fishing

line is made in the United States of American and Japanese components.

6. In truth and in fact, the Super Mono fishing line is totally made in Japan with Japanese labor and components. Only the spool on which the fishing line is wrapped and the package, labeling, and package inserts contain American labor or components. Therefore, the representation set forth in paragraph five was, and is, false or misleading.

7. Respondent has disseminated or has caused to be disseminated advertisements and other promotional materials for its Super Mono fishing line, including but not necessarily limited to the attached Exhibits B through J. These advertisements and other promotional materials contain the following statements and depictions:

A. **Poster, Exhibit B:**

Picture of the Super Mono fishing line packaging. The statement "MADE IN THE USA" is legible on the package. The statement "of American and Japanese components" is not visible.

B. **Newspaper Advertisement, Exhibit C:**

Picture of the Super Mono fishing line package. The statement "MADE IN THE USA" is legible on the package. The statement "of American and Japanese components" is not visible.

C. **Advertising Pamphlet, Exhibit D:**

Picture of the Super Mono fishing line package on the front cover of the pamphlet. The statement "MADE IN THE USA" is legible on the package. The statement "of American and Japanese components" is not visible.

D. **Fishing 1998 Catalog, Exhibit E:**

Picture of the Super Mono fishing line package on page 5 of the catalog. The statement "MADE IN THE USA" is legible on the package. The statement "of American and Japanese components" is not in a type size sufficiently large for an ordinary consumer to read and comprehend it.

E. **Fishing 1999 Catalog, Exhibit F:**

Picture of the Super Mono fishing line package on page 4 of the catalog. The statement "MADE IN THE USA" is legible on the package. The statement "of American and Japanese components" is not in a type size sufficiently large for an ordinary consumer to read and comprehend it.

F. **Fishing Ad Planner 1998, Exhibit G:**

Picture of the Super Mono fishing line package on page 14 of the ad planner. The statement "MADE IN THE USA" is legible on the package. The statement "of American and Japanese components" is not visible.

G. **Information Sheet, Exhibit H:**

Picture of the Super Mono fishing line package. The statement "MADE IN THE USA" is legible on the package. The statement "of American and Japanese components" is not visible.

H. **Product Insert, Exhibit I:**

Picture of the Super Mono fishing line package. The statement "MADE IN THE USA" is legible on the package. The statement "of American and Japanese components" is not in a type size sufficiently large for an ordinary consumer to read and comprehend it.

I. **Informational Videotape, Exhibit J:**

Picture of the Super Mono fishing line package. The statement "MADE IN THE USA" is legible on the package. The statement "of American and Japanese components" is not visible.

8. Through the means described in paragraph seven, respondent has represented, expressly or by implication, that its Super Mono fishing line is made in the United States, *i.e.*, that all, or virtually all, of the component parts of the Super Mono fishing line is made in the United States, and that all, or virtually all, of the labor in manufacturing the Super Mono fishing line is performed in the United States.

9. In truth and in fact, the Super Mono fishing line is totally made in Japan with Japanese labor and components. Only the spool on which the fishing line is wrapped and the package, labeling, and package inserts contain American labor or components. Therefore, the representation set forth in paragraph eight was, and is, false or misleading.

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

EXHIBIT A

EXHIBIT B

Exhibit B consists of a poster.
It has been placed on the public record of this proceeding.

EXHIBIT C

Exhibit C consists of a full-page newspaper advertisement.
It has been placed on the public record of this proceeding.

EXHIBIT D

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EXHIBIT E

EXHIBIT F

EXHIBIT G

EXHIBIT H

EXHIBIT I

Exhibit I consists of a product insert.
It has been placed on the public record of this proceeding.

EXHIBIT J

Exhibit J consists of an informational videotape.
It has been placed on the public record of this proceeding.

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 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 violations 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, and admission by the respondent of all the jurisdictional facts set forth in the draft 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 violated the said Act, 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, 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 Johnson Worldwide Associates, Inc. is a Wisconsin corporation with its principal office or place of business at 1326 Willow Road, Sturtevant, Wisconsin.

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

ORDER

I.

It is ordered, That respondent, Johnson Worldwide Associates, 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 manufacturing, marking, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of any fishing product in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, shall not misrepresent, in any manner, directly or by implication, the extent to which any such product is made in the United States. For purposes of this order, fishing product means any product that is intended to be used for fishing, including but not limited to fishing rods, fishing reels, fishing line, fishing lures, and fishing spoons.

Provided, however, that a representation that any fishing product is made in the United States will not be in violation of this order so long as all, or virtually all, of the component parts of the product are made in the United States and all, or virtually all, of the labor in manufacturing the product is performed in the United States.

Provided, further, that respondent shall not make a general U.S. origin claim, whether or not accompanied by qualifying information (*e.g.*, "Made in U.S.A. of U.S. and imported parts" or "Manufactured in U.S. with imported materials") unless the fishing product was last substantially transformed in the United States, as the term "substantially transformed" is defined by regulations or administrative rulings issued by the U.S. Customs Service under Section 304 of the Tariff Act of 1930, 19 U.S.C. 1304.

II.

It is further ordered, That respondent Johnson Worldwide Associates, Inc., and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All labeling, packaging, advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

III.

It is further ordered, That respondent Johnson Worldwide Associates, Inc., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

It is further ordered, That respondent Johnson Worldwide Associates, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent Johnson Worldwide Associates, Inc., and its successors and assigns, shall, within ninety (90) days after the date of service of this order, and at such other times as the Federal Trade 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.

VI.

This order will terminate on April 6, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of this order if such complaint is filed after the order has terminated pursuant to this Part. Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

KUBOTA TRACTOR CORPORATION

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

Docket C-3863. Complaint, April 6, 1999--Decision, April 6, 1999

This consent order, among other things, prohibits a California-based corporation from misrepresenting the extent to which any lawn and garden tractor, or lawn and garden tractor product line, is made in the United States.

Participants

For the Commission: *Kent Howerton, Laura Koss*, and *Elaine Kolish.*

For the respondent: *Richard Briggs,* in-house counsel, Gardena, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Kubota Tractor Corporation ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Kubota Tractor Corporation is a California corporation with its principal office or place of business at 3401 Del Amo Boulevard, Torrance, California.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including lawn tractors.

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

4. Respondent has disseminated or has caused to be disseminated advertisements for its line of T-Series Lawn Tractors, including but not necessarily limited to the attached Exhibits A through D. These advertisements contain the following statements:

Exhibit A, 1998 Full Line Brochure

"The Kubota T-Series lawn tractors are manufactured at Kubota Manufacturing of America in Gainesville, Georgia."

Exhibit B, dealer television commercial

"The Kubota T-Series - 3 models to choose from . . . Made in America, the Kubota T-Series."

Exhibit C, dealer promotion advertisement

"T-Series Lawn Tractors
•Made by Kubota in the U.S.A."
Photograph of the T1460 tractor

Exhibit D, dealer promotion advertisement featuring the T1760 tractor

"T-Series Lawn Tractors
•Made by Kubota in the U.S.A. . . .
•Easy lift 48" mower deck on T1760"
Photograph of the T1760 tractor

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that its entire line of T-Series Lawn Tractors is made in the United States, *i.e.*, that all, or virtually all, of the component parts of each of the T-Series Lawn Tractors are made in the United States, and that all, or virtually all, of the labor in manufacturing each of the T-Series Lawn Tractors is performed in the United States.

6. In truth and in fact, model T1760, one of the three lawn tractor models included in the T-Series, contains significant foreign parts and therefore is not all or virtually all made in the United States. Therefore, the representations set forth in paragraph five were, and are, false or misleading.

7. Respondent has disseminated or has caused to be disseminated advertisements and labeling for its model T1760 lawn tractors, including but not necessarily limited to the attached Exhibits D through F. These advertisements and labeling contain the following statements:

Exhibit D, dealer promotion advertisement featuring the T1760 tractor

"T-Series Lawn Tractors
• Made by Kubota in the USA . . .
• Easy lift 48" mower deck on T1760"
Photograph of the T1760 tractor

Exhibit E, dealer ad planner page

"Kubota T1760 17 HP . . .
•Made by Kubota in the USA"

Exhibit F, serial plate for Model T1760

"Made in U.S.A."

8. Through the means described in paragraph seven, respondent has represented, expressly or by implication, that its model T1760

lawn tractor is made in the United States, *i.e.*, that all, or virtually all, of the component parts of the model T1760 lawn tractor is made in the United States, and that all, or virtually all, of the labor in manufacturing the model T1760 lawn tractor is performed in the United States.

9. In truth and in fact, the model T1760 lawn tractor contains significant foreign parts and therefore is not all or virtually all made in the United States. Therefore, the representations set forth in paragraph eight were, and are, false and misleading.

10. Respondent has disseminated or has caused to be disseminated advertisements for its line of TG-Series Lawn and Garden Tractors, including but not necessarily limited to the attached Exhibit G. This advertisement contains the following statement:

Exhibit G, dealer promotion advertisement featuring the TG1860 tractor

"TG-Series Lawn & Garden Tractors

• Made by Kubota in the U.S.A."

Photograph of the TG1860 tractor

11. Through the means described in paragraph ten, respondent has represented, expressly or by implication, that its entire line of TG-Series Lawn and Garden Tractors is made in the United States, *i.e.*, that all, or virtually all, of the component parts of each of the TG-Series Lawn and Garden Tractors are made in the United States, and that all, or virtually all, of the labor in manufacturing each of the TG-Series Lawn and Garden Tractors is performed in the United States.

12. In truth and in fact, both of the lawn and garden tractor models included in the TG-Series, TG1860 and TG1860G, contain significant foreign parts and therefore are not all or virtually all made in the United States. Therefore, the representations set forth in paragraph eleven were, and are, false and misleading.

13. Respondent has disseminated or has caused to be disseminated advertisements and labeling for its model TG1860 lawn and garden tractors, including but not necessarily limited to the attached Exhibits G and H. These advertisements and labeling contain the following statements:

Exhibit G, dealer promotion advertisement featuring the TG1860 tractor

"TG-Series Lawn & Garden Tractors

• Made by Kubota in the U.S.A."

Photograph of the TG1860 tractor

Exhibit H, serial plate for Model TG1860

"Made in U.S.A."

14. Through the means described in paragraph thirteen, respondent has represented, expressly or by implication, that its model TG1860 lawn and garden tractor is made in the United States, *i.e.*, that all, or virtually all, of the component parts of the model TG1860 lawn and garden tractor is made in the United States, and that all, or virtually all, of the labor in manufacturing the model TG1860 lawn and garden tractor is performed in the United States.

15. In truth and in fact, the model TG1860 lawn and garden tractor contains significant foreign parts and therefore is not all or virtually all made in the United States. Therefore, the representations set forth in paragraph fourteen were, and are, false and misleading.

16. Respondent has disseminated or has caused to be disseminated labeling for its model TG1860G lawn and garden tractor, including but not necessarily limited to the attached Exhibit I. This labeling contains the following statement:

Exhibit I, serial plate for Model TG1860G
"Made in U.S.A."

17. Through the means described in paragraph sixteen, respondent has represented, expressly or by implication, that its model TG1860G lawn and garden tractor is made in the United States, *i.e.*, that all, or virtually all, of the component parts of the model TG1860G lawn and garden tractor is made in the United States, and that all, or virtually all, of the labor in manufacturing the model TG1860G lawn and garden tractor is performed in the United States.

18. In truth and in fact, the model TG1860G lawn and garden tractor contains significant foreign parts and therefore is not all or virtually all made in the United States. Therefore, the representations set forth in paragraph seventeen were, and are, false and misleading.

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

EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBIT D

EXHIBIT E

EXHIBIT F

EXHIBIT G

EXHIBIT H

EXHIBIT I

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 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 violations 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, and admission by the respondent of all the jurisdictional facts set forth in the draft 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 violated the said Act, 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, 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 Kubota Tractor Corporation is a California corporation with its principal office or place of business at 3401 Del Amo Boulevard, P.O. Box 2992, Torrance, California.

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

ORDER

I.

It is ordered, That respondent, Kubota Tractor 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 manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any lawn tractor or lawn and garden tractor in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, shall not misrepresent, in any manner, directly or by implication, the extent to which any such lawn tractor or lawn and garden tractor, or lawn tractor or lawn and garden tractor product line, is made in the United States.

Provided, however, that a representation that any such lawn tractor or lawn and garden tractor, or lawn tractor or lawn and garden tractor product line, is made in the United States will not be in violation of this order so long as all, or virtually all, of the component parts of such product, or of all products in such product line, are made in the United States and all, or virtually all, of the labor in manufacturing such product, or of all products in such product line, is performed in the United States.

For purposes of this order, the terms "lawn tractor" and "lawn and garden tractor" shall mean products manufactured, labeled, advertised, promoted, offered for sale, sold, or distributed primarily for consumers to mow grass, including but not limited to respondent's T-Series lawn tractors and TG-Series lawn and garden tractors. Such products may be sold with or without attachments such as grass catchers, front blades, or snowblowers.

II.

It is further ordered, That respondent Kubota Tractor Corporation, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All labeling, packaging, advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

III.

It is further ordered, That respondent Kubota Tractor Corporation, and its successors and assigns, shall deliver a copy of this order to all current and future officers and directors, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

It is further ordered, That respondent Kubota Tractor Corporation, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent Kubota Tractor Corporation, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

VI.

This order will terminate on April 6, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of this order if such complaint is filed after the order has terminated pursuant to this Part. Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

AMERICAN HONDA MOTOR COMPANY, INC.

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

Docket C-3864. Complaint, April 6, 1999--Decision, April 6, 1999

This consent order, among other things, prohibits a California-based corporation from misrepresenting the extent to which any lawn mower is made in the United States.

Participants

For the Commission: *Kent Howerton, Laura Koss*, and *Elaine Kolish.*

For the respondent: *Harvey Applebaum, Covington & Burling*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that American Honda Motor Company, Inc. ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent American Honda Motor Company, Inc. is a California corporation with its principal office or place of business at 1919 Torrance Boulevard, Torrance, California.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including lawn mowers.

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

4. Respondent has disseminated or has caused to be disseminated advertisements for its Honda Masters, Honda Harmony II 3-in-1 and Honda Harmony II lawn mowers, including but not necessarily limited to the attached Exhibits A through C. These advertisements contain the following statements:

A. **Exhibit A, advertisement for Honda Masters**
"MADE IN AMERICA BY HONDA"

B. **Exhibit B, advertisement for Honda Harmony II 3-in-1**
"MADE IN AMERICA BY HONDA"

C. **Exhibit C, advertisement for Honda Harmony II**
"MADE IN AMERICA BY HONDA"

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that its Honda Masters, Honda Harmony II 3-in-1, and Honda Harmony II lawn mowers are made in the United States, *i.e.*, that all, or virtually all, of the component parts of the lawn mowers are made in the United States, and that all, or virtually all, of the labor in manufacturing the lawn mowers is performed in the United States.

6. In truth and in fact, a substantial portion of the components of the Honda Masters, Honda Harmony II 3-in-1 and Honda Harmony II lawn mowers is, or has been, of foreign origin. Therefore, the representations set forth in paragraph five were, and are, false or misleading.

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

EXHIBIT A

EXHIBIT B

EXHIBIT C

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 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 violations 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, and admission by the respondent of all the jurisdictional facts set forth in the draft 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 violated the said Act, 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, 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 American Honda Motor Company, Inc. is a California corporation with its principal office or place of business at 1919 Torrance Boulevard, Torrance, California.

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

ORDER

I.

It is ordered, That respondent, American Honda Motor Company, 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 manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any lawn mower in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, shall not misrepresent, in any manner, directly or by implication, the extent to which any such lawn mower is made in the United States.

Provided, however, that a representation that any such lawn mower is made in the United States will not be in violation of this order so long as all, or virtually all, of the component parts of the lawn mower are made in the United States and all, or virtually all, of the labor in manufacturing the lawn mower is performed in the United States.

Provided, further, that this order shall not apply to the labeling of such lawn mowers manufactured before the effective date of this order.

II.

It is further ordered, That respondent American Honda Motor Company, Inc., and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All labeling, packaging, advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

III.

It is further ordered, That respondent American Honda Motor Company, Inc., and its successors and assigns, shall deliver a copy of this order to all current and future officers, directors, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

It is further ordered, That respondent American Honda Motor Company, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent American Honda Motor Company, Inc., and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

VI.

This order will terminate on April 6, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of this order if such complaint is filed after the order has terminated pursuant to this Part. Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

RAND INTERNATIONAL LEISURE PRODUCTS, LTD.

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

Docket C-3865. Complaint, April 6, 1999--Decision, April 6, 1999

This consent order, among other things, prohibits a New York-based corporation from misrepresenting the extent to which its bicycle tire tube, or any product, is made in the United States.

Participants

For the Commission: *Kent Howerton, Laura Koss*, and *Elaine Kolish.*

For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Rand International Leisure Products, Ltd. ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Rand International Leisure Products, Ltd. is a New York corporation with its principal office or place of business at 52 Executive Boulevard, Farmingdale, New York.

2. Respondent has labeled, offered for sale, sold, and distributed products to the public, including the Signature Self-Sealing Tube ("Self-Sealing Tube").

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

4. Respondent has disseminated or has caused to be disseminated packaging for its Self-Sealing Tube, including but not necessarily limited to the attached Exhibit A. The packaging contains the following statement:

"Made in the U.S.A."

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that its Self-Sealing Tubes are made in the United States, *i.e.*, that all, or virtually all, of the component parts of the Self-Sealing Tubes are made in the United States, and that all, or virtually all, of the labor in manufacturing the Self-Sealing Tubes is performed in the United States.

6. In truth and in fact, the Self-Sealing Tubes packaged in Exhibit A were, or are, finished in the United States from imported tubes that were, or are, manufactured in Taiwan. Therefore, the representations set forth in paragraph five were, and are, false or misleading.

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

EXHIBIT A

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 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 violations of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondent of all the jurisdictional facts set forth in the draft 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 violated the said Act, 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, 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 Rand International Leisure Products, Ltd. is a New York corporation with its principal office or place of business at 51 Executive Boulevard, Farmingdale, 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.

It is ordered, That respondent, Rand International Leisure Products, Ltd., 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 manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, shall not misrepresent, in any manner, directly or by implication, the extent to which any such product is made in the United States.

Provided, however, that a representation that any such product is made in the United States will not be in violation of this order so long as all, or virtually all, of the component parts of the product are made in the United States and all, or virtually all, of the labor in manufacturing the product is performed in the United States.

II.

It is further ordered, That respondent Rand International Leisure Products, Ltd., and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All packaging, labeling, advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

III.

It is further ordered, That respondent Rand International Leisure Products, Ltd., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

It is further ordered, That respondent Rand International Leisure Products, Ltd., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent Rand International Leisure Products, Ltd., and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

VI.

This order will terminate on April 6, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of this order if such complaint is filed after the order has terminated pursuant to this Part. Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

USDRIVES CORPORATION

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

Docket C-3866. Complaint, April 6, 1999--Decision, April 6, 1999

This consent order, among other things, prohibits a California-based corporation from misrepresenting the extent to which any CD-ROM drive is made in the United States.

Participants

For the Commission: *Kent Howerton, Laura Koss* and *Elaine Kolish.*

For the respondent: *Jon Parsons*, Palo Alto, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that USDrives Corporation ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent USDrives Corporation is a California corporation with its principal office or place of business at 850 Auburn Court, Fremont, California.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including optical drives that read information on compact disc read-only memory discs ("CD-ROM drives").

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

4. Respondent has disseminated or has caused to be disseminated packaging and labeling for its CD-ROM drives, including but not necessarily limited to the attached Exhibits A through C. The packaging and labeling contain the following statements and depictions:

A. **Exhibit A, product packaging for CD-ROM drive 24X IDE**

1. Depiction of the American eagle (on two principal display panels of package);
2. The statement "MADE IN THE USA" in red and blue (on two principal panels and top panel of package);

3. The company name "USDrives" in red, white, and blue (on all panels except bottom panel of package).

B. **Exhibit B, product packaging for CD-ROM drive 20x IDE**

1. Depiction of the American flag in red, white, and blue in a circle surrounded by the statement "Well made in the U.S.A." (on two principal display panels and top panel of package);
2. A depiction of the Statue of Liberty (on one principal display panel of package);
3. A depiction of the American eagle (on one principal display panel of package);
4. The company name "USDrives" in red, white, and blue (on all panels except bottom panel of package).

C. **Exhibit C, name plate label for Model No.: USDRIVE 24DT**

1. The statement "MADE IN USA."

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that its CD-ROM drives are made in the United States, *i.e.*, that all, or virtually all, of the component parts of its CD-ROM drives are made in the United States, and that all, or virtually all, of the labor in manufacturing its CD-ROM drives is performed in the United States.

6. In truth and in fact, the CD-ROM drives packaged in Exhibits A or B or labeled with the statement in Exhibit C were, or are, assembled in the United States of primarily imported parts. Therefore, the representations set forth in paragraph five were, and are, false or misleading.

7. Respondent has disseminated or has caused to be disseminated packaging for its CD-ROM drives, including but not necessarily limited to the attached Exhibits D and E. The packaging contain the following statements and depictions:

A. **Exhibit D, revised product packaging for CD-ROM drive 24x IDE**

1. A depiction of the American Eagle (on two principal display panels of package);
2. A depiction of a billowing American flag in red, white, and blue (across two principal display panels of package);
3. The company name "USDrives" in red, white, and blue (on all panels except bottom panel of package);

In small print at the bottom of two side panels, the words "MADE IN CHINA."

B. **Exhibit E, product packaging for CD-ROM drive 32x IDE**

1. A depiction of a billowing American flag in red, white, and blue (across two principal display panels of package);
2. The company name "USDrives" in red, white, and blue (on all panels except bottom panel of package);

In small print on bottom panel, the words "MADE IN CHINA."

8. Through the means described in paragraph seven, notwithstanding the inconspicuous statement "Made in China," respondent has represented, expressly or by implication, that its CD-ROM drives are made in the United States, *i.e.*, that all, or virtually all, of the component parts of its CD-ROM drives are made in the United States, and that all, or virtually all, of the labor in manufacturing its CD-ROM drives is performed in the United States.

9. In truth and in fact, the CD-ROM drives packaged in Exhibits D or E were, or are, made in China of primarily non-U.S. parts. Therefore, the representations set forth in paragraph eight were, and are, false or misleading.

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

EXHIBIT A

EXHIBIT A

EXHIBIT B

EXHIBIT B

EXHIBIT B

EXHIBIT C

EXHIBIT D

EXHIBIT D

EXHIBIT E

EXHIBIT E

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 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 violations 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, and admission by the respondent of all the jurisdictional facts set forth in the draft 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 violated the said Act, 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, 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 USDrives Corporation is a California corporation with its principal office or place of business at 850 Auburn Court, Fremont, California.

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

ORDER

I.

It is ordered, That respondent, USDrives Corporation, 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 manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any optical drive that reads information on compact disc read-only memory discs ("CD-ROM drive") in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, shall not misrepresent, in any manner, directly or by implication, the extent to which any such CD-ROM drive is made in the United States.

Provided, however, that a representation that any such CD-ROM drive is made in the United States will not be in violation of this order so long as all, or virtually all, of the component parts of the CD-ROM drive are made in the United States and all, or virtually all, of the labor in manufacturing the CD-ROM drive is performed in the United States.

II.

It is further ordered, That respondent USDrives Corporation, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All packaging, labeling, advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

III.

It is further ordered, That respondent USDrives Corporation, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement

acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

It is further ordered, That respondent USDrives Corporation, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent USDrives Corporation, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

VI.

This order will terminate on April 6, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that if such complaint is

dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

ABB AB, 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 C-3867. Complaint, April 14, 1999--Decision, April 14, 1999

This consent order, among other things, requires the respondents to divest, within six months to a Commission-approved acquirer, the analytical division assets of Elsag Bailey Process Automation, which is involved in the manufacture and sale of process gas chromatographs and the research and development of a process mass spectrometer.

Participants

For the Commission: *Steven K. Bernstein, Pamela Taylor, Ann Malester, Naomi Licker, Daniel Ducore, William Baer, J. Elizabeth Callison,* and *David Meyer.*

For the respondents: *M. Elaine Johnston, White & Case,* New York, N.Y.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents, ABB AB and ABB AG (collectively hereinafter "ABB"), corporations subject to the jurisdiction of the Commission, have agreed to acquire Elsag Bailey Process Automation N.V. (hereinafter "Elsag Bailey"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. "*Process Gas Chromatograph*" means an analytical instrument used in process manufacturing to measure the chemical composition of a gas or a liquid using gas chromatography.

2. "*Process Mass Spectrometer*" means an analytical instrument used in process manufacturing to measure the chemical composition of a gas or a liquid using mass spectrometry.

II. RESPONDENTS

3. Respondent ABB AB is a corporation organized, existing, and doing business under and by virtue of the laws of Sweden with its principal place of business located at P.O. Box 7373, S10391, Stockholm, Sweden. ABB AB owns 50% of ABB Asea Brown Boveri, Ltd., which is the holding company for the ABB Group. The ABB Group includes approximately 1,000 companies around the world.

4. Respondent ABB AG is a corporation organized, existing, and doing business under and by virtue of the laws of Switzerland with its principal place of business located at P.O. Box 58, CH-5441, Baden, Switzerland. ABB AG owns 50% of ABB Asea Brown Boveri, Ltd.

5. Respondents are engaged in, among other things, the research, development, manufacture and sale of Process Gas Chromatographs and Process Mass Spectrometers.

6. Respondents are, 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 are corporations whose businesses are in or affect commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE ACQUIRED COMPANY

7. Elsag Bailey Process Automation N.V. is a corporation organized, existing, and doing business under and by virtue of the laws of the Netherlands, with its principal place of business located at Schiphol Boulevard 157, 1118 BG Luchthaven Schiphol, The Netherlands.

8. Elsag Bailey, through its Applied Automation, Inc. division, is engaged in, among other things, the research, development, manufacture and sale of Process Gas Chromatographs and the research and development of Process Mass Spectrometers.

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

IV. THE ACQUISITION

10. Pursuant to an October 26, 1998 cash tender offer, ABB has agreed to acquire 100% of the issued and outstanding voting securities of Elsag Bailey for $1.1 billion ("Acquisition").

V. THE RELEVANT MARKETS

11. For purposes of this complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are:

(a) The manufacture and sale of Process Gas Chromatographs; and

(b) The manufacture and sale of Process Mass Spectrometers.

12. For purposes of this complaint, the world is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce.

VI. STRUCTURE OF THE MARKETS

13. The market for the manufacture and sale of Process Gas Chromatographs is highly concentrated as measured by the Herfindahl-Hirschman Index ("HHI"). The post-acquisition HHI is 4,764 points, which is an increase of 2,310 points over the pre-acquisition HHI level. ABB and Elsag Bailey are the two leading suppliers of Process Gas Chromatographs in the world, and combined would have a market share of almost 70%.

14. ABB and Elsag Bailey are actual competitors in the relevant market for the manufacture and sale of Process Gas Chromatographs.

15. The market for the manufacture and sale of Process Mass Spectrometers is highly concentrated as measured by the HHI. The pre-acquisition HHI is 4,150. ABB is the world's leading supplier of Process Mass Spectrometers, and Elsag Bailey is involved in the research and development of a Process Mass Spectrometer which it plans to begin manufacturing and selling in 1999.

16. ABB is an actual competitor in the relevant market for the manufacture and sale of Process Mass Spectrometers. Elsag Bailey is an actual potential competitor in the relevant market for the manufacture and sale of Process Mass Spectrometers.

VII. BARRIERS TO ENTRY

17. Entry into either of the relevant markets, other than Elsag Bailey's imminent introduction of a new Process Mass Spectrometer, would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph 18 because of, among other things, the difficulty of designing and developing a new product, performing product testing, establishing a track record for product quality, and developing a service and support network.

VIII. EFFECTS OF THE ACQUISITION

18. The effects of the Acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) By eliminating actual, direct, and substantial competition between ABB and Elsag Bailey in the relevant market for the manufacture and sale of Process Gas Chromatographs;

(b) By increasing the likelihood that ABB will unilaterally exercise market power in the relevant market for the manufacture and sale of Process Gas Chromatographs;

(c) By increasing the likelihood that customers of Process Gas Chromatographs would be forced to pay higher prices;

(d) By reducing innovation in the relevant market for the manufacture and sale of Process Gas Chromatographs;

(e) By eliminating actual potential competition between ABB and Elsag Bailey in the relevant market for the manufacture and sale of Process Mass Spectrometers;

(f) By increasing the likelihood that customers of Process Mass Spectrometers would be forced to pay higher prices;

(g) By reducing innovation in the relevant market for the manufacture and sale of Process Mass Spectrometers.

IX. VIOLATIONS CHARGED

19. The Acquisition agreement described in paragraph 10 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

20. The Acquisition described in paragraph 10, 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 FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondents of all of the outstanding shares of Elsag Bailey Process Automation, N.V., and the respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

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

1. Respondent ABB AB is a corporation organized, existing and doing business under and by virtue of the laws of Sweden, with its office and principal place of business located at P.O. Box 7373, S-10391, Stockholm, Sweden.

2. Respondent ABB AG is a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business located at P.O. Box 58, CH-5441 Baden, Switzerland.

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

ORDER

I.

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

A. "*ABB AB*" means ABB AB, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; the subsidiaries, including Elsag Bailey after the proposed acquisition, divisions, groups and affiliates controlled by ABB AB, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

B. "*ABB AG*" means ABB AG, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; the subsidiaries, including Elsag Bailey after the proposed acquisition, divisions, groups and affiliates controlled by ABB AG, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

C. "*Respondents*" means ABB AB and ABB AG.

D. "*Elsag Bailey*" means Elsag Bailey Process Automation, N.V., a corporation organized, existing and doing business under and by virtue of the laws of The Netherlands, having its principal place of business at World Trade Center, Schiphol Boulevard 157, 1118 BG Luchthaven Schiphol, The Netherlands.

E. "*Applied Automation*" means Applied Automation, Inc., a Delaware corporation having its principal office and place of business located at Pawhuska Road, Bartlesville, Oklahoma.

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

G. "*Analytical Division Assets*" means:

1. All assets, properties, businesses and goodwill, tangible and intangible, of Applied Automation relating to the research, development, manufacture or sale of Process Gas Chromatographs and

Process Mass Spectrometers, including, without limitation, the following:

a. All owned or leased real property and improvements, buildings, plants, manufacturing operations, machinery, fixtures, equipment, furniture, tools and other tangible personal property located in Applied Automation's Bartlesville Facility, Chicago Facility and Houston Facility;

b. All intellectual property, inventions, technology, know-how, patents, trademarks, trade names, trade secrets and copyrights;

c. All research materials, technical information, management information systems, software, specifications, designs, drawings, processes and quality control data;

d. All customer lists, vendor lists, catalogs, sales promotion literature and advertising materials;

e. Inventory and storage capacity;

f. All rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits;

g. All rights, titles and interests in and to contracts relating to the research and development of any Process Gas Chromatograph or Process Mass Spectrometer, including, but not limited to, the August 1, 1992 Research and Development Agreement between Applied Automation and Jencourt, Inc., as amended; the August 1, 1992 Stockholders Agreement by and among Duane P. Littlejohn, Fritz H. Schlereth, Barry Schlereth, and Applied Automation, as amended; the August 1, 1992 Management Agreement by and among Applied Automation, Jencourt, Inc., Duane P. Littlejohn, and Fritz H. Schlereth, as amended; the August 1, 1992 Employment Agreement between Jencourt, Inc. and Duane P. Littlejohn, as amended; and the July 1992 Development Agreement between Leybold Inficon, Inc. and Jencourt Inc.;

h. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

i. All rights under warranties and guarantees, express or implied;

j. All books, records and files;

k. All items of prepaid expense; and

2. All additional assets of Elsag Bailey or any of its subsidiaries (but excluding owned or leased real property and improvements) relating to Process Gas Chromatographs and Process Mass Spectrometers, including, but not limited to:

a. All Sales and Service Operations;

b. All Systems Integration Operations; and

c. All intellectual property, inventions, technology, know-how, patents, trademarks, trade names, trade secrets and copyrights.

H. "*Applied Automation Assets*" means:

1. All assets, properties, business and goodwill, tangible and intangible, of Applied Automation, including, without limitation, the following:

a. All owned or leased real property and improvements, buildings, plants, manufacturing operations, machinery, fixtures, equipment, furniture, tools and other tangible personal property located in Applied Automation's Bartlesville Facility, Chicago Facility and Houston Facility;

b. All intellectual property, inventions, technology, know-how, patents, trademarks, trade names, trade secrets and copyrights;

c. All research materials, technical information, management information systems, software, specifications, designs, drawings, processes and quality control data;

d. All customer lists, vendor lists, catalogs, sales promotion literature and advertising materials;

e. Inventory and storage capacity;

f. All rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits;

g. All rights, titles and interests in and to the contracts entered into for the research and development of any Process Gas Chromatograph or Process Mass Spectrometer, including, but not limited to, the August 1, 1992 Research and Development Agreement between Applied Automation and Jencourt, Inc., as amended; the August 1, 1992 Stockholders Agreement by and among Duane P. Littlejohn, Fritz H. Schlereth, Barry Schlereth, and Applied Automation, as amended; the August 1, 1992 Management Agreement by and among Applied Automation, Jencourt, Inc., Duane P. Littlejohn, and Fritz H. Schlereth, as amended; the August 1, 1992 Employment Agreement

between Jencourt, Inc. and Duane P. Littlejohn, as amended; and the July 1992 Development Agreement between Leybold Inficon, Inc. and Jencourt Inc.;

h. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

i. All rights under warranties and guarantees, express or implied;

j. All books, records and files;

k. All items of prepaid expense; and

2. All additional assets of Elsag Bailey or any of its subsidiaries (but excluding owned or leased real property and improvements) relating to Process Gas Chromatographs and Process Mass Spectrometers, including, but not limited to:

a. All Sales and Service Operations;

b. All Systems Integration Operations; and

c. All intellectual property, inventions, technology, know-how, patents, trademarks, trade names, trade secrets and copyrights.

I. "*Acquisition*" means the proposed acquisition by ABB AB and ABB AG of all of the voting securities of Elsag Bailey.

J. "*Bartlesville Facility*" means Applied Automation's manufacturing plant located at Pawhuska Road, Bartlesville, Oklahoma.

K. "*Chicago Facility*" means Applied Automation's sales and service facility located at 500 Joliet Road, Willowbrook, Illinois.

L. "*Houston Facility*" means Applied Automation's manufacturing plant located at 7101 Hollister Street, Houston, Texas.

M. "*Process Gas Chromatograph*" means an analytical instrument used in process manufacturing to measure the chemical composition of a gas or a liquid using gas chromatography.

N. "*Process Mass Spectrometer*" means an analytical instrument used in process manufacturing to measure the chemical composition of a gas or a liquid using mass spectrometry.

O. "*Sales and Services Operations*" means all of Elsag Bailey's assets, properties, business and goodwill, tangible and intangible, used in the sale or service of Applied Automation's Process Gas Chromatographs or Process Mass Spectrometers, including all contracts with employees or independent contractors.

P. "*Systems Integration Operations*" means all of Elsag Bailey's assets, properties, business and goodwill, tangible and intangible, located in Telford (United Kingdom), Praunheim (Germany) and Singapore, used to provide systems integration services for Applied Automation's Process Gas Chromatographs or Process Mass Spectrometers.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, within six months from the date this agreement containing consent order is signed by respondents, the Analytical Division Assets.

B. Respondents shall divest the Analytical Division Assets 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 the divestiture of the Analytical Division Assets is to ensure the continued use of the Analytical Division Assets in the same business in which the Analytical Division Assets are engaged at the time of the acquisition, and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the Analytical Division Assets or the Applied Automation Assets as required by this order, respondents shall take such actions as are necessary to maintain the viability and marketability of the Analytical Division Assets and the Applied Automation Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Analytical Division Assets or Applied Automation Assets except for ordinary wear and tear.

D. Respondents shall comply with all of the terms of the Agreement to Hold Separate attached to this order and made a part hereof as Appendix I. The Agreement to Hold Separate shall continue in effect until such time as respondents have divested all the Analytical Division Assets or the Applied Automation Assets as required by this order.

E. At the time of the execution of a purchase agreement between respondents and a proposed acquirer of the Analytical Division Assets or the Applied Automation Assets, respondents shall provide the proposed acquirer with a complete list of all non-clerical, salaried employees of Applied Automation or Elsag Bailey who have been

involved in the research, development, manufacture, sale, service or customization of any Process Gas Chromatograph or Process Mass Spectrometer at any time during the period from January 1, 1998 until the date of the purchase agreement. Respondents shall also provide the proposed acquirer with a complete list of all independent contractors involved in the research, development, manufacture, sale, service or customization of any Process Gas Chromatograph or Process Mass Spectrometer from January 1, 1998 until the date of the purchase agreement. The lists shall state each individual's name, position or positions held from January 1, 1998 until the date of the purchase agreement, address, telephone number, and a description of the duties and work performed by the individual in connection with any Process Gas Chromatograph or Process Mass Spectrometer researched, developed, manufactured or sold by Applied Automation or Elsag Bailey.

F. Respondents shall provide the proposed acquirer with an opportunity to inspect the personnel files and other documentation relating to the individuals identified in paragraph II.E. of this order to the extent permissible under applicable laws, at the request of the proposed acquirer any time after the execution of the purchase agreement.

G. Respondents shall provide the individuals identified in paragraph II.E. of this order with financial incentives to continue in their employment positions during the period covered by the Hold Separate Agreement, hereto attached, and to accept employment with the Commission-approved acquirer at the time of the divestiture. Such incentives shall include:

1. Continuation of all employee benefits offered by Applied Automation or Elsag Bailey until the date of the divestiture; and

2. A bonus equal to 20 percent of an employee's annual salary (including any other bonuses) as of the date this order becomes final for any individual who agrees to accept an offer of employment from the Commission-approved acquirer, payable by respondents upon the beginning of the employee's employment by the Commission-approved acquirer.

H. For a period of one (1) year commencing on the date of the individual's employment by the Commission-approved acquirer, respondents shall not re-hire any of the individuals identified in

paragraph II.E. of this order who accept employment with the Commission-approved acquirer, unless the individual's employment has been terminated by the acquirer.

III.

It is further ordered, That:

A. If respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Analytical Division Assets within six months from the date this agreement containing consent order is signed, the Commission may appoint a trustee to divest the Applied Automation Assets. In the event that 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, respondents shall consent to the appointment of a trustee in such action to divest the Applied Automation Assets. 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 the respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission 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. If respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Applied Automation Assets.

3. Within ten (10) days after appointment of the trustee, respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III. B. 3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the 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, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Applied Automation Assets or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents 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 in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to an acquirer as set out in paragraph II of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by respondents from among those approved by the Commission; provided further, however, that respondents shall select such entity within five (5) business days of receiving notification of the Commission's approval.

7. 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 the authority to employ, at the cost and expense of respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture 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 the 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's divesting the Applied Automation Assets.

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A. of this order.

10. 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.

11. The trustee shall have no obligation or authority to operate or maintain the Applied Automation Assets.

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

IV.

It is further ordered, That:

Within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until respondents have fully complied with the provisions of paragraphs II. or 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, and have complied with paragraphs II. and III. of this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II. and III. of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

V.

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

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondents shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondents relating to any matters contained in this order; and

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

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate is by and between ABB AB, a corporation headquartered in Sweden, ABB AG, a corporation headquartered in Switzerland (collectively "ABB"), Elsag Bailey Process Automation, N.V. ("Elsag Bailey"), a company headquartered in Amsterdam, The Netherlands, 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.*

PREMISES

Whereas, ABB has proposed to acquire one hundred percent of the issued and outstanding voting securities of Elsag Bailey ("Proposed Acquisition"); and

Whereas, ABB manufactures and markets, among other things, process gas chromatographs and process mass spectrometers; and

Whereas, Elsag Bailey, through its Applied Automation, Inc., subsidiary, manufactures and markets, among other things, process gas chromatographs, and is involved in the research and development of process mass spectrometers; and

Whereas, the Commission is now investigating the Proposed Acquisition to determine if it would violate any of the statutes the Commission enforces; and

Whereas, ABB has entered into an Agreement Containing Consent Order ("Consent Agreement"), which requires, among other things, ABB to divest the Analytical Division Assets of Elsag Bailey, as defined in Paragraph I of the Consent Agreement, or the Applied Automation Assets, as defined in Paragraph I of the Consent Agreement; and

Whereas, if the Commission accepts the Consent Agreement, the Commission will place it on the public record for a period of at least sixty (60) days and subsequently may either withdraw such acceptance or issue and serve its Complaint and decision in disposition of the proceeding pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the Analytical Division Assets and the Applied Automation Assets, as defined in

Paragraph I. of the Consent Agreement, during the period prior to the final issuance of the Consent Agreement by the Commission (after the 60-day public notice period), there may be interim competitive harm, and divestiture or other relief resulting from a proceeding challenging the legality of the proposed acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the purposes of this Agreement to Hold Separate and the Consent Agreement are:

A. To preserve the Analytical Division Assets and the Applied Automation Assets as viable, competitive, and independent businesses pending divestiture of the Analytical Division Assets or the Applied Automation Assets, as required by the Consent Agreement, and

B. To remedy any anticompetitive effects of the Proposed Acquisition; and

Whereas, ABB and Elsag Bailey entering into this Agreement to Hold Separate shall in no way be construed as an admission by ABB or Elsag Bailey that the Proposed Acquisition constitutes a violation of any law; and

Whereas, ABB and Elsag Bailey understand that no act or transaction contemplated by this Agreement to Hold Separate 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 to Hold Separate.

Now, therefore, upon the understanding that the Commission has not yet determined whether it will challenge the Proposed Acquisition, and in consideration of the Commission's agreement that, at the time it accepts the Consent Agreement for public comment, it will grant early termination of the Hart-Scott-Rodino waiting period applicable to the Proposed Acquisition, ABB and Elsag Bailey agree as follows:

1. ABB and Elsag Bailey agree to execute and be bound by the terms of the order contained in the Consent Agreement, as if it were final, from the date ABB and Elsag Bailey sign the Consent Agreement.

2. ABB and Elsag Bailey agree that from the date ABB and Elsag Bailey sign the Consent Agreement until the earlier of the dates listed in subparagraphs 2.a. - 2.b., they will comply with the provisions of Paragraph 3 of this Agreement to Hold Separate:

a. Three (3) business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's rules;

b. The day after the divestiture required by the Consent Order is completed.

3. To ensure the complete independence and viability of the Analytical Division Assets and the Applied Automation Assets and to assure that no Material Confidential Information ("Material Confidential Information" as used herein, means competitively sensitive or proprietary information not independently known to an entity from sources other than the entity to which the information pertains, and includes, but is not limited to, customer lists, price lists, marketing methods, patents, technologies, processes or other trade secrets) is exchanged between ABB and the Analytical Division Assets or the Applied Automation Assets, ABB shall hold the Applied Automation Assets separate and apart on the following terms and conditions:

a.. The Applied Automation Assets shall be held separate and apart and shall be managed and operated independently of ABB, except to the extent that ABB must exercise direction and control over such assets to assure compliance with this Agreement to Hold Separate, or with the Consent Agreement, and except as otherwise provided in this Agreement to Hold Separate.

b. ABB will appoint a Manager ("the Manager") within three (3) business days of the date the Proposed Acquisition is consummated to manage and maintain the Applied Automation Assets. The Manager shall not make any changes to the Applied Automation Assets other than changes made in the ordinary course of business. The Manager shall manage the Applied Automation Assets independently of the management of ABB’s other businesses. The Manager shall not be involved in any way in the operations or management of any other ABB business.

c. The Manager shall have exclusive control over the Applied Automation Assets, with responsibility for the management of the Applied Automation Assets and for maintaining the independence of that business.

d. ABB shall not exercise direction or control over, or influence directly or indirectly the Manager relating to the operation of the

Applied Automation Assets; provided, however, that ABB may exercise only such direction and control over the Manager and the Applied Automation Assets as is necessary to assure compliance with this Agreement to Hold Separate and with all applicable laws.

e. ABB and Elsag Bailey shall maintain the marketability, viability, and competitiveness of the Applied Automation Assets and shall not sell, transfer, encumber them (other than in the normal course of business or to assure compliance with the Consent Agreement), and shall not cause or permit the destruction, removal, wasting or deterioration, or otherwise impair the marketability, viability or competitiveness of the Applied Automation Assets.

f. ABB and Elsag Bailey shall ensure that the Applied Automation Assets have appropriate funds for research and development, quality control, manufacturing and marketing of the products produced by the Applied Automation Assets at a level not lower than that budgeted for the 1998 fiscal year, and shall increase such spending as the Manager shall reasonably determine. ABB and Elsag Bailey shall also ensure that the Applied Automation Assets have sufficient working capital to operate at a level no less than that described in the regularly prepared annual operating plan(s) in effect during the twelve (12) months preceding the date of this Hold Separate Agreement.

g. Employees of the Applied Automation Assets shall not be involved in any other ABB business.

h. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Proposed Acquisition, defending investigations or litigation, obtaining legal advice, negotiating agreements to divest assets, or complying with this Agreement to Hold Separate or the Consent Agreement, ABB shall not receive or have access to any Material Confidential Information about the Applied Automation Assets or the activities of the Manager or support service employees involved in the Applied Automation Assets.

i. ABB and Elsag Bailey shall circulate to all their salaried, non-clerical employees employed in the research, development, manufacture, or sale of Process Gas Chromatographs or Process Mass Spectrometers and all other salaried, non-clerical employees of the Applied Automation Assets, and appropriately display, a copy of this Agreement to Hold Separate and the Consent Agreement.

j. If the Manager ceases to act or fails to act diligently, ABB shall appoint a substitute Manager, subject to Commission approval.

k. The Manager shall have access to and be informed about all companies who inquire about, seek or propose to buy the Analytical Division Assets or the Applied Automation Assets. ABB may require the Manager to sign a confidentiality agreement prohibiting the disclosure of any Material Confidential Information gained as a result of his or her role as Manager to anyone other than the Commission.

l. Within thirty (30) days after the date this Agreement to Hold Separate is signed and every thirty (30) days thereafter until this Agreement to Hold Separate terminates, the Manager shall report in writing to the Commission concerning his or her efforts to accomplish the purposes of this Agreement to Hold Separate.

4. Should the Commission seek in any proceeding to compel ABB to divest itself of the Analytical Division Assets or the Applied Automation Assets, as provided in the Consent Agreement, or to seek any other injunctive or equitable relief, ABB and Elsag Bailey shall not raise any objection based on the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Proposed Acquisition. ABB and Elsag Bailey shall also waive all rights to contest the validity of this Agreement to Hold Separate.

5. To the extent that this Agreement to Hold Separate requires ABB or Elsag Bailey to take, or prohibits ABB or Elsag Bailey from taking, certain actions that otherwise may be required or prohibited by contract, ABB and Elsag Bailey shall abide by the terms of this Agreement to Hold Separate or the Consent Agreement, and shall not assert as a defense such contract requirements in any action brought by the Commission to enforce the terms of this Agreement to Hold Separate or the Consent Agreement.

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

a. Access during the office hours of ABB and in the presence of counsel to inspect any facilities and to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of ABB relating to compliance with this Agreement to Hold Separate; and

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

7. For the purpose of determining or securing compliance with this Agreement to Hold Separate, subject to any legally recognized privilege, and upon written request, and on reasonable notice, to Elsag Bailey made to its principal office, Elsag Bailey shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Elsag Bailey and in the presence of counsel to inspect any facilities and to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Elsag Bailey relating to compliance with this Agreement to Hold Separate; and

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

8. This Agreement to Hold Separate shall not be binding until accepted by the Commission.

IN THE MATTER OF

THE BRITISH PETROLEUM COMPANY P.L.C., 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 C-3868. Complaint, April 19, 1999--Decision, April 19, 1999

This consent order, among other things, requires BP and Amoco to divest, to Williams Energy Ventures, Inc., or an acquirer approved by the Commission, 134 gas stations in eight markets and nine light petroleum products terminals.

Participants

For the Commission: *Dennis Johnson, Arthur Nolan, Anthony Low Joseph, Kirsten Wolfe, Constance Salemi, Richard Liebeskind, Phillip Broyles, Naomi Licker, Daniel Ducore, William Baer, Charlotte Wojcik,* and *Leslie Farber*.

For the respondents: *Robert Osgood, Sullivan & Cromwell,* New York, N.Y. and *Ilene Knable Gotts, Wachtell, Lipton, Rosen & Katz,* New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("FTC" or "Commission"), having reason to believe that respondents The British Petroleum Company p.l.c. ("BP"), a corporation, and Amoco Corporation ("Amoco"), a corporation, have entered into an agreement and plan of merger whereby BP proposes to acquire all of the outstanding common stock of Amoco, that such agreement and plan of merger violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such agreement and merger, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and BP and Amoco having merged into a corporation ultimately controlled by BP Amoco p.l.c. ("BP Amoco"), and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENTS

A. The British Petroleum Company, p.l.c.

1. Respondent BP is a corporation organized, existing and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business located at Brittannic House, 1 Finsbury Circus, London EC2M 7BA, England.

2. Respondent BP is, and at all times relevant herein has been, a diversified energy products company engaged in oil and gas exploration; the development, production and transportation of crude oil and natural gas; the refining, marketing, transportation, terminaling and sale of gasoline, diesel fuel, jet fuel and other petroleum products; and the production, marketing and sale of petrochemicals.

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

B. Amoco Corporation

4. Respondent Amoco is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 200 East Randolph Drive, Chicago, Illinois.

5. Respondent Amoco is, and at all times relevant herein has been, an integrated petroleum and chemical products company engaged in the exploration, development, and production of crude oil, natural gas, and natural gas liquids; the marketing of natural gas and natural gas liquids; the refining, marketing, and transportation of petroleum products, including crude oil, gasoline, jet fuel, diesel fuel, heating oil, asphalt, motor oil, lubricants, natural gas liquids, and petrochemical feedstocks; the terminaling and sale of gasoline, diesel fuel, and other petroleum products; and the manufacture and sale of various petroleum-based chemical products.

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

in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

C. BP Amoco p.l.c.

7. Respondent BP Amoco is a corporation organized, existing and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business located at Brittannic House, 1 Finsbury Circus, London EC2M 7BA, England.

8. Respondent BP Amoco is the successor corporation to respondents BP and Amoco.

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

II. THE PROPOSED MERGER

10. Pursuant to an agreement and plan of merger dated August 11, 1998, BP intends to acquire all of the outstanding common stock of Amoco in exchange for stock of BP valued at the time of the agreement at approximately $48.2 billion, with the combined entity to be renamed BP Amoco p.l.c. As a result of the merger, BP's shareholders will hold approximately 60%, and Amoco's shareholders will hold approximately 40%, of the new combined entity.

11. On or about December 31, 1998, respondents BP and Amoco merged into a corporation ultimately controlled by respondent BP Amoco.

III. TRADE AND COMMERCE

A. Terminaling

12. Petroleum terminals are facilities that provide temporary storage of gasoline and other light petroleum products received from a pipeline or marine vessel, and the redelivery of such products from storage tanks into tank trucks or transport trailers for ultimate delivery to retail gasoline stations or other buyers. There are no substitutes for petroleum terminals for providing such terminaling services.

13. The terminaling of gasoline and other light petroleum products is a relevant line of commerce in which to evaluate the effects of this merger.

14. The following metropolitan areas are relevant sections of the country in which to evaluate the effects of this merger on the terminaling of gasoline and other light petroleum products: Cleveland, Ohio; Chattanooga and Knoxville, Tennessee; Jacksonville, Florida; Meridian, Mississippi; Mobile and Montgomery, Alabama; and North Augusta and Spartanburg, South Carolina (hereinafter collectively referred to as the "terminaling markets").

15. The terminaling of gasoline and other light petroleum products in each terminaling market is either moderately concentrated or highly concentrated, and would become significantly more concentrated as a result of the merger. Premerger concentration in the terminaling markets, as measured by the Herfindahl-Hirschmann Index, ranges from more than 1,300 to more than 2,500, and as a result of the merger concentration would increase in each terminal market by more than 100 points to levels ranging from more than 1,500 to more than 3,600.

16. Entry into the terminaling of gasoline and other light petroleum products in each terminaling market is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects that may result from this merger.

B. Wholesale Gasoline

17. Gasoline is a motor fuel used in automobiles and other vehicles. It is manufactured from crude oil at refineries in the United States and throughout the world. There are no substitutes for gasoline as a fuel for automobiles and other vehicles that use gasoline.

18. The wholesale sale of gasoline is the business of selling gasoline to retail dealers, or to intermediaries ("jobbers") that in turn sell gasoline to retail dealers. Firms such as BP and Amoco sell gasoline in wholesale quantities as either branded or unbranded fuels at terminals serving particular local areas. The wholesale sale of gasoline is a relevant line of commerce in which to evaluate the effects of this merger.

19. The following cities and metropolitan areas are relevant sections of the country in which to evaluate the effects of this merger on the wholesale sale of gasoline: Albany, Georgia; Athens, Georgia;

Birmingham, Alabama; Charleston, South Carolina; Charlotte, North Carolina; Charlottesville, Virginia; Clarksville, Tennessee; Cleveland, Ohio; Columbia, South Carolina; Columbus, Georgia; Cumberland, Maryland; Dothan, Alabama, Fayetteville, North Carolina; Florence, Alabama; Goldsboro, North Carolina; Hattiesburg, Mississippi; Hickory, North Carolina; Jackson, Tennessee; Memphis, Tennessee; Meridian, Mississippi; Mobile, Alabama; Myrtle Beach, South Carolina; Pittsburgh, Pennsylvania; Raleigh, North Carolina; Rocky Mount, North Carolina; Savannah, Georgia; Sumter, South Carolina; Tallahassee, Florida; Toledo, Ohio; and Youngstown, Ohio (hereinafter collectively referred to as the "gasoline markets").

20. The wholesale sale of gasoline in each gasoline market would be moderately concentrated or highly concentrated after the merger. In markets that would be moderately concentrated after the merger, postmerger concentration, as measured by the Herfindahl-Hirschmann Index, would increase by more than 100 points to levels between 1,400 and 1,800. In markets that would be highly concentrated after the merger, postmerger concentration, as measured by the Herfindahl-Hirschmann Index, would increase by more than 100 points to levels in excess of 1,800.

21. Entry into the wholesale sale of gasoline in each gasoline market is difficult and would not be timely, likely or sufficient to prevent anticompetitive effects that may result from this merger.

IV. VIOLATIONS CHARGED

First Violation

22. Respondents Amoco and BP each own terminaling facilities that service each terminaling market, and are competitors for terminaling of gasoline and other light petroleum products in each terminaling market.

23. The effect of the proposed merger, if consummated, may be substantially to lessen competition or tend to create a monopoly in the terminaling of gasoline and other light petroleum products in the terminaling markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct competition in the terminaling of gasoline and other light petroleum products between Amoco and BP in each terminaling market;

b. By increasing the likelihood of, or facilitating, collusion or coordinated interaction between providers of terminaling services in each terminaling market;

each of which increases the likelihood that the prices of terminaling services for gasoline and other light petroleum products will increase in the terminaling markets.

Second Violation

24. Respondents Amoco and BP are actual competitors in the wholesale sale of gasoline in each gasoline market.

25. The effect of the proposed merger, if consummated, may be substantially to lessen competition or tend to create a monopoly in the wholesale sale of gasoline in the gasoline markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct competition in the wholesale sale of gasoline between Amoco and BP in each gasoline market;

b. By increasing the likelihood of, or facilitating, collusion or coordinated interaction between Amoco, BP and other wholesale sellers of gasoline in each gasoline market;

each of which increases the likelihood that the prices of gasoline will increase in the gasoline markets.

V. STATUTES VIOLATED

26. The agreement and plan of merger between Amoco and BP constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

27. The proposed merger, 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 ("Commission") having initiated an investigation of the proposed merger between The British Petroleum Company p.l.c. ("BP") and Amoco Corporation ("Amoco"), which merger resulted in Amoco becoming a direct, wholly-owned subsidiary of BP Amoco p.l.c. ("BP Amoco") (collectively "respondents"), and respondents having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of 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 BP was a corporation organized, existing and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business located at Brittannic House, 1 Finsbury Circus, London EC2M 7BA, England. BP was renamed BP Amoco p.l.c.

2. Respondent Amoco was a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 200 East

Randolph Drive, Chicago, Illinois 60601. Amoco was renamed BP Amoco Corporation, which is a wholly-owned subsidiary of BP Amoco.

3. Respondent BP Amoco is a corporation organized, existing and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business located at Brittannic House, 1 Finsbury Circus, London EC2M 7BA, England.

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

ORDER

I.

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

A. "*Amoco*" means Amoco Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Amoco Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*BP*" means The British Petroleum Company p.l.c., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by The British Petroleum Company p.l.c., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "*BP Amoco*" means BP Amoco p.l.c., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by BP Amoco p.l.c., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "*Amoco Branded Seller*" means any person (other than BP or Amoco) that has, by virtue of contract or agreement with Amoco in effect at the time respondents execute the agreement containing consent order, the right to sell gasoline using Amoco's brand name at Retail Sites located in any Branded Seller Metropolitan Area, or to resell gasoline to any such person. "Amoco Branded Seller" does not

include Retail Sites leased from Amoco except for sites leased from Amoco by Amoco Two Party Dealers.

E. "*Amoco Retail Divestiture Assets*" means all Retail Assets owned by Amoco or leased by Amoco from another person located in the following Metropolitan Areas: Tallahassee, Florida and Pittsburgh, Pennsylvania. "Amoco Retail Divestiture Assets" do not include Retail Sites leased from Amoco by Amoco Two Party Dealers.

F. "*Amoco Two Party Dealer*" means a person that directly or indirectly owns or leases from a lessor other than Amoco a Retail Site in a Branded Seller Metropolitan Area and that has leased to Amoco and directly or indirectly leased back from Amoco the Retail Site.

G. "*Amoco Two Party Dealer Lease*" means all leases, deeds, contracts, rights and obligations associated with the lease of a Retail Site by any person to Amoco and the lease of that Retail Site back to such person or an affiliate of such person.

H. "*BP Branded Seller*" means any person (other than BP or Amoco) that has, by virtue of contract or agreement with BP in effect at the time respondents execute the agreement containing consent order, the right to sell gasoline using BP's brand name at Retail Sites located in any Branded Seller Metropolitan Area, or to resell gasoline to any such person, except that "BP Branded Seller" does not include Retail Sites leased from BP.

I. "*BP Retail Divestiture Assets*" means all Retail Assets owned by BP or leased by BP from another person located in the following Metropolitan Areas: Charleston, South Carolina; Charlotte, North Carolina; Columbia, South Carolina; Jackson, Tennessee; Memphis, Tennessee; and Savannah, Georgia.

J. "*Branded Fuels*" means motor gasoline purchased by a person for resale under a trade name owned by another person.

K. "*Branded Seller Metropolitan Area*" means (1) each of the following Metropolitan Areas: Albany, Georgia; Athens, Georgia; Birmingham, Alabama; Charleston, South Carolina; Charlotte, North Carolina; Charlottesville, Virginia; Clarksville, Tennessee**;** Cleveland, Ohio; Columbia, South Carolina; Columbus, Georgia; Cumberland, Maryland; Dothan, Alabama; Fayetteville, North Carolina; Florence, Alabama; Goldsboro, North Carolina; Hattiesburg, Mississippi; Hickory, North Carolina; Jackson, Tennessee; Memphis, Tennessee; Mobile, Alabama; Myrtle Beach, South Carolina; Pittsburgh, Pennsylvania; Raleigh, North Carolina; Rocky Mount, North Carolina; Savannah, Georgia; Sumter, South Carolina; Tallahassee, Florida; Toledo, Ohio;

and Youngstown, Ohio; and (2) the city of Meridian, Mississippi and the counties of Kemper, Lauderdale, and Newton, Mississippi.

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

M. "*Deed Restriction*" means any obligation that would prevent or inhibit the owner of a Retail Site (or the owner's tenant) from selling motor fuels at that Retail Site other than a brand licensed from respondents.

N. "*Existing Supply Agreement*" means each franchise agreement, supply contract, image agreement, jobber outlet incentive program contract, Amoco Two Party Dealer Lease, and all related agreements between respondents and any BP Branded Seller or Amoco Branded Seller relating to such person's right or obligation to sell or resell gasoline using BP's brand name or Amoco's brand name at a Retail Site in a Branded Seller Metropolitan Area.

O. "*Long Term Lease*" means a lease the terms of which allow respondents to divest to the acquirer of Retail Assets a right to occupy those Retail Assets for ten (10) years or longer from the date on which the order becomes final, and where such divestiture is not subject to landlord approval or, if subject to such approval, respondents have obtained the necessary approval prior to the divestiture. "Long Term Lease" does not include a leasehold interest in which any respondent is a lessor.

P. "*Merger*" means the proposed merger of Amoco and BP.

Q. "*Metropolitan Area*" means any Metropolitan Statistical Area or Consolidated Metropolitan Statistical Area as defined by the U.S. Office of Management and Budget as of June 30, 1998.

R. "*Ohio Metropolitan Area*" means each of the following Metropolitan Areas: Toledo, Ohio, and Youngstown, Ohio.

S. "*Ohio Retail Divestiture Assets*" means a package of Retail Assets, to be identified by respondents but approved by the Commission, (i) that includes individual Retail Sites with aggregate sales of 40 million gallons of gasoline in Youngstown, Ohio during 1997, and aggregate sales of 14 million gallons of gasoline in Toledo, Ohio during 1997; (ii) each of which complies with all 1998 and 1999 environmental requirements for underground storage tanks; and (iii) for each of which respondents can convey fee ownership or a Long Term Lease.

T. "*Option Effective Date*" means a date identified by the Amoco Branded Seller or BP Branded Seller that is not later than sixty (60)

days after respondents' receipt of a written notice from an Amoco Branded Seller or BP Branded Seller pursuant to paragraph IV.A.1.

U. "*Option Period*" means, for each BP Branded Seller or Amoco Branded Seller, a sixty (60) day period commencing upon the date on which such person receives the written notification specified in paragraph IV.A of this order; except that, if this order is made final on or after April 20, 1999, the Option Period shall end on June 30, 1999.

V. "*Person*" means any individual, partnership, association, company or corporation.

W. "*Respondents*" means BP Amoco, Amoco and BP, individually and collectively.

X. "*Retail Assets*" means, for each Retail Site, all assets, tangible or intangible, that are used at the Retail Site, including but not limited to all permits and contracts, and all assets relating to all ancillary businesses (such as automobile mechanical service, convenience stores, restaurants, and car washes) located at each Retail Site. Respondents shall make good faith diligent efforts to obtain all third-party approvals necessary to convey all licenses, permits, consents and ancillary businesses with each Retail Site. Retail Assets do not include respondents' proprietary trademarks, trade names, logos, trade dress, identification signs, additized product inventory, petroleum franchise agreements, petroleum product supply agreements, credit card agreements, satellite-based or centralized credit card processing equipment not incorporated in gasoline dispensers, or systemwide software and databases.

Y. "*Retail Divestiture Assets*" means the Amoco Retail Divestiture Assets and the BP Retail Divestiture Assets.

Z. "*Retail Site*" means a business establishment from which gasoline is sold to the general public.

AA. "*Terminaling*" means the services performed by a facility that provides temporary storage of gasoline received from a pipeline or marine vessel, and the redelivery of gasoline from storage tanks into tank trucks or transport trailers.

BB. "*Terminal Assets*" means all assets, tangible and intangible, relating to Terminaling at the Terminaling facilities owned by Amoco (including but not limited to real property, tanks, loading racks, offices, buildings, warehouses, equipment, machinery, fixtures, tools, spare parts, licenses, permits, and other property used for

Terminaling) at the following locations: Aurora, Ohio; Chattanooga, Tennessee; Jacksonville, Florida; Knoxville, Tennessee; Meridian, Mississippi; Mobile, Alabama; Montgomery, Alabama; North Augusta, South Carolina; and Spartanburg, South Carolina.

CC. "*Terminated Retail Site*" means a Retail Site as to which an Amoco Branded Seller or BP Branded Seller has exercised the option to cancel an Existing Supply Agreement pursuant to paragraph IV of this order.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, the Terminal Assets to Williams Energy Ventures, Inc., in accordance with the Purchase and Sale Agreement dated October 29, 1998 between Amoco Oil Company and Williams Energy Ventures, Inc., no later than:

(1) Ten (10) days after the date on which the Merger is consummated, or

(2) Thirty (30) days after the date on which respondents sign the agreement containing consent order,

whichever is later. Provided, however, that if respondents have divested the Terminal Assets to Williams Energy Ventures, Inc. prior to the date the order becomes final, and if, at the time the Commission determines to make the order final, the Commission notifies respondents that Williams Energy Ventures, Inc., is not an acceptable buyer of the Terminal Assets or that the manner in which the divestiture was accomplished is not acceptable, then respondents shall immediately rescind the transaction with Williams Energy Ventures, Inc., and shall divest the Terminal Assets within six months from the date the order becomes final, absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

B. Pending divestiture of the Terminal Assets, respondents shall take such actions as are necessary to maintain the viability and marketability of the Terminal Assets and to prevent the destruction, removal, wasting, deterioration or impairment of any of the Terminal

Assets except for ordinary wear and tear that does not affect the viability and marketability of the Terminal Assets.

C. Respondents shall comply with all terms of the Purchase and Sale Agreement dated October 29, 1998, between Amoco Oil Company and Williams Energy Ventures, Inc., for the Terminal Assets, and such agreement is incorporated by reference into this order and made a part hereof as Confidential Appendix B. Any failure by respondents to comply with the requirements of such agreement shall constitute a failure to comply with this order.

D. The purpose of this paragraph II is to ensure the continuation of the Terminal Assets as ongoing, viable enterprises engaged in the Terminaling of gasoline and other petroleum products, and to remedy the lessening of competition resulting from the Merger in Terminaling markets as alleged in the Commission's complaint.

III.

It is further ordered, That:

A. Respondents shall divest, at no minimum price, absolutely and in good faith, within six months from the date respondents execute the agreement containing consent order, the Retail Divestiture Assets.

B. Upon divestiture, respondents shall cancel all existing dealer leases, dealer loans, building incentive agreements, and related dealer agreements between respondents and their lessee dealers applicable to the divested Retail Sites.

C. For each Metropolitan Area identified in paragraphs I.E. and I.I., respondents shall divest the Retail Divestiture Assets in such Metropolitan Area to a single acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

D. Pending divestiture of the Retail Divestiture Assets, respondents shall take such actions as are necessary to maintain the viability and marketability of the assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of such assets except for ordinary wear and tear. Respondents shall continue at least at their scheduled pace all capital projects involving the assets that were ongoing, planned, or approved as of the date the agreement containing consent order is signed by respondents, and otherwise shall maintain the Retail Divestiture Assets at least at the same standards and on the same schedule as respondents have been

maintaining them until the date of divestiture. Respondents shall not remove or degrade the brand identification at the Retail Divestiture Assets, until the divestiture of the assets is completed.

E. The purpose of this paragraph III is to ensure the continued use of these assets in the same business in which they were engaged at the time of the proposed Merger, and to remedy the lessening of competition in the sale of gasoline in each of the Metropolitan Areas identified in paragraphs I.E. and I.I. resulting from the proposed Merger as alleged in the Commission's complaint.

IV.

It is further ordered, That:

A. Within ten days from the date this order becomes final, respondents shall provide written notification to each BP Branded Seller and each Amoco Branded Seller, giving each such person the option to cancel, without penalty, that portion of any Existing Supply Agreement with BP or Amoco that applies to any Terminated Retail Site, upon the following terms and conditions:

1. Such option to cancel may be exercised by delivering written notice to BP or Amoco during the Option Period. Each such written notice shall identify by address each Retail Site within any Branded Seller Metropolitan Area as to which the BP Branded Seller or Amoco Branded Seller intends to exercise such option, and the Option Effective Date for each such Retail Site. The exercise of such option shall become effective on the Option Effective Date.

2. Respondents shall release each BP Branded Seller or Amoco Branded Seller from all debts, loans, Deed Restrictions, obligations or responsibilities, attributable to Terminated Retail Sites, except for amounts owed for fuels actually received and for the unamortized portion of any debt identified in Confidential Appendix C, on the condition that such BP Branded Seller or Amoco Branded Seller notifies Amoco or BP in writing within the Option Period that such BP Branded Seller or Amoco Branded Seller (a) intends to cease purchasing Branded Fuels from respondents for resale at such Terminated Retail Site, (b) intends to continue to purchase gasoline for resale at such Terminated Retail Site, but (c) will not purchase Branded Fuels for resale as Branded Fuels at such Terminated Retail Site from any person that has a market share of more than 20% in

such Branded Seller Metropolitan Area, as measured by the 1998 annual market share estimates published by NPD Group, Inc.

3. For a period of two years from the Option Effective Date, respondents shall not sell Branded Fuels for resale as Branded Fuels at Terminated Retail Sites. For a period of two years from the date upon which respondents receive the notice specified in paragraph IV.A.1, respondents shall not solicit or engage in any discussions or negotiations to sell Branded Fuels to the Amoco Branded Seller or BP Branded Seller for resale as Branded Fuels at any Terminated Retail Site.

B. The purpose of this paragraph IV is to prevent respondents from enforcing agreements that may deter or impede existing sellers of BP or Amoco gasoline in Branded Seller Metropolitan Areas from switching wholesale suppliers of fuels for resale at Terminated Retail Sites, and to remedy the lessening of competition resulting from the Merger in gasoline markets as alleged in the Commission's complaint.

V.

It is further ordered, That:

A. Unless BP Branded Sellers or Amoco Branded Sellers that in 1998 had total yearly sales of at least 40 million gallons of gasoline in the Youngstown, Ohio Metropolitan Area and 14 million gallons of gasoline in the Toledo, Ohio Metropolitan Area cease purchasing Branded Fuels from respondents by the end of the Option Period or by June 30, 1999, whichever is later, respondents, within twelve (12) months from the date respondents execute the agreement containing consent order, shall divest, at no minimum price, absolutely and in good faith, the Ohio Retail Divestiture Assets.

B. Respondents shall divest the Ohio Retail Divestiture Assets in each Ohio Metropolitan Area to a single acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

C. Pending divestiture of the Ohio Retail Divestiture Assets, respondents shall take such actions as are necessary to maintain the viability and marketability of all Retail Assets that might be included as part of the Ohio Retail Divestiture Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of such assets except for ordinary wear and tear. Respondents shall

continue at least at their scheduled pace all capital projects involving any Retail Assets that might be included as part of the Ohio Retail Divestiture Assets that were ongoing, planned, or approved as of the date the agreement containing consent order is signed by respondents, and otherwise shall maintain such assets at least at the same standards and on the same schedule as respondents have been maintaining them until the date of divestiture. Respondents shall not remove or degrade the brand identification at any Retail Assets that might be included as part of the Ohio Retail Divestiture Assets, until the divestiture of the assets is completed.

D. The purpose of this paragraph V is to ensure the continued use of these assets in the same business in which they were engaged at the time of the proposed Merger, and to remedy the lessening of competition in the sale of gasoline in Toledo and Youngstown, Ohio, resulting from the proposed Merger as alleged in the Commission's complaint.

VI.

It is further ordered, That:

A. If respondents have not divested, absolutely and in good faith, the Terminal Assets pursuant to paragraph II. of this order, the Retail Divestiture Assets pursuant to paragraph III. of this order, and the Ohio Retail Divestiture Assets pursuant to paragraph V. of this order, the Commission may appoint a trustee or trustees to divest the Terminal Assets, the Retail Divestiture Assets, or the Ohio Retail Divestiture Assets. The trustee shall divest the Terminal Assets, the Retail Divestiture Assets, or the Ohio Retail Divestiture Assets at no minimum price, to an acquirer that receives the prior approval of the Commission, and in a manner that receives the prior approval of the Commission.

B. In the event that 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, respondents shall consent to the appointment of a trustee or trustees 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, including a court-appointed trustee or trustees, pursuant to Section 5(*l*) of the Federal Trade

Commission Act, or any other statute enforced by the Commission, for any failure by the respondents to comply with this order.

C. If any trustee is appointed by the Commission or a court pursuant to the terms of this order, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission 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. If respondents have not opposed, in writing, including the reasons for opposing, the selection of the proposed trustee, within ten (10) days after notice by the staff of the Commission to respondents of the identity of the proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Terminal Assets, the Retail Divestiture Assets, or the Ohio Retail Divestiture Assets.

3. Within ten (10) days after appointment of the trustee, respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to divest the Terminal Assets, the Retail Divestiture Assets, or the Ohio Retail Divestiture Assets.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph IV.C.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the 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, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Terminal Assets, the Retail Divestiture Assets, or the Ohio Retail Divestiture Assets, or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other

information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in the divestiture caused by respondents shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraphs II., III., and V. of this order, provided, however, if the trustee receives bona fide offers from more than one acquiring entity, 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 respondents from among those approved by the Commission, provided further, however, that respondents shall select such entity within five (5) days of receiving notification of the Commission's approval.

7. 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 the authority to employ, at the cost and expense of respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are 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 the 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's divesting the Terminal Assets, the Retail Divestiture Assets, or the Ohio Retail Divestiture Assets.

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses

incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph VI.A. of this order.

10. 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 divestitures required by this order.

11. Except as otherwise provided in this order, the trustee shall have no obligation or authority to operate or maintain the assets to be divested.

12. The trustee shall report in writing to respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestitures.

VII.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, joint ventures, or otherwise, acquire :

A.1. Any stock, share capital, equity, partnership, membership or other interest in any concern, corporate or non-corporate, engaged, at the time of such acquisition or within the year preceding such acquisition, in providing Terminaling services and located in any of the counties in Alabama, Florida, Georgia, Mississippi, Ohio, South Carolina or Tennessee, listed on Appendix A hereto, or

2. Any assets used or previously used (and still suitable for use) in providing Terminaling services and located in any of the counties in Alabama, Florida, Georgia, Mississippi, Ohio, South Carolina or Tennessee listed on Appendix A hereto, or

B.1. Any stock, share capital, equity, partnership, membership or other interest in any concern, corporate or non-corporate, engaged, at the time of such acquisition or within the year preceding such

acquisition, in the sale of gasoline in any Branded Seller Metropolitan Area, or

2. Any assets used or previously used (and still suitable for use) in the sale of gasoline in any Branded Seller Metropolitan Area for which the aggregate purchase price exceeds $10 million.

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"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 CFR 803.20), respondents shall not consummate the transaction until twenty (20) days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

VIII.

It is further ordered, That:

A. Within thirty (30) days from the date this order becomes final and every thirty (30) days thereafter until respondents have fully complied with the provisions of paragraphs II, III, IV and V 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, and have complied with paragraphs II, III, IV and V of this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full

description of the efforts being made to comply with paragraphs II, III, IV and V of this order, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestitures.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with each provision of this order.

IX.

It is further ordered, That:

A. Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.

B. Upon consummation of the Merger, respondents shall cause the merged entity to be bound by the terms of this order.

X.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondents shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access 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 any matters contained in this order; and

B. Upon five days' notice to respondents and without restraint or interference from it, to interview officers, directors, or employees of respondents.

APPENDIX A

Alabama Counties	**Florida Counties**	**Georgia Counties**
Autauga	Baker	Bartow
Baldwin	Bradford	Brantley
Bibb	Clay	Burke
Bullock	Duval	Camden
Butler	Escambia	Catoosa
Cherokee	Nassau	Charlton
Chilton	Putnam	Chattooga
Choctaw	Santa Rosa	Columbia
Clarke	St. Johns	Dade
Coosa	Union	Elbert
Crenshaw		Fannin
Dallas		Floyd
De Kalb		Franklin
Elmore		Gilmer
Escambia		Glascock
Greene		Glynn
Jackson		Gordon
Lee		Habersham
Lowndes		Hart
Macon		Jefferson
Marengo		Jenkins
Mobile		Lincoln
Monroe		Madison
Montgomery		McDuffie
Perry		Murray
Pickens		Oglethorpe
Pike		Pickens
Shelby		Rabun
Sumter		Richmond
Tallapoosa		Screven
Washington		Stephens
Wilcox		Taliaferro
		Walker
		Warren
		Whitfield
		Wilkes

APPENDIX A

Mississippi Counties	**Ohio Counties**	**South Carolina Counties**
Clarke	Ashland	Abbeville
George	Ashtabula	Aiken
Greene	Belmont	Allendale
Harrison	Carroll	Anderson
Jackson	Columbiana	Bamberg
Jasper	Coshocton	Barnwell
Jones	Crawford	Cherokee
Kemper	Cuyahoga	Chester
Lauderdale	Erie	Edgefield
Leake	Geauga	Fairfield
Neshoba	Guernsey	Greenville
Newton	Harrison	Greenwood
Noxubee	Holmes	Laurens
Perry	Huron	Lexington
Scott	Jefferson	McCormick
Smith	Knox	Newberry
Stone	Lake	Oconee
Wayne	Lorain	Orangeburg
Winston	Mahoning	Pickens
	Medina	Saluda
	Muskingum	Spartanburg
	Ottawa	Union
	Portage	York
	Richland	
	Sandusky	
	Seneca	
	Stark	
	Summit	
	Trumbull	
	Tuscarawas	
	Wayne	

APPENDIX A

Tennessee Counties		
Anderson	Greene	Monroe
Bledsoe	Grundy	Morgan
Blount	Hamblen	Polk
Bradley	Hamilton	Rhea
Campbell	Hancock	Roane
Claiborne	Hawkins	Scott
Cocke	Jefferson	Sequatchie
Coffee	Knox	Sevier
Cumberland	Loudon	Union
Fentress	Marion	Van Buren
Franklin	McMinn	Warren
Grainger	Meigs	

APPENDIX B

CONFIDENTIAL

Purchase and Sale Agreement Between Amoco and Williams

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONERS SHEILA F. ANTHONY AND MOZELLE W. THOMPSON

On December 30, 1998, the Commission published a proposed complaint alleging that this merger would violate Clayton Act Section 7, 15 U.S.C. 18, and FTC Act Section 5, 15 U.S.C. 45, in 30 wholesale gasoline markets and nine light petroleum products terminaling markets in the United States, and accepted a proposed consent order resolving those allegations. The Commission has now accorded final approval to the complaint and consent order.[1] Our colleague, Commissioner Swindle, dissents from that portion of the complaint and consent order that alleges violations and mandates relief in 27 of the wholesale gasoline markets.[2] We write to clarify our view.

[1] In response to comments received during the comment period, the Commission, with the agreement of BP-Amoco, has made a few modifications to the details of the complaint and order. None of these changes, however, alter the core relief.

[2] Commissioner Swindle concurs in the complaint and consent order to the extent they allege that the merger of BP and Amoco would violate the antitrust laws in the nine terminal markets and in wholesale gasoline markets in Pittsburgh, Pennsylvania, and Cleveland, Toledo and Youngstown, Ohio.

At the time the consent agreement was accepted for public comment -- before the merger at issue was consummated -- British Petroleum Company p.l.c. ("BP") and Amoco Corporation ("Amoco") were integrated producers, refiners and marketers of petroleum products, including gasoline, in the United States. Although BP's and Amoco's operations did not overlap in many areas,[3] both were wholesale marketers of gasoline in the southeastern and midwestern United States, *i.e.*, both BP and Amoco sold gasoline to retail gas stations that they might or might not have owned. In these markets, BP was the only firm that could sell "BP"-branded gasoline to retail dealers, and Amoco was the only firm that could sell "Amoco"-branded gasoline to dealers. Therefore, measuring concentration of retail sales by brand was an adequate proxy for measuring concentration in gasoline wholesaling.[4]

In 25 metropolitan area markets, absent the relief secured by the Commission, the combination of BP and Amoco would have resulted in a highly concentrated wholesale gasoline market, and an increase in concentration in an amount that the *Department of Justice-FTC Merger Guidelines* presume likely to create or enhance market power or facilitate its exercise. *Merger Guidelines* § 1.51(c).[5] In each of these markets, the top four firms would together have had at least

[3] For example, to a large extent, Amoco and BP produced and marketed different petrochemical products in the United States. BP produced acetic acid and acrylonitrile in the U.S., but Amoco did not. Similarly, Amoco produced ethylene, propylene, polypropylene, and styrene in the U.S., but BP did not. In the few petrochemical areas where the parties overlapped in the U.S., concentration did not change significantly as a result of the merger.

[4] Indeed, brand concentration may understate concentration in the wholesale market, because some branded wholesale sellers also supply unbranded gasoline to unbranded retail stations. The brand concentration statistics used here would not attribute these unbranded sales by branded wholesalers to the branded wholesaler.

[5] The *Merger Guidelines* presume anticompetitive effects when the post-merger Herfindahl-Hirschman Index ("HHI") is over 1800 and there is an increase of more than 100 points. HHI is a statistical index that measures the degree of concentration in a relevant antitrust market. Those metropolitan areas and the changes in HHI would have been: Albany, Georgia (post-merger HHI 3674, increase of 542); Charleston, South Carolina (1865/362); Charlotte, North Carolina (1909/610); Charlottesville, Virginia (2214/278); Clarkesville, Tennessee (1863/492); Cleveland, Ohio (1859/124); Columbia, South Carolina (2257/738); Columbus, Georgia (2194/351); Cumberland, Maryland (2592/161); Dothan, Alabama (2259/235); Fayetteville, North Carolina (2635/795); Florence, Alabama (1959/269); Goldsboro, North Carolina (2133/310); Hattiesburg, Mississippi (2214/281); Jackson, Tennessee (2051/508); Memphis, Tennessee (1948/468); Myrtle Beach, South Carolina (2138/353); Pittsburgh, Pennsylvania (2129/663); Raleigh, North Carolina (2032/535); Rocky Mount, North Carolina (2003/302), Savannah, Georgia (2668/515); Sumter, South Carolina (1920/528); Tallahassee, Florida (2366/794); Toledo, Ohio (2022/351); and Youngstown, Ohio (2540/1043).

70% of wholesale sales; in 15 markets, the top four firms would have had more than 80%.[6]

Market shares and concentration levels of this magnitude raise antitrust concern because they suggest that a small number of firms might, after this merger, be able to raise price without losing significant sales to what could well be an insignificant fringe.[7] *See, e.g., United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1283-84 (7th Cir. 1990). Concerns about collusion or coordination, and consequent price increases to consumers, are more pronounced in markets -- such as gasoline markets -- where (among other factors) the product is homogeneous and prices are generally observable, making it relatively easier for a small number of firms to coordinate and to detect deviation.

Of course, high market concentration is less of a threat to consumers if retailers in the market are likely to switch to new sources of supply in the event of a wholesale price increase. But, we require persuasive evidence that entry would be timely, likely and sufficient to defeat a coordinated price increase. *Merger Guidelines* § 3. Our colleague concludes that such entry could occur, and is likely to occur, "if there are enough branded retail gasoline stations that could switch and become customers of the new wholesale entrant."[8] We do not disagree with this analysis, but we are unpersuaded by the investigative record here that there is a sufficient likelihood that enough switching would occur to allay our concerns. The history of switching in these markets appears to be more among incumbents than to new entrants, and switching among incumbents (particularly among incumbents with substantial market shares) will not defeat a wholesale price increase by those incumbents. Dealers also would be less likely to switch to fringe suppliers or to new entrants if there are

[6] In addition, in five areas the HHI would have increased substantially (by more than 100 HHI points): Birmingham, Alabama (post-merger HHI 1778, increasing by 273); Mobile, Alabama (1600/160); Athens, Georgia (1654/251); Meridian, Mississippi (1705/359); and Hickory, North Carolina (1782/354). In each of these "moderately concentrated" markets, the top four firms would together have had at least 70% of wholesale sales, and independent unbranded sellers would have had less than 20%.

[7] In this case, the Commission examined the gasoline markets in which BP and Amoco competed and alleged antitrust violations in markets with a small number of fringe players, and not in markets where fringe competitors collectively appeared to have significant market presence.

[8] We all agree that our concerns about concentration among wholesale sellers of gasoline are not obviated by the asserted fact that retailers can set their own prices for retail gasoline sold at their outlets. The wholesale price of gasoline is plainly the most substantial portion of the dealer's cost, and increases in wholesale prices will likely result in increases in retail prices.

significant reasons for dealers to prefer major brands (particularly major brands that are well-established in a given area), such as the benefit of local marketing or of brand credit card programs. Moreover, dealers might not have an incentive to switch to new entrants to defeat a price increase by their suppliers in which they also may profit.

Instead, we believe that the consent order will make jobbers and open dealers able to switch, and by relieving them of financial penalties that might deter switching to new entrants, make it more likely that they will in fact switch, preventing an increase in concentration that otherwise could well give rise to a substantial risk of higher prices for gasoline in the markets alleged in the complaint. As we noted, our disagreement with our colleague is narrow: whether, in the absence of the relief under the consent order, jobbers and open dealers are sufficiently likely to switch in substantial numbers to protect the ultimate consumers from the risks that otherwise would be associated with highly concentrated gasoline markets. In this case, we believe the investigative record regarding dealer switching is insufficiently compelling to demand that ultimate consumers bear the substantial risk of higher prices for gasoline that may result from these highly concentrated markets.

STATEMENT OF COMMISSIONER ORSON SWINDLE CONCURRING IN PART AND DISSENTING IN PART

The Commission's complaint alleges that the merger of Amoco Corporation ("Amoco") and British Petroleum Company p.l.c. ("BP") is likely to substantially lessen competition or tend to create a monopoly in certain terminaling markets and in certain markets for the wholesale sale of gasoline. I agree that the merger is likely to have anticompetitive effects in terminaling markets and that the divestitures that would be required adequately remedy these antitrust violations. However, because the merger is unlikely to have anticompetitive effects in southeastern United States markets for the wholesale sale of gasoline,[1] I dissent from the allegations and relief related to those markets.

Refined gasoline is transported by pipeline from the refinery to gasoline terminals. Wholesalers sell refined gasoline from terminals

[1] The "southeastern United States markets for the wholesale sale of gasoline" include all of the "gasoline markets" described in Paragraph 19 of the proposed complaint except those located in Ohio and Pittsburgh, Pennsylvania. I support the Commission's action in the Ohio and Pittsburgh wholesaling markets.

to retail gasoline stations. Retail gasoline stations may be either unbranded or branded. Unbranded retail gasoline stations do not display the brand of a wholesaler and do not sell branded gasoline. In contrast, branded retail gasoline stations display the brand of the wholesaler, such as "Amoco" or "Texaco," and sell the wholesaler's brand of gasoline, which is refined gasoline plus proprietary additives.

Among branded retail gasoline stations, there are various types of ownership and operation arrangements. The wholesaler may itself own and operate the retail gasoline station (a "company station"). The wholesaler may own the retail gasoline station but lease the station pursuant to an agreement that requires the operator (a "lessee/dealer") to purchase branded gasoline from the wholesaler. The wholesaler may have franchisees ("open dealers") who sell branded gasoline pursuant to a franchise agreement. Finally, the wholesaler may sell branded gasoline to independent firms known as "jobbers" that distribute the branded gasoline to retail gasoline stations (which are sometimes owned by the jobber).

The complaint alleges, among other things, that the merger of Amoco and BP, both wholesalers of branded gasoline, would have an anticompetitive effect in certain southeastern United States markets for the wholesale sale of gasoline. Each of these markets would be moderately concentrated or highly concentrated after the merger, which would significantly increase the levels of concentration in these markets. The theory is that because these markets would be concentrated following the merger, wholesalers could coordinate the wholesale price of gasoline, which, in turn, would harm consumers by causing higher gasoline prices at the pump.[2]

Any effort by wholesalers to pass on a collusive price increase would be defeated if enough branded retail gasoline stations switched to other wholesalers rather than pay the higher price. Entry by new wholesalers offering lower prices could defeat a collusive price increase, and such entry is likely if there are enough branded retail gasoline stations that could switch and become customers of the new wholesale entrant.[3] Cheating by an existing wholesaler on a collusive price also is likely if enough branded retail gasoline stations would switch to make cheating worthwhile.

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[2] There is no evidence that wholesalers in these markets have already attempted to collude.

[3] Because the order should help ensure that gasoline terminaling markets in the southeastern United States remain competitive, a new wholesale entrant would be able to purchase gasoline at terminals to sell to jobbers.

Is such switching likely to occur? I certainly think so.[4] An evaluation of the southeastern markets reveals that switching is already the reality, not mere speculation or prediction. Unlike company stations and lessee/dealer stations, open dealers and jobbers have the option of responding to their wholesaler's collusive price increase by switching to another wholesaler. Open dealers and jobbers currently (and with some frequency) switch relatively easily and quickly[5] in response to changes in market conditions, including trying to combat price increases. Open dealers and jobbers have stated that they would in fact switch in response to a price increase attributable to the merger, and they have explained that they would not anticipate significant problems in switching.

Would enough branded retail gasoline stations in the southeastern markets be willing to switch to make possible new wholesale entry or cheating by an existing wholesaler? Again, I certainly think so. In most of these markets, open dealers and jobbers purchase from about 60 percent to about 80 percent of the gasoline that is sold at retail.[6] Given that open dealers and jobbers account for such a large proportion of retail gasoline sales and that they are likely to switch, enough switching likely would occur to induce entry or cheating sufficient to defeat a collusive price increase by wholesalers.

The majority of the Commission emphasizes that the concentration levels in these markets create a presumption of anticompetitive effects and that history demonstrates that switching to new wholesale entrants is unlikely to prevent these effects. Specifically, the majority believes that open dealers and jobbers will switch primarily to incumbent wholesalers. The majority reasons that switching will be limited primarily to incumbent wholesalers because many of them offer benefits (such as local marketing or brand credit card programs) that would not be offered by a new wholesale entrant.

The investigative record is to the contrary. While there has been significant switching by open dealers and jobbers among incumbent

[4] None of the public comments supplied analysis or data directly bearing on the issue of whether switching was likely to occur in these markets in the absence of the relief prescribed by the order.

[5] Switching can occur relatively quickly because, although any individual open dealer or jobber may have to wait for its contract to expire before it can switch, the short-term nature of contracts between Amoco and open dealers and jobbers means that some of those contracts are expiring at any given time. Station switching also can occur relatively inexpensively, especially because new wholesalers often reimburse open dealers and jobbers for the costs incurred in switching.

[6] By contrast, in other investigations the Commission has determined that sufficient switching would not occur in markets that are dominated by company stations and lessee/dealer stations.

wholesalers, there also has been significant switching away from incumbent wholesalers to new branded wholesalers and new unbranded wholesalers.[7] Moreover, open dealers and jobbers have stated that they would switch in response to a collusive price increase, but have not stated that their switching would be limited to moving from one incumbent wholesaler to another. Detailed economic analysis has shown that whatever non-price benefits incumbent wholesalers may be able to offer to open dealers and jobbers, they are unlikely to induce open dealers and jobbers to ignore promising opportunities offered by new wholesale entrants.[8]

Because switching is likely to defeat any collusive price increase, the merger of Amoco and BP is unlikely to have anticompetitive effects in the southeastern United States markets for the wholesale sale of gasoline. The Commission nevertheless has extracted from the merging parties a variety of costly concessions designed to facilitate switching and improve the marketplace.[9] As explained above, because market forces are likely to cause sufficient switching *without government intervention*, these measures are simply unnecessary. The Commission thus should have allowed the merger of Amoco and BP to proceed with antitrust relief limited to terminaling as well as the Ohio and Pittsburgh, Pennsylvania wholesaling situations.[10]

I therefore dissent from the aspects of this matter dealing with gasoline wholesaling in the southeastern United States markets identified in Paragraph 19 of the complaint.

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[7] For example, by offering lower prices to induce switching, Citgo has been able to enter Florida and Coastal has expanded in South Carolina. Similarly, by offering lower prices to induce switching, unbranded wholesalers (such as Kwic Trip, Racetrac, Speedway, Smile, Wilco, and Hess) also have been able to enter many of these markets.

[8] The majority also posits that instead of switching, open dealers and jobbers may decide to accept a collusive price increase, pass it on consumers at the pump, and share in the profit from the price increase. For an open dealer or jobber to share in the profit from a collusive increase, it would have to be confident that increased prices at the pump would not be undercut by other retailers. Given that wholesalers do not control the pricing at most retail gasoline stations in these markets, open dealers and jobbers would have good reason to worry that any collusive price that they sought to impose would be undercut, especially to the extent that there are unbranded retail gasoline stations in these markets.

[9] Because they distort the usual market incentives of jobbers, the order provisions designed to promote switching also may have unintended and unforeseen consequences in the marketplace.

[10] The majority has revised the order to respond to public comments regarding the provisions designed to promote switching. Assuming for the sake of argument that the types of provisions contained in the proposed order were needed to promote switching, the revisions contained in the final order are reasonable.

IN THE MATTER OF

SERVICE CORPORATION INTERNATIONAL

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-3869. Complaint, April 22, 1999--Decision, April 22, 1999

This consent order, among other things, permits Service Corporation International, the largest owner of funeral homes and cemeteries in the world, to acquire Equity Corporation International and requires the respondent to divest certain funeral service and cemetery properties to Carriage Services, Inc.

Participants

For the Commission: *Joseph Brownman, Marc Schneider, Barbara Shapiro, Harold Kirtz, James Rohrer, Maridel Freshwater Hoagland, Phillip Broyles, David von Nirschl, Roberta Baruch, William Baer, Louis Silvia, Jeffrey Fischer,* and *Christopher Garmon*.

For the respondent: *Marcus Watts* and *Annette Trip, Liddell, Sapp, Zively, Hill & LaBoon,* Houston, TX.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Service Corporation International ("SCI"), and Equity Corporation International ("ECI"), a corporation, have entered into an agreement in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that if the terms of such agreement, were they to be satisfied, would result in a violation of Section 5 of the Federal Trade Commission Act, and Section 7 of the Clayton Act, 15 U.S.C. 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT SERVICE CORPORATION INTERNATIONAL

1. Respondent SCI is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 1929 Allen

Parkway, Houston, Texas. Respondent SCI had sales in 1997 of approximately $2.4 billion.

2. Respondent SCI is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

3. Respondent SCI is, and at all times relevant herein has been, engaged in the provision of (a) funeral services in the funeral service relevant geographic markets and (b) cemetery services in the cemetery service relevant geographic markets.

II. EQUITY CORPORATION INTERNATIONAL

4. ECI is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 415 South First Street, Lufkin, Texas. ECI had sales in 1997 of approximately $135 million.

5. ECI at all times relevant herein has been engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

6. ECI at all times relevant herein has been engaged in the provision of (a) funeral services in the funeral service relevant geographic markets and (b) cemetery services in the cemetery service relevant geographic markets.

III. THE PROPOSED ACQUISITION

7. On or about August 6, 1998, respondent SCI and ECI entered into a formal agreement for respondent SCI to acquire ECI. That agreement was subsequently amended on or about December 14, 1998. The price is approximately $578 million.

IV. TRADE AND COMMERCE

8. The relevant lines of commerce in which to analyze the proposed acquisition are (a) funeral services and (b) cemetery services.

9. The relevant sections of the country in which to analyze the proposed acquisition in connection with the provision of funeral services, and the total dollar volume in sales in each market, is as follows:

Funeral Service Markets	Size of Market
a. Columbus, Georgia, & Phenix City, Alabama	$14 million
b. Evansville, Indiana	$11 million
c. Jacksonville Beach, Florida	$1.8 million
d. Roseville, California	$1.2 million
e. Ruskin and Sun City Center, Florida	$1.6 million
f. West Pasco County & Tarpon Springs, Florida	$7 million

10. The relevant sections of the country in which to analyze the proposed acquisition in connection with the provision of cemetery services, and the total dollar volume in sales in each market, is as follows:

Cemetery Service Markets	Size of Market
a. Broward County, Florida	$14.5 million
b. Chattanooga, Tennessee, and the neighboring north Georgia suburbs	$4.3 million
c. Citrus County, Florida	$1 million
d. Corpus Christi, Texas	$3.8 million
e. Eugene and Springfield, Oregon	$1.8 million
f. North Richmond, Virginia, and the northern, eastern and western suburbs of Richmond	$3.6 million
g. South Bay area of San Diego, California	$7.3 million
h. Summit County, Ohio	$11 million

V. ENTRY CONDITIONS

11. Entry into the relevant markets is difficult, and would not be timely, likely or sufficient to prevent anticompetitive effects.

VI. CONCENTRATION

12. The relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index ("HHI") or by two-firm or four-firm concentration ratios.

(a) In the funeral service markets:

(1) In Columbus, Georgia, and Phenix City, Alabama, the HHI will increases from about 2200 to about 3400;

(2) In Evansville, Indiana, the HHI will increase from about 2750 to about 3400;

(3) In Jacksonville Beach, Florida, the HHI will increase from about 7450 to about 10,000, resulting in a monopoly;

(4) In Roseville, California, the HHI will increase from about 5200 to about 10,000;

(5) In Ruskin and Sun City Center, Florida, the HHI will increase from about 3955 to about 6075, resulting in a duopoly;

(6) In West Pasco County and Tarpon Springs, Florida, the HHI will increase from about 2930 to about 4050.

(b) In the cemetery service markets:

(1) In Broward County, Florida, the HHI will increase from about 2800 to about 3750;

(2) In Chattanooga, Tennessee, and the neighboring north Georgia suburbs, the HHI will increase from about 2900 to about 5030;

(3) In Citrus County, Florida, the HHI will increase from about 5840 to about 10,000, resulting in a monopoly;

(4) In Corpus Christi, Texas, the HHI will increase from about 3550 to about 5050, resulting in a duopoly;

(5) In Eugene and Springfield, Oregon, the HHI will increase from about 4400 to about 4770;

(6) In North Richmond, Virginia, and the northern, eastern and western suburbs of Richmond, the HHI will increase from about 2760 to about 4530;

(7) In the South Bay area of San Diego, California, the HHI will increase form about 3970 to about 4660;

(8) In Summit County, Ohio, the HHI will increase from about 2350 to about 3450.

VII. EFFECTS OF THE ACQUISITION

13. The acquisition may substantially lessen competition in the relevant markets in the following ways, among others:

(a) By eliminating direct competition between respondent and ECI;

(b) By increasing the likelihood that respondent will unilaterally exercise market power; and

(c) By increasing the likelihood of, or facilitating, collusion or coordinated interaction;

each of which increases the likelihood that the prices of funeral services or cemetery services will increase, and that services to customers of funeral services or cemetery services will decrease.

VIII. VIOLATIONS CHARGED

14. The agreement described in paragraph seven 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 violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Service Corporation International ("SCI"), hereinafter sometimes referred to as "respondent," of the outstanding voting securities of Equity Corporation International, and respondent having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondent with violations of the Clayton Act and Federal Trade Commission Act;

Respondent, its attorneys, 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 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 respondent 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, 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 SCI is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 1929 Allen Parkway, Houston, Texas.

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

ORDER

I.

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

A. "*Respondent*" or "*SCI*" means Service Corporation International, its directors, officers, employees, agents, representatives, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by SCI, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

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

C. "*Acquisition*" means the proposed acquisition by SCI of Equity Corporation International.

D. "*Funeral Service*" means a group of services provided at the death of an individual, the focus of which is some form of commemorative ceremony of the life of the deceased at which ceremony the body is present; this group of services ordinarily includes, but is not limited to: removal of the body from the place of death; embalming or other preparation; making available a place for visitation and viewing, for the conduct of a Funeral Service, and for the display of caskets and outside cases; and arrangement for and conveyance of the body to a cemetery or crematory for final disposition.

E. "*Cemetery Service*" means a group of goods and services provided for the final disposition of human remains in a cemetery, whether by burial, entombment in a mausoleum or crypt, or disposition in a niche.

F. "*Assets To Be Divested*" consists of the businesses identified in Schedule A, attached to this order and made a part hereof, and all assets, leases, properties, permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the businesses operated at those locations.

G. "*Carriage*" means Carriage Services, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 1300 Post Oak Boulevard, Houston, Texas, and its subsidiary, Carriage Funeral Holdings, Inc., a Delaware Corporation operating and doing business at the same address as Carriage Services, Inc.

H. "*Carriage Agreement*" means the December 18, 1998, asset purchase agreement between respondent SCI and Carriage for the sale or assignment by respondent to Carriage of all Schedule A Assets.

II.

It is further ordered, That:

A. Respondent SCI shall divest absolutely and in good faith the Assets To Be Divested to:

1. Carriage, pursuant to the Carriage Agreement, which agreement shall not be interpreted so as to vary or contradict any of the terms of this order or the Asset Maintenance Agreement attached to this order and made a part hereof as Appendix I, no later than

(a) One hundred twenty (120) days from the date on which SCI signs the agreement containing consent order, or

(b) Seven (7) days after the Commission issues its order, whichever is earlier; or

2. An acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, within four (4) months of the date on which the Commission issues its order.

B. If respondent SCI submits any application for approval of a divestiture pursuant to paragraph II.A.2., respondent shall also provide a complete copy of such application to the Attorney General of each state in which any of the Assets To Be Divested are located. The purpose of this requirement is to allow the Attorney General of any state in which such proposed divestiture assets are located to provide information to the Commission to aid the Commission in its review and action upon each such application.

C. In each of the fourteen (14) geographic areas identified in Schedule A, attached, respondent shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Assets To Be Divested, pending the divestiture of the assets required to be divested pursuant to paragraph II.A. of this order in that particular geographic area, and preserve the ability of these assets to compete at the same levels of sales, profitability, and market share as prior to the Acquisition, and shall not permit the destruction, removal, wasting, deterioration, or impairment of any of these assets, except for ordinary wear and tear that does not affect their viability, marketability, or competitiveness, and shall transfer each asset required to be divested pursuant to Section II of this order to a Commission-approved acquirer in a manner that preserves the asset's marketability, viability, and competitiveness. Respondent SCI shall comply with all terms of the Asset Maintenance Agreement, attached to this order and made a part hereof as Appendix I. The Asset Maintenance Agreement shall continue in effect until such time as respondent has divested all of the Assets To Be Divested as required by this order.

D. The purposes of this Section II are to remedy the lessening of competition resulting from the Acquisition, as alleged in the Commission's complaint, and to ensure the continuation of the Assets To Be Divested as ongoing, viable enterprises engaged in the same businesses in which they are engaged at the time of the Acquisition.

III.

It is further ordered, That:

A. If respondent has not divested, absolutely and in good faith, the Assets To Be Divested as required by paragraph II.A. of this order, the Commission may appoint one or more trustees to accomplish the required divestitures, at no minimum price, to an acquirer or acquirers that receive(s) the prior approval of the Commission, and in a manner that receives the prior approval of the Commission. Each trustee shall be appointed to accomplish the divestitures for one or more of the geographic areas identified in Schedule A.

B. In the event that 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, the respondent shall consent to the appointment of a trustee in such action.

C. Neither the appointment of a trustee nor a decision not to appoint a trustee shall preclude the Commission from seeking civil penalties or any other relief (including, but not limited to, a court-appointed trustee) pursuant to the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

D. If a trustee is appointed by the Commission or a court pursuant to paragraphs III.A. or III.B. of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.D.3. to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the 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, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

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

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest expeditiously at no minimum price. The divestitures shall be made in the manner and to the acquirer or acquirers as set out in Section II of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, 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 respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture 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 the respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses

incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A. of this order.

10. 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 divestitures required by this order.

11. In the event that the trustee determines that he or she is unable to divest the Assets To Be Divested with respect to any geographic area in a manner consistent with the Commission's purposes as described in paragraph II.D., the trustee may divest such additional assets of respondent in that geographic area as necessary to satisfy the requirements of this order.

12. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.

13. The trustee shall report in writing to respondent and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestitures.

IV.

It is further ordered, That:

A. For a period of ten (10) years from the date this order becomes final, respondent shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, or any assets used or previously used (and still suitable for use), engaged in at the time of such acquisition, or within the two (2) years preceding such acquisition engaged in the provision of

1. Funeral Services in the following geographic areas:

(a) Phenix City, Alabama, and Columbus, Georgia, including Muscogee County, Georgia, Phenix City, Alabama, and 15-miles out from Muscogee County and Phenix City limits;

(b) Evansville, Indiana, including Posey, Vanderburgh, and Warrick Counties, Indiana;

(c) Jacksonville Beach, Florida, including Duval County east and south of the St. Johns River, and a 15-mile radius into St. Johns County from the southernmost county line of Duval County, Florida;

(d) Roseville, California, including Placer County, and Sacramento County north of the American and Sacramento Rivers and including the City of Folsum, California;

(e) Ruskin and Sun City Center, Florida, including Hillsborough County east of Tampa Bay and south of the city limits of Riverview, Florida; and

(f) West Pasco County and Tarpon Springs, Florida, including all of Pasco County west of Interstate 75, Florida, and Tarpon Springs, Florida.

2. Cemetery Services in the following geographic areas:

(a) Broward County, Florida;

(b) Chattanooga, Tennessee, and the neighboring north Georgia suburbs of Chattanooga, including Hamilton County, Tennessee, and Catoosa and Walker Counties, Georgia;

(c) Citrus County, Florida;

(d) Corpus Christi, Texas, including Nueces County, Texas;

(e) Eugene and Springfield, Oregon, including Lane County, Oregon;

(f) North Richmond, Virginia, and the northern, eastern and western suburbs of Richmond, including the City of Richmond, and Goochland, Hanover and Henrico Counties, Virginia;

(g) South Bay area of San Diego, California, including the area of San Diego County south of the northern city limits of the City of San Diego and a line from the northeast corner of the San Diego city limits eastward to the eastern boundary of San Diego County; and

(h) Summit County, Ohio.

B. The aforesaid 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"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made

to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 CFR 803.20), respondent shall not consummate the transaction until twenty (20) days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

C. Within three (3) business days of any notification to the Commission required by paragraphs IV.A. and IV.B. of this order, respondent shall deliver a copy of the Notification, return receipt requested, to the office of the Attorney General of each state in which any assets are located with respect to which notification to the Commission is required under paragraphs IV.A and IV.B.

V.

It is further ordered, That:

A. Within thirty (30) days of the date on which the respondent signs the Agreement Containing Consent Order and every thirty (30) days thereafter until respondent has fully complied with the provisions of Sections II and III of this order, respondent 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, and has complied with Sections II, III, and IV of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Sections II, III, and IV of the order, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties,

all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date on which this order is issued, annually for the next nine (9) years on the anniversary of the date this order is issued, and at other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with Section IV of this order. Said report shall include, among other things, copies of all return receipts of all Notification forms sent to any state offices in compliance with paragraph IV.C.

VI.

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

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request to counsel, respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect any facility and to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

B. Upon five (5) days' notice to counsel for respondent, and without restraint or interference from respondent, to interview officers, directors, or employees of respondent, who may have counsel present, regarding such matters.

SCHEDULE A

"ASSETS TO BE DIVESTED"

1. The following Funeral Service assets -

(a) In the Phenix City, Alabama/Columbus, Georgia, geographic area: (1) Vance Memorial Chapel, 3738 Highway 431 North, Phenix City, Alabama 36867; and (2) Vance Memorial Chapel, 2919 Hamilton Road, Columbus, Georgia 31904

(b) In the Evansville, Indiana, geographic area: Miller & Miller Colonial Chapel, 219 East Franklin Street, Evansville, Indiana 47711;

(c) In the Jacksonville Beach, Florida, geographic area: Beaches Funeral Home, 3600 South 3rd Street, Jacksonville Beach, Florida 32250;

(d) In the Roseville, California, geographic area: Cochrane's Chapel of the Roses, 103 Lincoln Street, Roseville, California 95678;

(e) In the Ruskin/Sun City Center, Florida, geographic area: Family Funeral Care Funeral Home, 1851 Rickenbacker Road, Sun City Center, Florida 33573; and

(f) In the West Pasco County, Florida, and Tarpon Springs, Florida, geographic area: Michels & Lundquist Funeral Home, 130 State Road 54, New Port Richey, Florida 34652; and

2. The following Cemetery Service assets -

(a) In the Broward County, Florida, geographic area: (1) Evergreen Cemetery, 1300 S.E. 10th Avenue, Fort Lauderdale, Florida 33316; (2) Lauderdale Memorial Park, 2001 S.W. 4th Avenue, Fort Lauderdale, Florida 33315; and (3) Sunset Memorial Gardens, 3201 19th Street, Fort Lauderdale, Florida 33311;

(b) In the Chattanooga, Tennessee, and the neighboring north Georgia suburbs of Chattanooga geographic area: (1) Lakewood Memory Gardens East Cemetery, 4621 Shallowford Road, Chattanooga, Tennessee 37411; (2) Lakewood Memory Gardens West Cemetery, 3509 Cummings Road, Chattanooga, Tennessee 37419; and (3) Lakewood Memory Gardens South Cemetery, 627 Greens Lake Road, Rossville, Georgia 30741;

(c) In the Citrus County, Florida, geographic area: Fountains Memorial Park, 4890 South Suncoast Boulevard, Homosassa Springs, Florida 34447;

(d) In the Corpus Christi, Texas, geographic area: Rose Hill Memorial Park, 2731 Comanche, Corpus Christi, Texas 78408;

(e) In the Eugene/Springfield, Oregon, geographic area: Sunset Hills Memorial Gardens, 4810 South Willamette Street, Eugene, Oregon 97405;

(f) In the North Richmond, Virginia, and the northern, eastern, and western suburbs of Richmond geographic area: Forest Lawn Cemetery, 4000 Pilots Lane, Richmond, Virginia 23222;

(g) In the South Bay area of San Diego, California, geographic area: LaVista Memorial Park, 3191 Orange Street, National City, California 91951; and

(h) In the Summit County, Ohio, geographic area: Greenlawn Memorial Park, 2580 Romig Road, Akron, Ohio 44320;

such assets to include, but not be limited to,

1. All rights, titles and interests in and to owned or leased real property, together with all appurtenances, licenses and permits, including property adjoining any cemetery property, whether held unconditionally or through an option or other device;

2. All machinery, fixtures, equipment, furniture, tools, rolling stock, and other tangible personal property;

3. All rights, titles and interests in all trade names; provided however that, with respect to the trade name "Family Funeral Care" associated with the Family Funeral Care Funeral Home located at 1851 Rickenbacker Road, Sun City Center, Florida 33573, the "Family Funeral Care" trade name shall be available for use by the acquirer for a period of 24 months;

4. All rights, titles and interests in the books, records and files pertinent to the Assets to be Divested;

5. All vendor lists, management information systems, software, catalogs, sales promotion literature, and advertising materials; and

6. All rights, titles, and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bids and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, and consignees.

APPENDIX I

ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement is by and between Service Corporation International, ("SCI"), a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 1929 Allen Parkway, Houston, Texas 77019, and the Federal Trade 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*.

PREMISES FOR AGREEMENT

Whereas, on or about August 6, 1998, SCI entered into an agreement with Equity Corporation International ("ECI"), in which SCI agreed to acquire ECI (the "Acquisition"); and

Whereas, both SCI and ECI own or operate assets that provide funeral services or cemetery services to consumers; and

Whereas, the Commission is now investigating the Acquisition to determine whether the Acquisition would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the Agreement Containing Consent Order to which this Appendix I is attached, the Commission is required to place it on the public record for a period of sixty (60) days for public comment and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules of Practice; and

Whereas, the purpose of this agreement and of the Consent Order is to preserve the Assets To Be Divested pending their divestiture to an acquirer or acquirers approved by the Commission, under the terms of the Consent Order, in order to remedy any anticompetitive effects of the Acquisition; and

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

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

Now, therefore, in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order,

it will terminate SCI's obligation to give twenty (20) days' notice to the Commission's staff prior to consummating the Acquisition, the parties agree as follows:

TERMS OF AGREEMENT

1. SCI agrees to execute, and upon acceptance by the Commission of the Agreement Containing Consent Order for public comment agrees to be bound by, the Consent Order.

2. SCI agrees that from the date this agreement is accepted until the earliest of the dates listed in subparagraphs 2.a and 2.b, it will comply with the provisions of this agreement:

a. Three business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. On the day the divestitures set out in the Consent Order have been completed.

3. SCI shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested, as listed in Schedule A of the Agreement Containing Consent Order, and shall not cause the wasting or deterioration of these assets, nor shall it cause the assets to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber or otherwise impair the marketability, viability, or competitiveness of the Assets. SCI shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use its best efforts to preserve the existing relationships with each businesses' suppliers, customers, employees and others having business relations with such businesses, in the ordinary course of their business and in accordance with past practice. SCI shall not terminate the operation of any of the businesses identified within the Assets To Be Divested. SCI shall use its best efforts to keep the organization and properties of each of the businesses identified in the Assets To Be Divested intact, including current business operations, physical facilities, working conditions and a work force of equivalent size, training and expertise associated with each business. Included in the above obligations, SCI shall, without limitation:

a. Maintain all operations and not reduce hours at any business;

b. Make all payments required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations, in a manner consistent with past practice;

c. Maintain each businesses' books and records;

d. Not display any signs or conduct any advertising that indicate that any business is moving its operations to another location or that the business will close;

e. Not change or modify in any material respect the existing advertising practices, programs and policies for any business, other than changes in the ordinary course of business consistent with past practice for the business not being closed or relocated; and

f. Not transfer any on-site employees of any business, as of the date this agreement is signed by SCI, to any other business or location, other than transfers in the ordinary course of business consistent with past practice.

4. Should the Federal Trade Commission seek in any proceeding to compel SCI to divest itself of any or all of the Assets To Be Divested, or to seek any other injunctive or equitable relief, SCI shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has not sought to enjoin the Acquisition. SCI also waives all rights to contest the validity of this agreement.

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

a. Access during the office hours of SCI, in the presence of counsel, to inspect any facility and to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of SCI relating to compliance with this Agreement; and

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

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

IN THE MATTER OF

MESA COUNTY PHYSICIANS INDEPENDENT PRACTICE ASSOCIATION, INC.

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

Docket 9284. Amended Complaint, [11]May 4, 1999--Decision, May 4, 1999*

This consent order, among other things, prohibits an organization of Colorado physicians from engaging in collective negotiations on behalf of its members; collectively refusing to contract with payers; acting as an exclusive bargaining agent for its members; restricting its members from dealing with third-party payers through an entity other than Mesa IPA; and exchanging information among physicians about the terms upon which physicians are willing to deal with third-party payers. In addition, the consent order prohibits the respondent from retaining any employee or any participating physician who Mesa IPA knows is participating in payer contract review.

Participants

For the Commission: *Markus Meier, Paul Nolan, Casey Triggs, Elizabeth Palmquist, David Pender, Robert Leibenluft, Rendell Davis, Daniel Ducore, William Baer, Louis Silvia,* and *Roger Boner*.

For the respondent: *Richard Raskin, Sidley & Austin,* Chicago, IL. *Mark Horoschak, Womble, Carlyle, Sandridge & Rice,* Charlotte, N.C. and *Thomas McMahon, Powers Phillips*, Denver, CO.

AMENDED COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Mesa County Physicians Independent Practice Association, Inc. ("Mesa County IPA" and "respondent") has violated and is violating Section 5 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, hereby issues this amended complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Mesa County IPA is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Colorado, with its address at 751 Horizon Court, Suite 256, Grand Junction, Mesa County, Colorado.

[11] * Complaint issued May 12, 1997 (unpublished).

PAR. 2. Grand Junction (population exceeds 37,600) is the largest city in Mesa County (population exceeds 100,000), Colorado, and is located approximately 30 miles east of the Utah border. Grand Junction is the largest city between Salt Lake City, Utah to the west, and Denver, Colorado to the east, a distance of approximately 400 miles.

PAR. 3. Respondent Mesa County IPA's members include at least 85% of the physicians (medical doctors and doctors of osteopathic medicine) in private practice in Mesa County, as well as at least 90% of the primary care physicians (family practitioners, general practitioners, internists, and pediatricians). These physicians compete in the Mesa County area. All of respondent's members are engaged in the business of providing health care services for a fee. Except to the extent that competition has been restrained as alleged herein, some or all of the physician members of respondent Mesa County IPA have been, and are now, in competition with each other for the provision of physician services.

PAR. 4. The general business practices of respondent Mesa County IPA and its members, including the acts and practices herein alleged, are in or affect "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 5. Respondent Mesa County IPA engages in substantial activities for the pecuniary benefit of its members. At all times relevant to this complaint, respondent is and has been organized in substantial part for the profit of its members, and is therefore a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 6. Respondent Mesa County IPA was formed in or about 1987 to promote the collective economic interests of Mesa County physicians. Respondent, acting as a combination of its members, and in conspiracy with at least some of its members, and others, has acted to restrain competition by, among other things, facilitating, entering into, and implementing agreements among its members, express or implied, to fix price and other competitively significant terms of dealing with payers, or by collectively refusing to deal with payers.

PAR. 7. Respondent Mesa County IPA has a multi-year contract with the Rocky Mountain Health Maintenance Organization ("Rocky Mountain HMO"). The alliance between respondent and Rocky Mountain HMO has created a substantial obstacle to the ability of

other payers to contract with a physician panel in Mesa County. Rocky Mountain HMO enrollees currently comprise at least 50% of the total patient volume of respondent's members.

PAR. 8. As early as 1993, respondent Mesa County IPA began negotiating collectively, on behalf of all of its members, with several third-party payers. Respondent Mesa County IPA's Board of Directors approved a set of guidelines and a fee schedule to be used by respondent's Contract Review Committee in reviewing contract offers from payers. Respondent's fee schedule resulted in significantly higher prices to several payers for physician services.

PAR. 9. Respondent Mesa County IPA, through its newsletters, documents, and other published media, has encouraged its physician members not to deal with new health plans or to do so only on terms that were approved by respondent, and has invited or contemplated concerted action by its members to avoid signing payer contracts. Respondent Mesa County IPA reviewed individual contract offerings to its members by third-party payers, and published adverse comments regarding such contracts. To facilitate its review of all contracts, respondent urged its members to forward all contracts to respondent's Contract Review Committee.

PAR. 10. A wide range of third-party payers of physician services, including preferred provider organizations, health maintenance organizations, and employer health care purchasing cooperatives, were excluded from doing business in Mesa County as a result of respondent's conduct. Although most payers sought alternatives to respondent, they were forced to contract with respondent to obtain the physician services they needed to market viable plans, or else abandon their efforts to enter Mesa County.

PAR. 11. In November 1997, respondent Mesa County IPA signed a proposed consent agreement which, if accepted by the Federal Trade Commission, would have required, *inter alia*, that respondent Mesa County IPA abolish its Contract Review Committee. In December 1997, the corporation Innovative Reviewers Inc. was incorporated in the State of Colorado by a group of individuals that included the Executive Director of respondent Mesa County IPA and the former Chairman of the Contract Review Committee of respondent Mesa County IPA. All but one of the fifteen shareholders of Innovative Reviewers Inc. had ties to respondent Mesa County IPA: twelve were physicians participating in respondent Mesa County IPA; one was the Executive Director of respondent

Mesa County IPA; and one was the husband of the Executive Director of respondent Mesa County IPA. After its formation, Innovative Reviewers Inc. engaged in conduct in which the Contract Review Committee of respondent Mesa County IPA had also engaged: reviewing payer contracts submitted by physicians, and advising those physicians whether particular terms and conditions of those contracts were acceptable.

PAR. 12. The physician members of respondent Mesa County IPA have not integrated their practices to create efficiencies sufficient to justify their acts and practices described in paragraphs six through eleven.

PAR. 13. The purpose, effects, tendency, or capacity of the conduct described in paragraphs six through eleven are and have been to restrain trade unreasonably and hinder competition in the provision of primary care physician services, as well as physician services generally, in the Mesa County area in the following ways, among others:

A. Price and other forms of competition among respondent Mesa County IPA's member physicians were unreasonably restrained;

B. Higher prices for physician services have resulted;

C. The development of alternative health care financing and delivery systems, including employer developed self-funded plans, was hindered;

D. Health plans, employers, and individual consumers were deprived of the benefits of competition in the purchase of physician services;

E. Health plans, employers, and individual consumers were deprived of the benefits of competition between health plans.

PAR. 14. The combination, conspiracy, acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. Such combination, conspiracy, acts and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with 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 contemplated relief; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all of 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

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

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having thereafter determined to modify the order contained in that consent agreement by adding paragraphs I.J, I.K, I.L, and II.F, and to issue an amended complaint to accompany that modified order, 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 Mesa County Physicians Independent Practice Association, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 751 Horizon Court, Suite 256, Grand Junction, Colorado.

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

ORDER

I.

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

A. "*Mesa IPA*" means Mesa County Physicians I.P.A., Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Mesa IPA, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. "*Payer*" means any person that purchases, reimburses for, or otherwise pays for all or part of any health care services for itself or for any other person. Payer includes, but is not limited to, any health insurance company; preferred provider organization; prepaid hospital, medical, or other health service plan; health maintenance organization; government health benefits program; employer or other person providing or administering self-insured health benefits programs; and patients who purchase health care for themselves.

C. "*Person*" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

D. "*Physician*" means a doctor of allopathic medicine ("M.D.") or a doctor of osteopathic medicine ("D.O.").

E. "*Participating physician*" means any physician (1) who is a stockholder, owner, or member of Mesa IPA; (2) who has agreed to provide services through Mesa IPA; or (3) whose services have been offered to any payer through Mesa IPA.

F. "*Provider*" means any person that supplies health care services to any other person, including, but not limited to, physicians, hospitals, and clinics.

G. "*Qualified risk-sharing joint arrangement*" means an arrangement to provide physician services in which (1) the arrangement does not restrict the ability, or facilitate the refusal, of physicians participating in the arrangement to deal with payers individually or through any other arrangement, and (2) all physicians participating in the arrangement share substantial financial risk from their participation in the arrangement through: (a) the provision of physician services to payers at a capitated rate; (b) the provision of physician services for a predetermined percentage of premium or

revenue from payers; (c) the use of significant financial incentives (*e.g.*, substantial withholds) for its participating physicians, as a group, to achieve specified cost-containment goals; or (d) the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined payment, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors.

H. "*Qualified clinically integrated joint arrangement*" means an arrangement to provide physician services in which (1) the arrangement does not restrict the ability, or facilitate the refusal, of physicians participating in the arrangement to deal with payers individually or through any other arrangement, and (2) all physicians participating in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the physicians participating in the arrangement, in order to control costs and ensure quality of the services provided through the arrangement.

I. "*Reimbursement*" means any payment, whether cash or non-cash, or other benefit received for the provision of physician services.

J. "*Payer contract*" means any contract, whether actual or proposed, offered by any payer to any physician.

K. "*Payer contract review*" means any activity, other than a qualified risk-sharing joint arrangement or a qualified clinically integrated joint arrangement, in which information concerning the terms or conditions of a payer contract is transmitted to a physician practicing in Mesa County and in which such activity

1. Facilitates collective decision-making among physicians,

2. Coordinates physicians' responses to a payer contract,

3. Disseminates to physicians the views or intentions of other physicians as to a payer contract,

4. Includes expressions of opinion as to whether the terms or conditions of a payer contract should be accepted by physicians,

5. Constitutes collective negotiation by physicians with a payer, or

6. Involves decisions as to whether to convey information concerning a payer contract to physicians based, at least in part, on

judgments about the attractiveness of the terms or conditions of the contract.

L. "*Conducting payer contract review*" means participating, or assisting, in the generation or transmission of information from payer contract review.

II.

It is further ordered, That Mesa IPA, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, cease and desist from:

A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding to:

1. Negotiate on behalf of any participating physicians with any payer or provider;

2. Deal, or refuse to deal, with any payer or provider;

3. Determine any terms, conditions, or requirements upon which participating physicians deal with any payer or provider, including, but not limited to, terms of reimbursement; or

4. Restrict the ability of participating physicians to deal with payers individually or through any arrangement outside Mesa IPA.

B. Coordinating terms of contracts with payers with any other group of physicians, including independent practice associations, located in Mesa County, Colorado, or any county contiguous to Mesa County, Colorado.

C. Exchanging, or facilitating the exchange of, information among physicians concerning the terms or conditions, including reimbursement, on which any physicians are willing to deal with payers.

D. Encouraging, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited if the person were subject to this order.

E. For a period of five (5) years from the date this order becomes final, acting as an agent for participating physicians in dealings with any payer, including transmitting terms on which participating

physicians may wish to independently contract with payers, unless each of the following conditions is met:

1. Mesa IPA's role in the contracting process between payers and participating physicians is limited to:

a. Soliciting or receiving from any participating physician, and conveying to the payer, information relating to reimbursement, outcomes data, practice parameters, utilization patterns, credentials, and qualifications of such individual physician;

b. Conveying to a participating physician any contract offer made by the payer;

c. Soliciting or receiving from the payer, and conveying to a participating physician, clarifications of proposed contract terms;

d. Providing to a participating physician objective information about proposed contract terms, including comparisons with terms offered by other payers;

e. Conveying to a participating physician any response made by the payer to information conveyed, or clarifications sought, by Mesa IPA;

f. Conveying, in individual or aggregate form, to the payer, the acceptance or rejection by a participating physician of any contract offer made by the payer; and

g. At the request of the payer, providing the individual response, information, or views of each participating physician concerning any contract offer made by such payer;

2. Each participating physician makes an independent, unilateral decision to accept or reject each contract offer made by the payer;

3. Mesa IPA does not:

a. Disseminate to any physician information about another physician's proposed or actual reimbursement, or views or intentions as to possible terms of dealing with the payer;

b. Act as an agent for the collective negotiation or agreement by the participating physicians; or

c. Encourage or facilitate collusive behavior among participating physicians; and

4. Each participating physician remains free to deal individually with any payer.

F. For a period of five (5) years from the date this order becomes final, allowing a person to be a participating physician or an employee of Mesa IPA if any managerial or professional employee, or any director of Mesa IPA, has knowledge that such person

1. Is conducting payer contract review, either directly or through an agent,

2. Has requested, and is receiving, information from payer contract review conducted by a physician practicing in Mesa County, or

3. Has entered into an agreement, other than a qualified risk-sharing joint arrangement or a qualified clinically integrated joint arrangement, with another physician practicing in Mesa County to obtain, and is receiving, information from payer contract review conducted by any person.

Provided that nothing in this order shall be construed to prohibit any agreement or conduct by Mesa IPA that is reasonably necessary to form, facilitate, manage, operate, or participate in:

a. A qualified risk-sharing joint arrangement; or

b. A qualified clinically integrated joint arrangement, if Mesa IPA has provided the prior notification(s) as required by this paragraph (b). Such prior notification must be filed with the Secretary of the Commission at least thirty (30) days prior to forming, facilitating, managing, operating, participating in, or taking any action, other than planning, in furtherance of any joint arrangement requiring such notice ("first waiting period"), and shall include for such arrangement the identity of each participant; the location or area of operation; a copy of the agreement and any supporting organizational documents; a description of its purpose or function; a description of the nature and extent of the integration expected to be achieved, and the anticipated resulting efficiencies; an explanation of the relationship of any agreement on reimbursement to furthering the integration and achieving the expected efficiencies; and a description of any procedures proposed to be implemented to limit possible anti-competitive effects resulting from such agreement(s).

If, within the first waiting period, a representative of the Commission makes a written request for additional information, Mesa IPA shall not form, facilitate, manage, operate, participate in, or take any action, other than planning, in furtherance of such joint arrangement

until thirty (30) days after substantially complying with such request for additional information ("second waiting period") or such shorter waiting period as may be granted by letter from the Bureau of Competition.

III.

It is further ordered, That Mesa IPA shall:

A. Within thirty (30) days after the date on which this order becomes final:

1. Distribute by first-class mail a copy of this order and the complaint to each participating physician, officer, director, manager, and employee; and to each payer enumerated in Attachment A to this order;

2. Amend its "Physician Manual" to bring it into compliance with this order and the antitrust laws, and distribute the amended Physician Manual to participating physicians; and

3. Abolish its Contract Review Committee.

B. Terminate any agreement or contract with any payer for the provision of physician services that does not comply with paragraph II. of this order at the earlier of: (1) the termination or renewal date (including any automatic renewal date) of such agreement or contract; or (2) receipt of a written request from a payer to terminate such agreement or contract.

C. For a period of five (5) years after the date this order becomes final:

1. Distribute by first-class mail a copy of this order and the complaint to each new participating physician, officer, director, manager, and employee within thirty (30) days of his or her admission, election, appointment, or employment;

2. Annually publish in an official annual report or newsletter sent to all participating physicians, a copy of this order and the complaint with such prominence as is given to regularly featured articles; and

3. Annually brief participating physicians on the meaning and requirements of this consent order and the antitrust laws, including penalties for the violation of this consent order.

IV.

It is further ordered, That Mesa IPA shall file a verified written report within sixty (60) days after the date this order becomes final, 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 require, setting forth in detail the manner and form in which it has complied and is complying with the order. In addition to any other information that may be necessary to demonstrate compliance, Mesa IPA shall include in such reports: (1) information identifying each payer that has contacted Mesa IPA for the purpose of contracting for physician services, the terms of any contract the payer was seeking with Mesa IPA, and Mesa IPA's response to the payer; (2) information sufficient to describe the manner in which participating physicians share financial risk in each qualified non-exclusive risk-sharing arrangement in which it participates; (3) a copy of the roster of the participating physicians who have attended the annual briefings required in paragraph III.C.3., and the text of such briefings; and (4) copies of the minutes of Mesa IPA's annual meetings.

V.

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

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, Mesa IPA shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in the possession or under its control relating to any matter contained in this order; and

B. Upon five (5) days' notice to Mesa IPA, and without restraint or interference from it, to interview officers, directors, or employees of Mesa IPA.

VII.

It is further ordered, That this order shall terminate on May 4, 2019.

ATTACHMENT A

ADMAR
Aetna/U.S. Healthcare
AllNet
America's Health Plan
Antero Health Plan
Blue Cross & Blue Shield of Colorado
Casualty Care Network
Colorado Access
Colorado Health Care Network
Colorado Health Care Purchasing Alliance, Inc.
Colorado Child Health Plan
Colorado Physician Networks
Community Health Networks
Community Health Plan of the Rockies
Comprehensive Rehabilitation Associates, Inc.
Compusys
Continental Medical Systems, Inc.
CorVel Corporation
Educators Mutual
Foundation Health Corporation
FHP Health Care
Health Payors Organization Limited
HMO Colorado
Health Care Excellence
Health Care Options
HealthCare/Compare/ Affordable/ OUCH
Humana Health Care Plan
Kaiser Permanente
Liberty Preferred Care
MEDCO Behavioral Care Systems
Medical Practice Associates
MedView Services, Inc.
Mountain Medical Associates
Mutual of Omaha Management Care/Exclusicare
New York Life/Corporate Medical Management, Inc.
Preferred Physician Agreement
Primera-First Federal
Private Healthcare Systems, Inc.
ProHealth, Inc.
Prudential Health Care
QMC3-CRA Managed Care
Rio Grande Employees Hospital Association
Rocky Mountain HMO
Sierra Health & Life Insurance
Sloans Lake Managed Care
State Farm of the Western Slope
The Healthcare Initiative, Inc.
The Segal Company
United HealthCare
USA Health Network

IN THE MATTER OF

ELI LILLY AND COMPANY

SET ASIDE 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-3594. Consent Order, July 28, 1995–Set Aside Order, May 13, 1999

This order reopens and sets aside a 1995 consent order that, among other things, required Eli Lilly and Company to ensure that the acquired company, PCS Health Systems, maintains an open formulary.

Participants

For the Commission: *Pamela Gill* and *Roberta Baruch*.

For the respondent: *Jack Kaufman, Dewey Ballantine*, New York

ORDER REOPENING AND SETTING ASIDE ORDER

On February 5, 1999, respondent Eli Lilly and Company ("Lilly") filed a Petition to Reopen and Set Aside July 28, 1995 Decision and Order ("Petition"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. In its Petition, Lilly requests that the Commission reopen the order in Docket No. C-3594 ("Order") to relieve Lilly of its compliance obligations under the Order.[1] The Petition was placed on the public record for thirty days pursuant to Section 2.51(c) of the Commission's Rules of Practice and Procedure. The Order requires that Lilly, a pharmaceuticals manufacturer, take measures to ensure that its drugs are not given unwarranted preference over those of its competitors in the "Pharmacy Benefits Management Services" ("PBM Services") that Lilly would provide after PCS Health Systems, Inc. ("PCS"), a subsidiary of McKesson Corporation ("McKesson"), became Lilly's subsidiary. Specifically, the Order requires Lilly to cause PCS, to maintain an "Open Formulary."[2] The Open Formulary must include any drug approved by an independent "Pharmacy and Therapeutics Committee," as prescribed by the Order. In addition, Lilly is required to cause PCS to accept all discounts, rebates or other concessions

[1] 120 FTC 243 (1995). Paragraphs II.B.-II.E., and III-X are the only remaining operative paragraphs of the Order. *See* Order ¶¶ II.B.-II.E., III-X.

[2] A formulary is a list of drugs used as a guide in prescribing and dispensing pharmaceuticals to health plan beneficiaries.

offered by Lilly's competitors for drugs on the Open Formulary and to accurately reflect such discounts in ranking the drugs on the formulary. Another provision of the Order prohibits PCS and Lilly from sharing proprietary or other "Non-Public Information," such as price data, that PCS may obtain from competitors of Lilly whose drugs may be placed on a PCS formulary, or from PBM competitors of PCS that must deal with Lilly to complete their formularies. Lilly is also required to obtain the prior approval of the Commission for any exclusive distribution agreement with McKesson. The other provisions of the Order require Lilly to file annual reports respecting its compliance with the Order and provide that the Commission shall have access to specified records and officers and personnel of Lilly. The Order expires, pursuant to Paragraph X, on August 18, 2005.

On January 22, 1999, Rite Aid Corporation ("Rite Aid") acquired from Lilly 100% of the stock of PCS Holdings Corporation, which in turn owns 100% of the stock of PCS. According to Lilly, with this change, the Order no longer serves any useful purpose.[3]

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 modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require.[4] 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 it inequitable or harmful to competition.[5]

The language of Section 5(b) plainly places the burden on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by

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[3] Petition at 2; Kauffman Affidavit at ¶ 6.

[4] Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Lilly has based its request upon changed conditions of fact and not the public interest standard for reopening and modifying orders.

[5] S. Rep. No. 96-500, 96th Cong., 1st Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter"). *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification").

conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order."[6] If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether 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 petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.[7] However, if the Commission denies relief, it must provide a sufficient explanation of its reasons for the denial.[8]

Upon consideration of Lilly's request and other information, the Commission finds, pursuant to Section 2.51 of the Commission's Rules of Practice and Procedure, that changed conditions of fact warrant reopening and setting aside the Order. Lilly has shown that there is no need for the Order by presenting evidence of the sale by Lilly of PCS to Rite Aid and that Lilly is not in a position to control PCS. As a result of the sale, Lilly is no longer engaged in the PBM Services business which gave rise to the Order, and the Commission has no reason to believe that Lilly has any present intent to re-enter that business in the future. The Order addresses competitive concerns that arose through the vertical integration between Lilly, a pharmaceuticals manufacturer, and PCS, a PBM Services provider. Rite Aid, unlike Lilly, is not a pharmaceuticals manufacturer. Therefore, the competitive problems that prompted issuance of the Order no longer exist. Since there are no competitive concerns that would justify the need to maintain the Order, the Order should be set aside.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened and that the Commission's Order issued on July 28, 1995, be and it hereby is, set aside as of the effective date of this Order.

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[6] S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify).

[7] *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

[8] *United States v. Louisiana-Pacific Corp.*, 754 F.2d 1445 (9th Cir. 1985).

IN THE MATTER OF

NOVARTIS CORPORATION, ET AL.

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

Docket 9279. Complaint, June 21, 1996–Final Order, May 13, 1999

This final order, among other things, prohibits Novartis Corporation and Novartis Consumer Health, Inc., successors-in-interest to Ciba-Geigy Corporation and Ciba Self Medication, Inc., and the marketers of Doan's Pills, from representing that any over-the-counter analgesic drug is more effective than other over-the-counter analgesic drugs unless they possess and rely upon competent and reliable scientific evidence that substantiates their claims. In addition, the order requires the respondents to include a corrective notice in certain of Doan's advertisements, and to possess and rely upon competent and reliable scientific evidence as substantiation for any claims regarding the efficacy, safety, benefits or performance of any over-the-counter analgesic they market.

Participants

For the Commission: *Theodore Hoppock, Michael Ostheimer, Kevin Bank, Lynne Colbert, C. Lee Peeler,* and *Susan Braman.*

For the respondents: *Michael Denger, Boyd Johnson* and *Phillip Rudolph, Gibson, Dunn & Crutcher,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Ciba-Geigy Corporation, and CIBA Self-Medication, Inc., corporations ("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 Ciba-Geigy Corporation ("Ciba-Geigy") is a New York corporation with its principal office or place of business at 444 Saw Mill River Road, Ardsley, New York.

Respondent CIBA Self-Medication, Inc. ("CIBA Self-Medication"), is a Delaware corporation with its principal office or place of business at 581 Main Street, Woodbridge, New Jersey. CIBA Self-Medication is a wholly-owned subsidiary of Ciba-Geigy.

PAR. 2. Respondents have manufactured, labeled, advertised, offered for sale, sold, and distributed drug products, including Doan's analgesic products, to the public. Doan's analgesic products are

"drugs" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

PAR. 3. CIBA-Geigy acquired the Doan's analgesic product line in 1987. Between 1987 and 1994, Ciba-Geigy advertised and sold Doan's analgesic products through its CIBA Consumer Pharmaceuticals division. CIBA Self-Medication was incorporated in December 1994, at which time Ciba-Geigy transferred the assets of CIBA Consumer Pharmaceuticals to CIBA Self-Medication. Since December 1994, CIBA Self-Medication has advertised and sold Doan's analgesic products.

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

PAR. 5. Respondents have disseminated or caused to be disseminated advertisements for Doan's analgesic products, including, but not necessarily limited to, the attached Exhibits A- I. Respondents have disseminated these or substantially similar advertisements for at least eight years. These advertisements contain the following statements and depictions:

A. Doctors measure back pain by how far you can bend. Extra Strength Doan's is made for back pain relief with an ingredient these pain relievers don't have. *[Depiction of large package of Doan's in front of smaller packages of Bayer, Advil and Tylenol]* Doan's makes back pain go away. Extra Strength Doan's. The Back Specialist. *[Superscript: The back specialist]*

[Exhibit A: "Graph" 15-Second Television]

B. Lower back pain. Neck pain. Upper back pain. There are all kinds of back pain. Doan's relieves them all. With a special ingredient these brands don't have. *[Depiction of large package of Doan's in front of smaller packages of Bayer, Advil and Tylenol]*. Relieve back pain with Doan's, the Back Specialist. *[Superscript: The Back Specialist.]*

[Exhibit B: "Black & White Back" 15-Second Television]

C. Now. Back pain doesn't have to ruin another night's sleep. Introducing new Doan's P.M. Doan's starts with a unique pain reliever these brands don't have; *[Depiction of large package of Doan's P.M. and smaller packages of Tylenol, Bayer and Advil] [Superscript: Magnesium Salicylate]* then adds a second ingredient to help you sleep. New Doan's P.M. For nighttime back pain. *[Superscript: For Nighttime Back Pain]*

[Exhibit C: "Ruin A Night's Sleep" 15-Second Television]

D. If nothing seems to help, try Doan's. It relieves back pain no matter where it hurts. Doan's has an ingredient these pain relievers don't have. *[Depiction of large package of Doan's in front of smaller packages of Bayer, Aleve, Advil and*

Tylenol] [Superscript: Magnesium Salicylate]. Doan's. The back Specialist. *[Superscript: The Back Specialist]*

[Exhibit D: "Activity - Pets" 15-Second Television]

E. There are hundreds of muscles in the back. Any one can put you in agony. That's when you need Doan's. *[Depiction of Doan's package on top of packages of Tylenol, Bayer, Aleve and Advil]*. Doan's has an ingredient the leading brands don't. It relieves back pain no matter where it hurts. There are hundreds of muscles in the back. *[Superscript: The Back Specialist]* Doan's relieves them all.

[Exhibit E: "Muscles" 15-Second Television]

F. Doan's. Made for back pain relief. With an ingredient these other pain relievers don't have. *[Depiction of packages of Bayer, Tylenol, and Advil]*.

[Exhibit F: Print Advertisement}

G. Back pain is different. Why use these pain relievers? *[Depiction of packages of Tylenol, Motrin, and Advil]* Doan's is just for back pain.

[Exhibit G: Print Advertisement]

H. BACK PAIN SUFFERERS[:] IT'S EASY TO SEE WHY YOU NEED DOAN'S. These are for all kinds of aches and pains. *[Depiction of packages of Tylenol, Bayer, Motrin, and Advil, with a magnifying glass on the Tylenol package emphasizing Tylenol's labeling indications for use for "the temporary relief of minor aches, pains, headaches and fever."]* Doan's is just for back pain.

[Exhibit H: Print Advertisement]

I. WHY TREAT GENERAL ACHES? *[Depiction of packages of Bayer, Tylenol, Advil, and Aleve]*.

BACK PAIN NEEDS THE SPECIALIST *[Depiction of packages of Regular Strength Doan's, Extra Strength Doan's, and Extra Strength Doan's P.M.]*.

DOAN'S. WITH A UNIQUE INGREDIENT THE OTHERS DON'T HAVE.

[Exhibit I: Print Advertisement]

PAR. 6. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits A- I, respondents have represented, directly or by implication, that Doan's analgesic products are more effective than other analgesics, including Bayer, Advil, Tylenol, Aleve, and Motrin, for relieving back pain.

PAR. 7. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including, but not necessarily limited to, the advertisements attached as Exhibits A- I, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph six, respondents possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 8. In truth and in fact, at the time they made the representation set forth in paragraph six, respondents did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Commissioner Azcuenaga dissenting.

EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBIT D

EXHIBIT E

EXHIBIT F

EXHIBIT G

EXHIBIT H

EXHIBIT I

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Although I have reason to believe that the respondents have violated Section 5 of the Federal Trade Commission Act as alleged in the complaint, I dissent on the ground that, because the case could have been settled on satisfactory terms, it is not in the public interest to litigate.

INITIAL DECISION

BY LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE
MARCH 9, 1998

I. INTRODUCTION

On June 21, 1996, the Commission issued its complaint in this proceeding charging that Ciba-Geigy Corporation and Ciba Self-Medication, Inc., now Novartis Corp. and Novartis Consumer Health, Inc. ("Novartis" or respondents), successors-in-interest to Ciba-Geigy and Ciba Self-Medication (*see* order dated April 23, 1997), violated Section 5 of the Federal Trade Commission Act.

Novartis manufactures, advertises and sells Doan's analgesic products. The complaint alleges that Novartis has represented, directly or by implication, that these products are more effective than other analgesics, including Bayer, Advil, Tylenol, Aleve, and Motrin, for relieving back pain.

The complaint further charges that Novartis has, by the use of several ads, falsely represented, directly or by implication, that at the time it made its effectiveness claims, it possessed and relied upon a reasonable basis that substantiated them.

After extensive pretrial discovery, trial was held in Washington, D.C. The record was closed on December 5, 1997 and the parties filed their proposed findings on December 19, 1997. Replies were filed on January 16, 1998.

This decision is based on the transcript of testimony, the exhibits which I received in evidence, and the proposed findings of fact and conclusions of law, and answers thereto, filed by the parties. I have adopted several proposed findings verbatim. Others have been adopted in substance. All other findings are rejected either because they are not supported by the record or because they are irrelevant.

II. FINDINGS OF FACT

A. Novartis

1. Respondent Novartis is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its offices and principal place of business located at 556 Morris Avenue, Summit, New Jersey. Respondent Novartis Consumer Health, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 560 Morris Avenue, Summit, New Jersey. Novartis Consumer Health, Inc., is a subsidiary of Novartis Corporation. (*See* Ans ¶ 1; JX 2 ¶ 11.)[1]

2. Novartis and Novartis Consumer Health, Inc., (hereinafter, individually and collectively referred to as "Novartis") are successors-in-interest to, respectively, Ciba-Geigy Corporation and Ciba Self-Medication, Inc. (hereinafter individually, and collectively referred to as "Ciba") (JX 2 ¶ 11).

3. On April 23, 1997, upon agreement of the parties, Novartis was substituted for Ciba as respondent in this proceeding. (Order dated March 23, 1997.)

4. Novartis is a subsidiary of Novartis AG, a corporation organized, existing, and doing business under and by virtue of the laws of Switzerland with its office and principal place of business located at Centralbahnstrasse 7, CH-4010 Basel, Switzerland. (*Ciba-Geigy Limited,* Dkt. C-3725 (March 24, 1997).)

5. Novartis manufactures and sells many over-the-counter ("OTC") products in addition to Doan's, including such well known brands as Ascriptin, Ciba Vision, Desenex, Dulcolax, ExLax, Gas-X, Habitrol, Maalox, Sunkist Vitamin C, Tavist-D, Theraflu, and Triaminic. (*See, e.g.*, CX 401-A; CX 385-Z-36-39.)

6. From January 1987 to December 1994, Ciba-Geigy Corporation was responsible for the marketing and advertising of Doan's analgesic products ("Doan's"). In December 1994, Ciba transferred the Doan's line of products to Ciba Self Medication ("CSM"), a wholly-owned subsidiary. CSM was responsible for the marketing

[1] Abbreviations used in this decision are:

Cplt:	Complaint	CX:	Commission Exhibit
Ans:	Answer	RX:	Respondents' Exhibit
CPF:	Complaint Counsel's proposed findings	JX:	Joint Exhibit
RPF:	Respondents' proposed findings	Tr.:	Transcript of the proceeding
		F:	Finding of fact

and advertising of Doan's products from December 1994 to March 24, 1997 (JX 2 ¶ 13). For purposes of the Federal Trade Commission Act, 15 U.S.C. 52, Doan's analgesic products are "drugs" as defined in Section 15 of the Act, 15 U.S.C. 55 (Ans ¶ 2; JX 2 ¶ 14).

7. At all relevant times, the acts and practices of Novartis challenged in the complaint have been in or affecting commerce (Ans ¶ 4; JX 2 ¶ 15).

B. Doan's

8. Doan's has been sold in this country for over 90 years and has always been advertised (or "positioned") for the relief of back pain (Peabody Tr. 285-87) (Mr. Peabody is the Director of Marketing Research at Novartis Consumer Health, Inc.).

9. Ciba purchased the Doan's brand in early 1987 from DEP Corporation, which had shortly before acquired the brand from Jeffrey Martin, Inc. (JX 2 ¶ 12; CX 455-A; CX 500 at 19-20 [Russo Dep.]).

10. Ciba purchased the Doan's brand for approximately $35 million (CX 500 at 21-33 [Russo Dep.]) because it believed that Doan's was a brand name with a high level of awareness and potential for expanding sales (CX 501 at 24 [Sloan Dep.]). At that time, Ciba believed that Doan's did not have much of a brand image and was viewed as dated and old fashioned. This view was confirmed by consumer research that Ciba had conducted shortly after acquiring the brand (Peabody Tr. 285).

11. In 1986, before Ciba purchased the Doan's brand, Jeffrey Martin, Inc., was disseminating three different 30-second television commercials for Doan's: "Hollingshead," "Schwartz" (CX 431), and "Drake" (CX 432) (CX 508-Z-2). The creative strategy for these ads was that Doan's "relieves minor muscular back pain." The ads featured hidden camera testimonials with individuals explaining how they got relief from Doan's pills. (*See id.* at Z-2-3; CX 431; CX 432; Mazis Tr. 942-45.)

12. Until late 1987, the only Doan's analgesic product sold was named "Doan's." In the fourth quarter of 1987, Ciba introduced Extra Strength Doan's, containing a larger dose of the active ingredient. The original product was renamed "Regular Strength Doan's." (*See* Peabody Tr. 584-85; JX 2 ¶ 18; CX 455-B.) In September 1991, Ciba

introduced Doan's P.M., which contains a sleep aid (JX 2 ¶ 18; CX 455-B).

13. Regular Strength Doan's is available in 24 pill or "count" packages, Extra Strength Doan's is available in 24 count and 48 count packages, and Doan's P.M. is available in 20 count packages (CX 455-J).

14. The active analgesic ingredient in Doan's products is magnesium salicylate (JX 1 ¶ 1). Regular Strength Doan's contains 325 mg of magnesium salicylate and Extra Strength Doan's contains 467 mg of magnesium salicylate (CX 455-B). Doan's P.M. contains 500 mg of magnesium salicylate, as well as 25 mg of diphenhydramine, a sleep aid (CX 368-D; CX 455-B). The recommended dosage for all three Doan's products is two tablets (CX 497 at 40 [Esayian Dep.]; *see also* CX 510-Z-24).

15. Doan's analgesic products are sold at a price premium over general purpose analgesic products (CX 402-F; CX 496 at 23-24 [Caputo Dep.]). This is true for both Doan's factory prices (*i.e.*, the price paid by retailers) and retail prices. (*See* Peabody Tr. 331, 550-52; CX 360-Z-38; CX 497 at 173 [Esayian Dep.].) In 1992, the retail price of a 24 count package of Doan's Regular Strength tablets was $4.32, while 24 count packages of regular strength Tylenol and Bayer tablets sold for $2.61 and $2.57, respectively, constituting price premiums of 66% and 68%. (*See* CX 360-Z-38; CX 402-F.)

16. Doan's is more expensive relative to other OTC analgesics on a per pill basis (CX 402-F). The largest size packages of Doan's available, depending on the particular version, are 20, 24, or 48 count packages, whereas general analgesics are sold in substantially larger, more economical packages. (*See* CX 368-D-I; CX 402-F; CX 455-J; Peabody Tr. 551.) In 1995, a 24 count package of Doan's Regular Strength cost $.18 per pill, while in 100 count packages, Regular Strength Tylenol cost $.06 per pill, Advil cost $.08 per pill, and private label aspirin cost $.03 per pill (CX 402-F). On this basis, Doan's was sold at a 200% premium over Tylenol and a 500% premium over private label aspirin. With respect to Advil, the recommended dose is only one pill, while the recommended dose of Doan's is two pills. Accordingly, one dose of Doan's cost $.35 versus $.08 for Advil, a premium of over 300%. Doan's premium price may have been a barrier to increased brand usage (CX 501, pp. 89-90; CX 454-C), so Ciba's strategy for marketing it was to "use back pain

specific/special ingredient strategy to justify price premium" (CX 351-Z-27).

C. Doan's And The FDA

17. Product labeling for magnesium salicylate, the active ingredient in Doan's analgesic products, is regulated by the Food and Drug Administration ("FDA"). *Tentative Final Monograph on Internal Analgesic, Antipyretic, Antirheumatic Products for Over-the-Counter Human Use* (53 Fed. Reg. 46,204, Nov. 16, 1988) ("Monograph") (JX 1 ¶ 1).

18. Under the Monograph, an OTC analgesic drug product may be labeled as indicated for the temporary relief of minor aches and pain associated with one or more of the following: a cold, the common cold, sore throat, headache, toothache, muscular aches, backache, premenstrual or menstrual periods or cramps, and arthritis. 53 Fed. Reg. at 46,209. (JX 1-B ¶ 5.)

19. In 1988, when it promulgated the Monograph, the FDA was aware of comments expressing the concern that pain-specific labeling would suggest to consumers that "one product offers unique advantages over another for the specific indications stated on the label" (RX 88.1-Z-7). Despite this view, the FDA permitted pain-specific labeling as an alternative labeling option, concluding that such labeling "May be helpful to consumers to provide them with examples of the general types of pain for which OTC internal analgesic products are useful" (JX 1-B ¶ 5). Many OTC analgesic brands have positioned themselves for or advertised their efficacy for specific indications, such as headaches, arthritis, or back pain relief (RX 60-A-Z). Doan's specific positioning as a back pain reliever is consistent with the Monograph (JX 1-B ¶ 5; RX 88; RX 88.1) although it has not been FDA approved. (*See* CX 114-A; CX 500 at pp 14, 74-76.)

20. Although the Monograph states that magnesium salicylate is effective for pain relief for several ailments, the only indication for which Novartis has marketed Doan's has been for the relief of back pain (CX 501 at 20 [Sloan Dep.]). The manufacturers of Advil, Aleve, Bayer, Motrin, and Tylenol label their products as providing relief from pain associated with several different problems. (*See* Peabody Tr. 557; *see, e.g.,* RX 114.)

21. The Monograph does not state that any approved analgesic ingredient is more effective for the relief of back pain than any other approved ingredient (CX 415-A-Z-31) and it does not sanction a company's labeling or advertising of its analgesic product as being more effective for back pain (*id.; see also* Peabody Tr. 588-89; Scheffman Tr. 2643-44).

22. No other brand of OTC analgesic contains magnesium salicylate as its active ingredient (Peabody Tr. 314), but there are no studies demonstrating that it relieves back pain more effectively than acetaminophen, aspirin, ibuprofen or naproxen sodium (CX 584; JX 1 ¶ 9).

D. The Dissemination of Doan's Ads

23. The challenged ads were disseminated in a long-running national ad campaign beginning in May 1988, and continuing through May 1996 (JX 2 ¶¶ 25, 35, 36).

24. Ciba's ad efforts for Doan's products used national television ads and free-standing inserts ("FSI's") and, at times, radio ads disseminated in selected markets (JX 2 ¶¶ 25, 28, 29, 33-36). FSI's are ads appearing in Sunday newspaper supplements with, in some cases, attached discount coupons. FSI's are primarily used by "coupon clippers." During the relevant period Doan's FSI's were redeemed by less than 1% of newspaper subscribers (RX 160-A; Peabody Tr. 486).

25. Over the period 1988 through 1996, Ciba's broadcast ad expenditures for Doan's products totaled approximately $55 million, and its consumer promotion spending for Doan's (including FSI production and dissemination and merchandising materials) totaled about $10 million (JX 2 ¶ 21).

26. The target audience for Doan's ads was backache sufferers who treat their back pain with OTC pain relievers ("sufferers/treaters") within specified age ranges that varied over time (JX 2 ¶ 27). The goals of Ciba's ad and promotion campaign were to maintain the loyalty of existing Doan's users, encourage Doan's users to increase their usage of Doan's pills for treating their backaches, regain lapsed Doan's users, and attract new users who had been using other OTC pain relievers to treat their back pain or who were new to the analgesics market. (*See, e.g.,* Peabody Tr. 150; Stewart Tr. 3608; CX 360-Z-43; CX 455-I; CX 508-O.)

1. Television Ads

27. Between January 1987 and June 1996, Doan's television ads were disseminated nationally both on network television during daytime and late night hours, as well as on syndicated and cable television during prime time, early evening, weekend, daytime and late night. (*See* JX 2 ¶ 28; CX 370-A-Z-78; CX 371-A-Z-39; Stewart Tr. 3418-19, 3440.) They appeared during such popular television shows as One Life to Live, The Young and the Restless, General Hospital, Family Feud, Jeopardy, Wheel of Fortune, Cops, Inside Edition, Current Affair, Oprah Winfrey, Rush Limbaugh, and, in 1989, during prime time newscasts (JX 2 ¶ 29; CX 370-A-Z-78). Doan's television commercials appeared on cable stations such as the Cable News Network, Nashville Network, USA Network, Turner Network Television, Turner Broadcasting Service, Weather Channel, and Lifetime (JX 2 ¶ 29). It also bought time on cable television programs with high Southern viewership, such as "Country News Late," "Texas Connection," "Western Block," and "Truck and Tractor" (CX 371-A-Z-79; Stewart Tr. 3438-39).

28. The advertising agencies Hicks & Greist and Ketchum Advertising participated in the creative development, production, and media dissemination of Doan's television commercials from 1987 to April 1993. Jordan, McGrath, Case & Taylor, Inc. ("Jordan McGrath"), another advertising agency, participated in the creative development, production, and media dissemination of Doan's television commercials from April 1993 to June 1996. Ciba gave final approval for all advertising copy and dissemination (JX 2 ¶ 26).

29. The television ads disseminated by Ciba were 15-second spots (JX 2 ¶ 25). According to Jordan McGrath, the rationale for using 15-second ads is that they provide maximum efficiency, afford continuity and build frequency (CX 390-S; *see also* CX 503 at 110-11 [Jackson Dep.]). Ciba's one-time Marketing Director for Doan's testified that 15-second ads are an effective way of advertising the product, because Doan's television commercials had a fairly singular communication point that could be easily made in 15 seconds (CX 499 at 135 [Nagy Dep.]). Doan's competitors apparently disagree, for more than 80% of TV commercials for Tylenol, Advil, Motrin and Aleve were 30 seconds in length or longer in 1984 (JX 2-H ¶ 31; RX 36-Z-27).

30. For purposes of efficiently purchasing air time for Doan's television commercials, Ciba defined the Doan's target market in terms of the age demographics it believed best described potential Doan's purchasers. From 1988 to 1990, the age demographics of the target audience for Doan's television commercials were adults 35 years of age or older. From 1991 to 1996, the age demographics of the target audience for Doan's television commercials were adults 25 to 54 years of age (JX 2 ¶ 27; Stewart Tr. 3431).

31. Based on estimates by Ciba's ad agencies, from 1988 to 1996 television commercials for Doan's reached 80% to 90% of the Doan's target audience, on average, 20 to 27 times per year (JX 2 ¶ 28).

32. The first ads disseminated by Ciba for Doan's were 15-second versions of the "Hollingshead" and "Schwartz" television commercials developed by Doan's prior owner, Jeffrey Martin, Inc. These ads were disseminated from January 1987 through February 1988. After it introduced Extra-Strength Doan's, Ciba modified these ads by adding tag lines announcing the Extra-Strength product. These revised "Hollingshead" and "Schwartz" (CX 2) ads aired from February through May 1988 (JX 2 ¶ 25; *see also* Mazis Tr. 947; CX 500 at 57-58 [Russo Dep.]; Peabody Tr. 161, 605-607).

33. The first television commercial created by Ciba, "Graph" (CX 2; CX 13), was disseminated from May 1988 through June 1991. A television ad known alternatively as "X-Ray" or "Acetate" (CX 14), which was a variation of the "Graph" ad, was disseminated concurrently with "Graph" from August 1989 through June 1991 (JX 2 ¶ 25).

34. The "Black & White Back" television ad (CX 15) was disseminated from June 1991 through October 1992. A variation of the "Black & White Back" ad known as "Black & White Pan" (CX 7; CX 16) was disseminated from December 1992 through June 1994 (JX 2 ¶ 25).

35. The "Ruin A Night's Sleep" television ad (CX 7; CX 17) was disseminated from January 1992 through August 1992. Subsequently, "Ruin A Night's Sleep - Non-New" (CX 8; CX 18) was disseminated concurrently with "Black & White Pan" from August 1993 through June 1994 (JX 2 ¶ 25).

36. The "Activity–Pets" (CX 8; CX 22) and "Activity–Playtime" (CX 8; CX 10; CX 20) television ads were disseminated concurrently from July 1994 through July 1995 (JX 2 ¶ 25).

37. The "Muscles" television ad (CX 11; CX 23) was disseminated from August 1995 through May 1996 (JX 2 ¶ 25).

38. The most recent challenged television ad, "Muscles," last aired in May 1996 (JX 2 ¶ 25). Beginning in May 1996, a revised version of the "Muscles" ad, "New Muscles - Male" (RX 17; RX 24-A), and a revised female version, "New Muscles - Female" (RX 18), have been disseminated (RX 5-Z-84, Z-90-92; RX 17; RX 18; RX 24-A).

2. Free Standing Inserts

39. Between 1987 and mid-1996, Ciba disseminated FSI's for Doan's products in Sunday newspaper supplements two to three times per year (JX 2 ¶ 36). One FSI (CX 32-A) was disseminated on May 21, 1989 in newspapers with circulations totaling 34.9 million, and was used twice again, appearing on October 14, 1990 in 45.3 million individual newspapers (CX 29-J) and on September 29, 1991 in 12.6 million individual newspapers (CX 29-Z-4). On June 2, 1991, two different FSI's (CX 29-U; CX 29-W) appeared in 583,000 newspapers and 473,000 newspapers, respectively. On January 8, 1995, another FSI (CX 53-E; CX 544) appeared in 40.3 million newspapers.

3. Radio Ads

40. From March through December 1991, Ciba tested local radio ads for Doan's in five cities: Denver, Nashville, Oklahoma City, Orlando, and Tampa-St. Petersburg-Clearwater. For each twelve-week flight, the tested Doan's radio ads reached an estimated 45% to 52% of the target audience (adults between the ages of 25 and 54) an average of 17 to 20 times each (JX 2 ¶ 33). In 1992, at least three four-week flights of Doan's radio ads were aired in selected markets (JX 2 ¶ 34).

41. From May through September 1993, Ciba tested Spanish language Doan's radio ads (CX 58 [translated as CX 467]; CX 59 [translated as CX 468]; CX 60 [translated as CX 469]; CX 61 [translated as CX 470]; CX 62 [translated as CX 471]; CX 472 [translated as CX 473]; CX 474 [translated as CX 475]; and CX 476 [translated at CX 477]) targeted at Hispanic consumers in Houston. Three Houston radio stations broadcast between twelve and seventeen Doan's ads weekly for ten weeks (JX 2 ¶ 35).

Novartis voluntarily ceased running the challenged ads in May 1996, prior to the issuance of the complaint (Peabody Tr. 442; JX 2-E ¶ 25).

E. The Claims Conveyed By The Challenged Ads

42. Several expert witnesses were called by the parties to testify about significant issues in this case -- the claims conveyed by the challenged ads, their materiality, and the need for corrective advertising if the complaint's allegations were upheld.

1. Complaint Counsel's Experts

a. Dr. Michael B. Mazis

43. Dr. Mazis is a tenured Professor of Marketing at The American University in the Kogod College of Business Administration (Mazis Tr. 923, 925; CX 417-A, J). Dr. Mazis has taught Principles of Marketing to undergraduates; Marketing and Public Policy to graduate students; marketing research courses to both undergraduates and graduate level students; and consumer behavior courses to undergraduates, graduate level students, and Ph.D. level students (Mazis Tr. 925; CX 417-J).

44. Dr. Mazis received his Doctor of Business Administration from Pennsylvania State University in 1971 with a major in marketing and minors in social psychology and quantitative business analysis (statistics) (Mazis Tr. 924; CX 417-A). From 1971 to 1976, Dr. Mazis was an Assistant Professor and Associate Professor of Marketing at the University of Florida where he taught a variety of courses involving marketing research and consumer behavior (Mazis Tr. 924-25; CX 417-B).

45. From 1976 to 1979, Dr. Mazis served as a full time consultant, first to the FDA's Bureau of Drugs, then in the FTC's Division of National Advertising, and finally as Chief of Marketing and Consumer Research in the FTC's Office of Policy and Planning (Mazis Tr. 925; CX 417-B). During this period he conducted consumer research and worked on a variety of issues related to advertising and consumer information (Mazis Tr. 925).

46. Dr. Mazis was made a full professor at American University in 1981 (Mazis Tr. 925). From 1980 to 1989, he was the Chair of the Department of Marketing. In 1991, Dr. Mazis was awarded the Kogod College Award for Scholarship (CX 417-J).

47. Dr. Mazis has published extensively in peer-reviewed journals, including many articles with application to advertising and public policy issues (CX 417-C-H). These include an article regarding copy testing issues in FTC advertising cases and four articles regarding corrective advertising (Mazis Tr. 926-27; CX 417-E-G).

48. Dr. Mazis was awarded a $700,000 grant from the National Institutes of Health to study consumer perceptions of alcohol warning labels (Mazis Tr. 926; CX 417-C) and has served as a consultant to several government agencies, including the FTC, the FDA, the Consumer Product Safety Commission, the Department of Justice and the State of California (Mazis Tr. 926; CX 417-J).

49. Dr. Mazis has served as a consultant to numerous private corporations, has conducted litigation copy testing for Lanham Act cases, and has testified as an expert witness (Mazis Tr. 926, 929). In prior expert testimony that has been accepted by the courts, he has on a number of occasions analyzed advertising and marketing materials on the face of the ad and offered an opinion with regard to what reasonable consumers are likely to take away from such advertising or promotional materials (*id.*, 929, 932).

b. Dr. David W. Stewart

50. Dr. Stewart is a full Professor of Marketing in the Marshall School of Business at the University of Southern California (Stewart Tr. 3390-91; CX 589-A, B, E). He holds the Robert E. Brooker Chair and currently serves as the Chairperson of the Department of Marketing (Stewart Tr. 3391, 3393; CX 589-A-B). Dr. Stewart has taught a variety of graduate and undergraduate level courses related to advertising, advertising and promotional management, consumer behavior, marketing research, market analysis, marketing strategy, product management, and sales management (Stewart Tr. 3393; CX 598-E). Dr. Stewart received his Ph.D. and M.A. in psychology from Baylor University and his B.A. in psychology from Northeast Louisiana University (Stewart Tr. 3391; CX 589-A-B).

51. Dr. Stewart has had a long and distinguished academic career. Prior to his teaching at the University of Southern California, he was employed as an Associate Professor of Psychology and Business at Jacksonville State University from 1978 to 1980, and as an Associate Professor of both marketing and psychology at Vanderbilt from 1980 to 1986 (Stewart Tr. 3392; CX 589-E-F).

52. Dr. Stewart has authored or co-authored six books on advertising related issues and has written over 70 articles which have been accepted in peer reviewed academic journals (Stewart Tr. 3396; CX 589-A, Z-1-9). His published works have involved the effectiveness of comparative advertising for brands with low market share, the manner in which advertising campaigns wear in and out, the defensive role of advertising for mature brands, and whether sales increases are sufficient to determine whether an advertising campaign has been successful (Stewart Tr. 3397-98). A number of his publications have involved the ARS copy testing methodology used by Research Systems Corporation (Stewart Tr. 3397, 3450).

53. Dr. Stewart has received numerous academic honors during his teaching career. Currently he is the President of the Academic Council of the American Marketing Association and chairman of the Section on Statistics in Marketing of the American Statistical Association (Stewart Tr. 3393-95; CX 589-A, H). He is a past president of the Society of Consumer Psychology of the American Psychological Association (Stewart Tr. 3395; CX 589-A, I). He has won numerous awards, including awards from the American Academy of Advertising for best paper published during 1989 in the *Journal of Advertising* and the best paper published during 1992-1994 in the *Journal of Public Policy and Marketing* (Stewart Tr. 3397; CX 589-A, C-D).

54. Dr. Stewart has served as the editor, associate editor, or member of the editorial board of numerous academic journals (Stewart Tr. 3397; CX 589-H-J) and has served as a peer reviewer of articles submitted for publication to numerous academic journals (CX 589-J).

55. Dr. Stewart was also employed for two years as the Research Manager for a major advertising agency, Needham, Harper, and Steers (now called DDB Needham) where he managed a research department and was responsible for research, including diagnostic copy testing and communication tests, research regarding markets, and profiling consumers (Stewart Tr. 3391-92; CX 589-A, F).

56. Dr. Stewart has also done extensive consulting work for major corporations in the areas of advertising effectiveness, consumer behavior, and the structure of markets (Stewart Tr. 3398).

57. Dr. Stewart has testified as an expert witness both before the Federal Trade Commission and in U.S. district courts (Stewart Tr. 3399-3400; CX 589-A, T-U). He has previously testified as an expert

in advertising, marketing, marketing research, survey methodology, marketing communication, and branding (Stewart Tr. 3400; CX 589-A).

2. Novartis' Experts

a. Dr. David Scheffman

58. Dr. Scheffman is the Justin Potter Professor of American Competitive Enterprise and Professor of Business Strategy and Marketing at the Owen Graduate School of Management at Vanderbilt University in Nashville, Tennessee (Scheffman Tr. 2513; RX 205-A). He is also a consultant for a national consulting company, Law & Economic Consulting Group, Inc. (Scheffman Tr. 2513, 2515; RX 205-A).

59. Dr. Scheffman teaches courses in marketing, pricing, strategic management, brand equity evaluation and distribution to MBA and executive MBA students (Scheffman Tr. 2516; RX 205-C-D). Dr. Scheffman specializes in industrial organization economics, which uses various theories and tools to evaluate quantitative and qualitative evidence concerning markets and competition (Scheffman Tr. 2513).

60. Dr. Scheffman has a B.S. in mathematics from the University of Minnesota and a Ph.D. from the Massachusetts Institute of Technology in economics (Scheffman Tr. 2512; RX 205-A).

61. Dr. Scheffman worked for the Commission beginning in 1982 (RX 205-B). From 1985 to 1988, he was the Director of the Bureau of Economics, and served as the chief economist on all matters being investigated or litigated by the Commission, including consumer protection matters (Scheffman Tr. 2515; RX 205-B).

62. Dr. Scheffman has co-authored five books and written forty-one articles (RX 205-M-Q). Dr. Scheffman has written articles about the relationship between advertising and product quality, and has authored one book on consumer protection regulation (Scheffman Tr. 2524).

b. Mr. Robert Lavidge

63. Mr. Robert Lavidge was qualified as an expert in consumer survey research, marketing and advertising (Lavidge Tr. 746-47).

64. Mr. Lavidge received a B.A. with highest honors in 1943 from DePauw University, and an M.B.A. with highest honors in 1947 from the University of Chicago (Lavidge Tr. 742; RX 21-A). For over

thirty years, Mr. Lavidge has taught in the areas of marketing and advertising as a member of the adjunct faculty of the Northwestern University School of Management (Lavidge Tr. 743). Since 1980, Mr. Lavidge has served as a member of the Advisory Council for the University of Chicago Graduate School of Business (RX 21-B).

65. Since 1951, Mr. Lavidge has served as the President of Elrick & Lavidge, one of the largest consumer survey research companies in the country (Lavidge Tr. 739). As President of Elrick & Lavidge, Mr. Lavidge has participated in thousands of surveys, hundreds of which have been offered as evidence in court (Lavidge Tr. 739).

66. Mr. Lavidge has served as the President of the American Marketing Association ("AMA") (Lavidge Tr. 740). Mr. Lavidge also has served as the head of the AMA's Marketing Research Division, the chairman of the Census Advisory Committee and of the Long-Range Planning Committee, and is currently serving as the chair of the AMA's Foundation Board of Trustees, which provides a means for members of the AMA and others in the marketing field to perform public service (Lavidge Tr. 741-42).

67. Mr. Lavidge has been qualified as an expert witness concerning marketing and survey research in excess of forty times (Lavidge Tr. 746).

68. In 1961, Mr. Lavidge wrote an article for the Journal of Marketing entitled, "A Model for Predictive Measures of Advertising Effectiveness" (Lavidge Tr. 744; RX 21-C). This article is credited with introducing the concept of the "hierarchy of effects," has been reprinted in numerous publications over the years, and is regarded as a seminal article by researchers and others studying the functions and effects of advertising (Lavidge Tr. 744; Mazis Tr. 1627).

c. Dr. Jacob Jacoby

69. Dr. Jacoby was qualified as an expert in the fields of consumer behavior, consumer research, social science research methodology, and the comprehension and miscomprehension of advertising (Jacoby Tr. 2921-22).

70. Dr. Jacoby received a B.A. in Psychology in 1961 and a Masters in Psychology in 1963 from Brooklyn College (Jacoby Tr. 2910; RX 4-A). Dr. Jacoby received a Ph.D. in Social Psychology from Michigan State University in 1966 (Jacoby Tr. 2910; RX 4-A).

71. Dr. Jacoby has taught for over thirty years in the areas of advertising and marketing (Jacoby Tr. 2911-13; RX 4-A). From 1968 to 1981, Dr. Jacoby served as an assistant professor and then professor in the Department of Psychology at Purdue University (Jacoby Tr. 2911; RX 4-A). While at Purdue, Dr. Jacoby taught courses in consumer behavior and research methods (Jacoby Tr. 2911-12). Since 1981, Dr. Jacoby has held an endowed chair as the Merchants Council Professor, Consumer Behavior and Marketing at the Stern School of Business, New York University (Jacoby Tr. 2912; RX 4-A). At New York University, Dr. Jacoby has taught courses in consumer behavior, research methods, and market research, among others, to undergraduates, masters, and doctoral students (Jacoby Tr. 2912-13; RX 4-A).

72. Since 1968, Dr. Jacoby has worked as a consultant for clients including the Commission, the FDA, General Electric, Pillsbury and Proctor & Gamble, among others (Jacoby Tr. 2905-07). As a consultant, Dr. Jacoby has designed well over 1000 studies, hundreds of which have been offered in court (Jacoby Tr. 2907-08), including hundreds of studies focusing on the effects of advertising (Jacoby Tr. 2908).

73. Dr. Jacoby has served as the President of the Consumer Psychology Division of the American Psychological Association (Jacoby Tr. 2917; RX 4-B). Dr. Jacoby has served on the Executive Committee of the Market Research Council (Jacoby Tr. 2918; RX 4-C). Dr. Jacoby also has served as a reviewer of proposals for the FDA and for the National Science Foundation (Jacoby Tr. 2919; RX 4-C).

74. Dr. Jacoby has co-authored seven books and written over 100 articles, including books and articles on deceptive advertising, corrective advertising, the miscomprehension of televised and print communication, and research methodology (Jacoby Tr. 2920).

75. Dr. Jacoby has been qualified as an expert over 100 times in federal court (Jacoby Tr. 2921).

d. Dr. Morris Whitcup

76. Dr. Morris Whitcup was qualified as an expert in marketing and consumer research (Whitcup Tr. 2102). Dr. Whitcup designed, conducted and analyzed two studies for Novartis (Whitcup Tr. 2082).

77. Dr. Whitcup received a B.A. from Yeshiva College (Whitcup Tr. 2085). He subsequently received a Ph.D. in social psychology

from Columbia University in 1977 (Whitcup Tr. 2085; RX 1-A). Dr. Whitcup has over twenty years of professional experience in consumer marketing research (Whitcup Tr. 2085) and has participated in more than 2,500 marketing research studies (Whitcup Tr. 2093; RX 1-A).

78. In 1995, Dr. Whitcup founded Advanced Analytics, Inc., a full-service market research company (Whitcup Tr. 2089; RX 1-A). Advanced Analytics, Inc. is a division of Guideline Research Corporation, one of the top 50 marketing research companies in the world (Whitcup Tr. 2090; RX 1-A).

79. Over the years, Dr. Whitcup has conducted various types of consumer research studies, including tracking studies, communication studies, and attitude studies (Whitcup Tr. 2094-97).

80. Dr. Whitcup has extensive experience conducting consumer research in the pharmaceutical area (Whitcup Tr. 2088; RX 1-A). For example, Dr. Whitcup was involved in a number of studies related to the switch of Aleve from a prescription brand analgesic to an OTC product (Whitcup Tr. 2098). Dr. Whitcup also has been involved in research for the FDA involving packaging and consumer comprehension of labels and packages (Whitcup Tr. 2089).

81. Dr. Whitcup has been qualified as an expert a number of times in court and before the NAD appeals board and the NARB (Whitcup Tr. 2101; RX 1-A).

e. Dr. James Jaccard

82. Dr. James Jaccard is a professor of psychology at the State University of New York at Albany (Jaccard Tr. 1400; RX 122-C). He specializes in social science research methodology, including the design of scientific experiments and surveys and the analysis of the results to draw conclusions about consumer attitudes, behavior, and decision-making (Jaccard Tr. 1401, 1405). In connection with his work in social science research methodology, Dr. Jaccard has taught, applied, and evaluated statistical methodology for analyzing behavioral data (Jaccard Tr. 1401; RX 122-B).

83. Dr. Jaccard received an A.B. in psychology from the University of California at Berkeley in 1971 (Jaccard Tr. 1400; RX 122-C). He received his A.M. and Ph.D. in social psychology from the University of Illinois, Urbana in 1972 and 1976, respectively (Jaccard Tr. 1400; RX 122-C).

84. Dr. Jaccard has taught and practiced social science research methodology for more than twenty years (RX 122-C-D). Since 1987, he has served as a professor in the Department of Psychology at the State University of New York, Albany, New York (RX 122-C). Dr. Jaccard has taught graduate and undergraduate courses on research methodology, experimental design, and statistical methods as applied to the analysis of behavioral data (Jaccard Tr. 1402; RX 122-B-C, S).

85. Dr. Jaccard has been a statistical consultant for the federal government and the State of New York, as well as for numerous industries (Jaccard Tr. 1403-04; RX 122-B). Dr. Jaccard also has served as a consulting editor for a number of major scientific journals, and has evaluated statistical analyses of original research (Jaccard Tr. 1404-05; RX 122-B).

86. Dr. Jaccard has authored or co-authored four books addressing statistical methods for evaluating behavioral data. He also has written numerous book chapters and articles published in peer reviewed academic journals (RX 122-A, B, D to N). In these articles, Dr. Jaccard has developed, explained, and applied statistical approaches for evaluating behavioral data (Jaccard Tr. 1408). Several of Dr. Jaccard's publications have dealt specifically with consumer attitudes and decision-making (Jaccard Tr. 1406, 1408-09).

3. Facial Analysis Of The Challenged Ads

a. TV Ads

87. In the first ad Ciba created for Doan's -- "Graph" -- (CX 13) a voice-over announces that "New Extra Strength Doan's is made for back pain relief." This statement is followed by a depiction of a Doan's package on the left side of the screen and packages of three competing analgesic brands -- Advil, Extra Strength Tylenol, and Bayer -- on the right. The voice-over states: "with an ingredient these pain relievers don't have," as the spotlight on the competing brands is darkened, leaving only the Doan's package clearly visible on the screen.

88. All of the challenged television ads disseminated after "Graph" continued to focus on Doan's special efficacy in relieving back pain, and emphasized that Doan's has an ingredient not found in competing analgesics. The ads, like "Graph," display and then visually diminish competitive analgesics. The same symbolism has

been used by Doan's competitors (RX 60; CX 14; CX 15; CX 16; CX 17; CX 18; CX 20; CX 22; CX 23).

89. "X-Ray" (CX 14) is a variation of the "Graph" ad with the addition of an audio and visual reference to Doan's as "The back specialist." The Ketchum advertising executive who oversaw Doan's advertising from 1987 through 1991 testified that he intended the "back specialist" phrase to create a memorable analogy to a doctor who treats backs only. A conference report summarizing a meeting between Ciba and Jordan McGrath stated with respect to "X-Ray": "Since Doan's is the expert, Doan's works better for back pain" (CX 131-B).

90. The "back specialist" tag line was used in most subsequent Doan's television ads (CX 15; CX 16; CX 20; CX 22; CX 23).

91. In "Black & White Back" (CX 15), the ingredient the other pain relievers don't have is referred to as a "special ingredient," and in the "Ruin A Night's Sleep" ads (CX 17; CX 18) that ingredient is described as "unique." Jordan McGrath's Senior Vice President, who was responsible for the Doan's ads created subsequent to "Ruin A Night's Sleep," but who was not involved in the creation of "Black & White Back," testified that she would not have approved a Doan's advertisement that contained the phrase "with a special ingredient." (*See* CX 504 at 116 [Schaler Dep.].)

92. The final frames of "Activity–Playtime" (CX 20) and "Activity–Pets" (CX 22), Novartis' more recent ads, depict a package of Doan's alongside packages of Advil, Tylenol, Bayer, and a newly introduced competitor, Aleve, while the voice-over states that "Doan's has an ingredient these pain relievers don't have." These ads conclude with the "back specialist" tag line, as does "Muscles" (CX 23).

b. Free Standing Inserts

93. An FSI that first ran in 1989 (and that was disseminated again in 1990 and 1991) features a large Doan's package alongside smaller but clearly visible packages of Advil, Extra-Strength Tylenol, and Bayer (CX 32-A; CX 29-J; CX 29-Z-4). Prominent copy above the packages states: "Doan's. Made for back pain relief." Under this statement, and just above the packages of the competing brands, is the claim "With an ingredient these other pain relievers don't have."

94. One of two FSI's that ran in 1991 headlined: "Back Pain Sufferers -- It's Easy to See Why You Need Doan's" (CX 29-W). This

statement appears directly above packages of Bayer, Extra-Strength Tylenol, Advil, and Motrin. A magnifying glass is superimposed on the packages, highlighting an excerpt from the product labeling for Extra-Strength Tylenol, *i.e.*, that Extra Strength Tylenol is "For the temporary relief of minor aches, pains, headaches and fever." Below the competing packages is the phrase "These are for all kinds of aches and pains." To the right is a Doan's package accompanied by the words "Doan's is just for back pain." The second FSI features the statement "Back pain is different" above a display of the three competing analgesic packages, with the phrase "Why use these pain relievers?" alongside them (CX 29-U). Directly below is a package of Doan's and the words "Doan's is just for back pain." In a similar vein, a 1995 FSI asks "Why Treat General Aches?" above a display of packages of Bayer, Extra Strength Tylenol, Advil and Aleve (CX 53-E; CX 544). It continues: "Back Pain Needs the Specialist," set above pictures of Doan's packages.

c. Radio Ads

95. In a Spanish radio ad, a woman complains of back pain and a man tells her, "Buy Doan's. It's the medicine that works best when I need back pain relief" (CX 61 [translated as CX 470]). She asks, "And what is it that Doan's has that makes it work so well?" The announcer answers her, "Doan's has a unique ingredient that alleviates pain, and no other pain reliever has it." The ad concludes "Trust Doan's, the back specialist."

96. The claims in its TV, FSI and radio ads that Doan's is special because it has an ingredient other pain relievers don't have, that it is the "back specialist" (*see* CX 131-B) and that it is made for back pain relief clearly carries the message that it is more effective than other OTC analgesics for back pain relief.

d. Expert Testimony

97. Dr. Jacoby testified that it would be inappropriate for an expert to make a facial analysis of the challenged ads (Jacoby Tr. 2945).

98. Dr. Mazis disagreed, and, applying his understanding of consumer psychology and after reviewing certain Ciba strategy and research documents, testified that several Doan's ads made the alleged superiority claim. He stated that "Graph," which refers to an

"ingredient that [other] pain relievers don't have" conveys the message that Doan's is unique and different, and couples this claim with references to back pain, thus conveying the net impression that Doan's is more effective for back pain relief than other pain relievers mentioned in the ad (Mazis Tr. 932, 949-51, 957; CX 508-Z-32).

99. Dr. Mazis gave essentially the same opinion with respect to other Doan's TV ads and FSI's comparing Doan's with other OTC analgesics: "X-Ray" (adding "The Back Specialist") (CX 14; Mazis Tr. 952-54); "Black & White Back" (CX 15; Mazis Tr. 958-60); "Black & White Pan" (CX 16; Mazis Tr. 960-63); "Ruin A Night's Sleep" (CX 17; Mazis Tr. 961-62) and "Ruin A Night's Sleep - Non-New" (CX 17; CX 18; Mazis Tr. 961-63); "Activity–Pets" and "Activity–Playtime" (CX 20; CX 22; Mazis Tr. 964-66); "Muscles" (Mazis Tr. 966-69); FSI, May 1989 (CX 32-A; Mazis Tr. 971); FSI "Back Pain Is Different" (CX 29-U; Mazis Tr. 974); FSI "back pain sufferers" (CX 29-W; Mazis Tr. 974-76); FSI, 1995 (CX 53-E; CX 544; Mazis Tr. 976-78).

4. Novartis' Knowledge Of The Claims Conveyed By The Ads

100. Ciba's Marketing Department knew that advertising claims required substantiation, and that, while the OTC Analgesics Monograph supported efficacy claims, superiority claims would require one or two well-controlled clinical studies (CX 501 at 27-28 [Sloan Dep.]; *see also* CX 499 at 58-59 [Nagy Dep.]). Company officials, members of the Marketing Department, and ad agency executives were unaware of any scientific evidence that Doan's was more effective than other analgesics (*see e.g.*, CX 501 at 8-10 [Sloan Dep.]; CX 496 at 64-65 [Caputo Dep.]; CX 497 at 42 [Esayian Dep.]; CX 498 at 18-19 [Gray Dep.]; CX 499 at 58-59 [Nagy Dep.]; CX 500 at 62 [Russo Dep.]; CX 504 at 48-49 [Schaler Dep.]).

101. In a 1994 letter addressed to the Marketing Director for Doan's, Jordan McGrath's Senior Vice President responsible for Doan's stated: "Doan's cannot support product 'superiority' . . . nor can it deliver a unique or seemingly superior consumer benefit" (CX 169-D; CX 504 at 136 [Schaler Dep.]).

102. In a "demo exploratory" document attached to a summary of discussions between Jordan McGrath and Ciba regarding creative strategy for 1995, the agency noted:

While we would like to *imply* that Doan's provides superior efficacy because of its unique ingredient, we cannot clinically support this since the other brands work equally well as Doan's at relieving back pain.

(emphasis in original) (CX 147-J.)

103. In a June 1995 response to an inquiry from the Federal Trade Commission, Ciba's Vice President of Marketing responsible for Doan's wrote that there are "no such documents or studies in existence demonstrating that magnesium salicylate relieves back pain more quickly and/or effectively than acetaminophen, aspirin, ibuprofen or naproxen sodium" (CX 584).

104. Despite its awareness that it lacked substantiation, Ciba knowingly and intentionally conveyed in its ads that Doan's was better for back pain than other OTC analgesics, an intention which is shown by the creative strategy upon which the first ads it created were based: "Graph" (CX 13) and "X-Ray" (CX 14). This strategy targeted "adults 35+ who: suffer from backache" and "seek better relief than provided by all purpose pain relievers" and sought to convince them that because Doan's "is made for back pain relief" and "contains a back pain medicine that no leading analgesic product has" it "provides relief from backache that the leading pain relievers may not be able to do" (CX 508-Z-31-32; Peabody Tr. 260-61).

105. Mr. Peabody testified that a reason that Ciba tested Doan's commercials prior to dissemination was to make sure that the ad did not miscommunicate a claim for which Ciba did not have support, and that he became concerned about miscommunication if an ad communicated a claim in copy testing at a 10% to 15% level (Peabody Tr. 149-51), but that he would not be concerned if the target audience was composed of a disproportionate share of users since this group tends to play back a "more favorable message" (Peabody Tr. 617-18).

106. A communication test of the "Graph" ad conducted prior to its production and dissemination informed virtually all of the senior marketing executives at Ciba that it communicated "product superiority" to 38% of respondents (CX 225-C; Peabody Tr. 171-73). This exceeded Mr. Peabody’s 10% to 15% miscommunication threshold. An executive summary of the results of this study recommended the production of "Graph," since it had the strengths of the prior ad "as well as communicates product superiority and perceived efficacy" (CX 225-A-D). Doan’s 1989 Marketing Plan

repeated the product superiority playback and described the ad as a "strong execution which effectively communicates product superiority and perceived efficacy" (CX 335-Z-8). Ciba disseminated the "Graph" ad from May 1988 through June 1991 (JX 2 ¶ 25).

107. The report of a 1989 focus group of the "Graph" ad informed Ciba that "[m]entioning the competitive brands by name ... appears to create the impression that Doan's may in fact be better than the other brands, thereby promulgating a more favorable predisposition to trying Doan's" (CX 227-Z-3).

108. In September 1990, Ciba commissioned a communication test of three alternative commercial executions to see which best communicated Doan's "Relieving All Kinds of Back Pain" strategy. One of the three ads was the "Black & White Back" ad (CX 15). The test showed that it had a 62% open-ended communication of "superiority over other products" (CX 236-M, Z-67; Peabody Tr. 180). (An open-ended question is one that provides respondents with very little context or structure in order to obtain unprompted answers in respondents' own words (Mazis Tr. 100; Peabody Tr. 165).) The ad was tested prior to its production by the ASI 24-hour delayed-recall methodology (CX 76-A-D; CX 237-A-Z-38; Peabody Tr. 181). A memorandum from the Marketing Research Department to Ciba's senior marketing executives compared ASI test results of "Black & White Back" to an ASI test of "Graph" and reported that "'Black and White Back' does a better job than 'Graph' in establishing Doan's relief/efficacy, quality, and brand superiority" (CX 76-A, C; Peabody Tr. 183-85). A Doan's Marketing Plan also reported, "Our current execution, 'Black & White Back,' is a strong performer .... Communicates backache relief, efficacy and product superiority" (CX 360-Z-100; Peabody Tr. 263). Ciba disseminated the "Black & White Back" ad from June 1991 through October 1992 (JX 2 ¶ 25).

109. A pre-production communications test of the "Ruin A Night's Sleep" ad reported 35% open-ended communication of "superiority over other products" among non-users of Doan's and 15% open-ended communication of "superiority over other products" among Doan's users (CX 244-F, T; Peabody Tr. 188-89). A report of this study, as well as an executive summary, was distributed to the Marketing Department. Ciba disseminated the "Ruin A Night's Sleep" ad from January 1992 through August 1992, and then disseminated "Ruin A Night's Sleep - Non-New" (CX 18) from August 1993 through June 1994 (JX 2 ¶ 25).

110. In April 1993, Ciba switched the Doan's account from Ketchum Advertising to Jordan McGrath. Ciba and its new ad agency intended to convey the message that Doan's was more effective for back pain. A December 1993 Conference Report of discussions between Ciba and Jordan McGrath indicates that Ciba and the agency agreed to pursue several executions to "strongly communicate that Doan's has something the others don't have (thereby implying that Doan's is different/better)" and to "more clearly communicate that since Doan's is the expert, Doan's works better on back pain" (emphasis in originals) (CX 131-A-B).

111. In May 1994, Ciba and Jordan McGrath were put on notice regarding an implied superiority claim. Jordan McGrath wrote to Ciba:

> All three Networks are requiring substantiation for the claim "If nothing you take seems to help." The Networks believe that this language implies that Doan's provides superior efficacy vis-a-vis the competitive products shown .... As such, to make this claim, we will need substantiation that Doan's is more effective (due to its Magnesium Salicylate ingredient) at relieving back pain versus the competitors pictured.
> Importantly, our Agency council [sic] agrees with the networks.

(emphasis in original) (CX 165-A). Ciba could not provide the networks with substantiation (*see*, CX 166-A; CX 503 at 83-93 [Jackson Dep.]; CPF. ?). The "Activity" ads disseminated later contain language similar to that which the networks disapproved: "If nothing seems to help try Doan's. It relieves back pain no matter where it hurts. Doan's has an ingredient these pain relievers don't have" (CX 20).

112. Further evidence of Ciba's knowledge of its implied superiority claim involves the "Activity–Playtime" (CX 20) ad. At approximately the same time the ad was first disseminated, it was tested by ARS using its 72-hour delayed recall testing methodology (CX 169-A; CX 387-G). Several weeks after "Activity–Playtime" began airing, Jordan McGrath's Senior Vice President responsible for Doan's wrote to Ciba's Marketing Director, notifying her that the ARS testing showed 12% "implied superiority" and stating:

> Doan's cannot support product "superiority" ... nor can it deliver a unique or seemingly superior consumer benefit. Hence, it's a challenge for the advertising execution to compensate and persuasively deliver a dimension of competitive "news."

(CX 169-B, D; CX 504 at 133-34 [Schaler Dep.]). Several days later, the agency's Vice President Account Supervisor also wrote to Ciba's Marketing Director, telling her:

"Unfortunately, as we all know, in the Doan's 'Activity' executions our 'unique ingredient' story is not linked to a specific 'back pain relief' claim. Rather our claim 'Doan's has an ingredient these pain relievers don't have,' is used as a copy point that stands by itself with the objective of implied superiority."

(emphasis in original) (CX 170-B; *see* CX 503 at 55-58 [Jackson Dep.]; CX 504 at 143-44 [Schaler Dep.]). Subsequent to this correspondence, no one from Ciba asked that the "Activity–Playtime" ad be modified or withdrawn from dissemination (CX 504 at 135-36 [Schaler Dep.]; CX 503 at 57-58 [Jackson Dep.]). Ciba disseminated the "Activity–Playtime" ad from July 1994 through July 1995 (JX 2 ¶ 25).

113. In a "demo exploratory" attached to a February 1995 Conference Report of a meeting between Ciba and Jordan McGrath regarding the creative strategy for 1995, the agency noted:

While we would like to *imply* that Doan's provides superior efficacy because of its unique ingredient, we cannot clinically support this since the other brands work equally well as Doan's at relieving back pain.

(emphasis in original)(CX 147-J). Nevertheless, before the "Muscles" (CX 23) ad was produced it was also tested by ARS 72-hour delayed recall testing (CX 265-A; Peabody Tr. 191-93). In that study, 18% of those with related recall played back a "better/best product" claim (*see* CX 265-M; Peabody Tr. 196). A report of this study, as well as an executive summary, was distributed to the Marketing Department (CX 265-A). The executive summary noted that "The conclusion that our product may be better/best is more likely to be conveyed in 'Muscles' than in 'Activity Playtime' ...." (CX 265-B). Ciba disseminated the "Muscles" ad from August 1995 through May 1996 (JX 2 ¶ 25).

114. Although comparative advertising may be the optimal technique for the promotion of low-share brands (Stewart Tr. 3459) and although Mr. Peabody denied any intention by Ciba to do so (Peabody Tr. 539), I find that Ciba's advertising campaign created the false message that Doan's was more effective for the relief of back pain than other OTC analgesics. This finding is based on the clear

import of the challenged ads, Dr. Mazis' analysis of them, and Ciba's comments on those ads (F 98, 99, 102, 104, 106, 107-113).

5. Copy Tests Of The Challenged Ads

115. Respondents or their agents performed copy tests in the ordinary course of business on a number of the challenged ads. In addition, complaint counsel commissioned the United States Research Company ("USR") to execute a copy test of two of the challenged ads. These tests support the conclusion that Doan's ads communicated the false message that it was superior to other OTC analgesics for the relief of back pain.

a. Copy Tests Conducted For Ciba

(1) Bruno & Ridgeway Copy Tests Of The "Graph" Ad

116. In March 1988, Bruno & Ridgeway, an independent consumer research company, copy tested the "Graph" ad (CX 2; CX 13), a potential ad, "Twisted," and an ad which was being run, "Hollingshead" (CX 224-E; Peabody Tr. 158). The questionnaires were designed by the staff of Ciba's marketing department and researchers at Bruno & Ridgeway (Peabody Tr. 159-60; CX 502 at 70).

117. This test used the mall intercept method in six geographically dispersed shopping centers. Qualified respondents were taken to a central interviewing room and were shown one of the test ads (Mazis Tr. 996; CX 224-D; Z-97).

118. Qualified respondents included adult back pain sufferers/treaters aged 35 to 64 (CX 224-E, Z-97-98; Mazis Tr. 997; Peabody Tr. 158-59). Respondents were not required to have used or been aware of Doan's for the treatment of backache. These demographics constituted the target audience that Ciba was attempting to reach with its Doan's ads at the time (Peabody Tr. 159). This was an appropriate group of consumers upon which to test these ads (Whitcup Tr. 2383-84; Mazis Tr. 997).

119. A total of 300 copy test respondents were included in this survey (CX 224-E). Each respondent was shown one of the three tested ads which were in a rough, unfinished form. Ciba routinely tested unfinished ads to save the approximately $300,000 it would cost to produce fully three different ads, none of which might ultimately be aired (Peabody Tr. 338-39). In the experience of Ciba's marketing research department, the results obtained from copy testing

rough versions of Doan's ads provided an accurate measure of how those ads would communicate to consumers in finished form (Peabody Tr. 148-49, 338-40; CX 224-Z-99).

120. Approximately 100 respondents were exposed twice to each tested ad (CX 224-E, Z-99; Mazis Tr. 999-1000). Thereafter, they were asked to identify the advertised product, state how likely they were to buy it, and explain why (Questions 7a-8b) (CX 224-Z-100).

121. Respondents were then asked an open-ended question (F 108) (9a) asking what they thought was the main idea of the ad (*id.*; Mazis Tr. 1000-01). Thereafter, respondents were asked another open-ended question (9c) to elicit what other ideas had been communicated to them by the ad (CX 224-Z-101; Mazis Tr. 1002). There is nothing in the questionnaire that would bias the results of the copy test (CX 502 at 74 [Wright Dep.]).

122. In response to question 9a, 18% of the respondents answered that the main idea of the "Graph" ad was "Superior to other products" (CX 224-M; Mazis Tr. 1002). When the results of the "main idea" question (9a) and the "other ideas" question (9c) were netted, 38% of the respondents exposed to the "Graph" ad were coded as answering that it communicated that Doan's was "Superior to other products" (CX 224-M; Mazis Tr. 1003; Peabody Tr. 163-64).

123. The open-ended responses that were coded as "Superior to other products" only included responses that Doan's was "better than/more effective than other products" (CX 224-Z-22; Mazis Tr. 1006; CX 502 at 84 [Wright Dep.]). In their own research conducted for this litigation, the experts for both parties coded such "better than/more effective than other products" responses to mean superior efficacy for back pain, since back pain is the subject of the ads (Whitcup Tr. 2418-23; Jacoby Tr. 3063; Lavidge Tr. 902-03; RX 128-D-E). The "Superior to other products" category is equivalent to the superior efficacy claim alleged in the complaint (Mazis Tr. 1007).

124. A 38% communication of a superior efficacy message in response to open-ended questions is quite high (Mazis Tr. 1009). In its report to Ciba, Bruno & Ridgeway concluded that the "Graph" ad was "successful at communicating the more specific ideas of: . . . Superiority to other products" (CX 224-K).

125. Respondents' marketing research department recommended "Graph" for finished production since it had many of the same

strengths as "Hollingshead" and communicated product superiority and perceived efficacy (CX 225-D).

126. The "Graph" test did not use a control ad, *i.e.*, an ad that is similar to the tested ad but which is believed not to make the claim that the tested ad is making. The purpose of a control ad is to account for "noise" -- responses that come from sources other than the ad's communication (Mazis Tr. 1077-78). For close-ended questions, the results of the control ad are subtracted from the results of the test ad to net out the effects of such noise. (Close-ended questions ask about specific topics and provide the respondent with a finite number of response options such as "yes" or "no" or "more," "same" or "less," *Kraft, Inc.*, 114 FTC 40, 68 (1991).) The results obtained from open-ended questions are usually not deducted from the test ad (Jacoby Tr. 325).

127. Copy testing research done in the ordinary course of business for Ciba did not employ control ads (*id*. at 354-56). Ciba relied heavily upon these copy tests in making consumer research-based business decisions (Peabody Tr. 354-56, 622).

128. The "Hollingshead" ad tested in CX 224 had an Extra-Strength tag line to announce its introduction. Only 7% of the respondents exposed to "Hollingshead" were coded as saying it conveyed a "superior to other products" claim. Thirty-seven percent of them were coded as stating that it communicated extra strength (CX 224-M; Mazis Tr. 1009).

129. Both the "Graph" and "Hollingshead" ads promoted Extra-Strength Doan's. Of the respondents viewing the "Graph" ad, 38% were coded as stating it communicated "Superior to other products," but only 24% were coded as stating it communicated "Extra Strength." Conversely, 7% of the respondents viewing "Hollingshead" were coded as stating the ad communicated "Superior to other products," but 37% were coded as stating it communicated "Extra-Strength" (CX 224-M). There is no correlation between consumer playback of the extra strength nature of the advertised Doan's product and consumer playback of superior efficacy (CX 224-M; Whitcup Tr. 2376-81).

130. Responses to open-ended questions 9a and 9c that were coded as "Extra-Strength" in CX 224 were not included in the "Superior to other products" code (Peabody Tr. 610-12; Whitcup Tr. 2355). Based upon the copy test results, Ciba's marketing research

department concluded that "Extra Strength" was a secondary message for the "Hollingshead" execution. It did not find "Extra Strength" to be a secondary message in the "Graph" ad, which the marketing research department stated "was perhaps due to greater intrusiveness of Extra Strength in Hollingshead" (CX 225-C).

(2) Bruno & Ridgeway Copy Test Of The "Black & White Back" Ad

131. In September 1990, Bruno & Ridgeway copy tested the "Black & White Back" ad (CX 15) and two other potential ads named "Thermography" and "Broadcast News" (CX 236-E-F; Peabody Tr. 174).

132. The purpose of this mall intercept copy test was to test these ads for communication of a new message: that Doan's was effective at relieving all kinds of back pain (Peabody Tr. 357-76; CX 236-E).

133. The target audience in this test was current and lapsed Doan's users (users who had not used Doan's in the previous six months (CX 236-E-F; Peabody Tr. 376).

134. Approximately 100 copy test respondents were exposed to each tested ad (CX 236-Z-44). Each respondent was shown one of the three tested ads in unfinished form (*id*. at Z-206). The first exposure placed the Doan's ad in the middle of a reel of five commercials. The four ads surrounding the Doan's ad were for products unrelated to analgesics or back pain (CX 236-Z-44, Z-206; Mazis Tr. 1012-13). This "clutter reel" methodology was infrequently used by Ciba (Peabody Tr. 175).

135. After this first exposure, respondents were asked what products they recalled being advertised. For those who recalled a Doan's ad, three open-ended questions (5a-c) were asked to elicit respondents' take-away from the Doan's ad. Respondents were then exposed to the Doan's ad by itself (CX 236-Z-206-07; Peabody Tr. 175-76).

136. Following the second exposure to the Doan's ad, respondents were asked open-ended questions regarding what brand was advertised (questions 7a-b), what was the main idea of the ad (question 8), what other ideas was the ad trying to communicate (question 9), and what, based upon the ad, the respondent would like about the advertised product (questions 10a-b) (CX 236-Z-207-08; Mazis Tr. 1017-18). Open-ended questions 8-10 were not leading (Mazis Tr. 1023; *see* Peabody Tr. 178).

137. In response to open-ended questions, 5a-c, 46% of the respondents who saw the "Black & White Back" ad gave answers that were coded as "Superiority over other products" (CX 236-J, T; Mazis Tr. 1018; Peabody Tr. 177). Bruno & Ridgeway included a number of groups of comments into this superiority coding category, including "Better/more effective than Tylenol/Advil/aspirin," "Works better than other products," "Best backache medication," and "Works faster than other brands" (CX 236-T, Z-67-68). Dr. Mazis testified that the 46% result was extraordinarily high and demonstrates consumer take-away of the superior efficacy message (Mazis Tr. 1022).

138. Bruno & Ridgeway also netted the "Superiority over other products" responses for all of the open-ended questions (5a-c, 8, 9, and 10a-b) (CX 236-Z-67; Mazis Tr. 1021; Peabody Tr. 179). The result of that netting shows that 62% of the respondents exposed to "Black & White Back" understood it to communicate a superior efficacy claim (CX 236-Y, Z-67; Mazis Tr. 1021; Peabody Tr. 180). Bruno & Ridgeway concluded that this data established that "Black & White Back" "generate[d] high playback of Doan's being superior to other products. . . ." (CX 236-M) and that it "appear[s] to be highly successful at breaking through clutter" (CX 236-I). Clutter refers to the other commercials that were shown respondents in this copy test (CX 236-E, I; Mazis Tr. 1012-13).

139. Sixteen percent of the respondents viewing "Black & White Back" gave an answer to an open-ended question that was coded as "Extra Strength" (CX 236-Z-71). The 16% of responses coded as "Extra Strength" were not included in the "Superiority over other products" coding category (*see* Peabody Tr. 619-22; Whitcup Tr. 2355).

(3) December 1990 ASI Copy Test Of The "Black & White Back" Ad

140. In December 1990, Ciba had a research company, ASI, conduct a copy test on the same "Black & White Back" commercial that was tested in the 1990 Bruno & Ridgeway Copy Test (Peabody Tr. 386-87; RX 98-A-Z-11). Consumer playback was measured 24 hours after exposure to the commercial through telephone interviews (Peabody Tr. 387-88).

141. The 1990 ASI Copy Test reported that only 3% of the 384 respondents questioned twenty-four hours after exposure to the "Black & White Back" commercial said that it communicated "product superiority" (Peabody Tr. 389; RX 98-H). Similarly, only 1% of respondents played back that Doan's was "more effective/works better" in comparison to other products (Peabody Tr. 390; RX 98-H).

142. Ciba believed that the ASI testing method is closer to a real world viewing situation than the Bruno & Ridgeway method, and, since it measures both communication and recall, that the data from the 1990 ASI Copy Test provided more reliable evidence of the effectiveness of the "Black & White Back" commercial than data from the 1990 Bruno & Ridgeway Copy Test (Peabody Tr. 392, 394-95).

(4) The Bruno & Ridgeway Copy Test Of The "Ruin A Night's Sleep" Ad

143. In October 1991, Bruno & Ridgeway copy tested the "Ruin A Night's Sleep" and "Car Bed" ads (CX 7; CX 17; CX 244-B; Peabody Tr. 185) to determine which of the ads best communicated consumers' response to the new Doan's P.M., a line extension product aimed at people who suffered nighttime back pain (Peabody Tr. 396-97).

144. This copy test used the mall intercept procedure, and it targeted nighttime back pain sufferers/treaters within the past 6 months, aged 25-60, one-half of whom who had ever used Doan's (CX 243-A-C; CX 244-B; CX 245-H; Peabody Tr. 186-87).

145. Respondents were asked open-ended questions and a close-ended question (CX 243-D; Mazis Tr. 1033).

146. Approximately 25% of consumers gave answers that were coded "superiority over other products," a result which Dr. Mazis testified was quite high for open-ended questions. This superiority coding included such responses as "works better than others," "Better than Tylenol," "Better than Advil," "Better than Bayer" (Mazis Tr. 1039-40).

147. Four percent of the respondents reported that the "Ruin A Night's Sleep" ad communicated that Doan's "is the best brand for back pain versus other brands" (Peabody Tr. 405; CX 244-V) and Mr. Peabody claimed that the rest of the 25% superiority playback was linked to the presence of the second sleep ingredient in Doan's

P.M. which was not available in formulations offered by Doan's competitors (Peabody Tr. 405-06).

(5) 1991 ARS Copy Test Of "Ruin A Night's Sleep"

148. In 1991, ARS (F 159) tested the "Ruin A Night's Sleep" commercial and found that only 2% of the 165 backache sufferers reported 72 hours after exposure that it communicated that Doan's was "effective/works/better" and four percent of these respondents reported that the commercial communicated "good product/better/best" (Peabody Tr. 411; RX 89-Z-20). Of the 81 nighttime backache sufferers/treaters included in the test, 7% reported that the commercial communicated "good product/better/best" (Peabody Tr. 412; RX 89-Z-20).

149. In addition, there were no respondents in the 1991 ARS Copy Test who recalled that "Ruin A Night's Sleep" communicated that Doan's P.M. had a "unique combination of ingredients/pain relieving medicine that Advil, Tylenol & Bayer don't have" (Peabody Tr. 414-15; RX 89-P, R, S, T, U).

(6) The 1993 ARS Copy Test Of "Black & White Pan Rev. 15"

150. In 1993, Ciba asked ARS to conduct a copy test of the proposed "Black & White Pan Rev. 15" commercial (Peabody Tr. 436; RX 32-A-Z-33). The ARS testing methodology measures the "persuasion" of a proposed commercial on a scale of one to seven. A score of zero to two is called "inelastic" and predicts a zero percent chance of the proposed advertising generating sales (Peabody Tr. 416-18; Stewart Tr. 3522). A score of two to four is called "low elasticity" and indicates that there is only a small possibility that the advertisement will increase sales (Peabody Tr. 418). A score of four to seven is called "moderate elasticity" and predicts a 50% chance of positive sales response from the advertising (Peabody Tr. 417).

151. Dr. Stewart testified that the ARS persuasion score was a "perfectly appropriate measure" for Ciba to rely upon in determining the effectiveness of its advertising campaign (Stewart Tr. 3516).

152. "Black & White Pan Rev. 15" scored in the low elasticity range of 2.3 to 3.7 on the ARS persuasion scale (Peabody Tr. 437; RX 32-F). Despite this, Ciba ran the "Black & White Pan Rev. 15" commercial (Peabody Tr. 437).

153. In addition to poor persuasion scores, 4% of the 163 male and female back pain sufferers who viewed "Black & White Pan Rev. 15" recalled that the commercial communicated "good product/ better/best" (Peabody Tr. 438; RX 32-Y). Because playback of "good product" does not necessarily connote superiority, Mr. Peabody testified that the 4% figure overestimated the playback of a more effective claim in the 1993 ARS Copy Test (Peabody Tr. 438-39).

154. One percent of respondents recalled that "Black & White Pan Rev. 15" communicated that Doan's "contains a back pain relieving medicine that no leading analgesic product has" (Peabody Tr. 440; RX 32-M).

(7) The 1994 ARS Copy Test Of "Activity–Playtime"

155. In 1994, Ciba had ARS conduct a copy test of the proposed "Activity–Playtime" commercial. The persuasion scores for it were "abysmally low," *i.e.*, in the 1.5 to 2.1 inelastic range (Peabody Tr. 429; RX 33-J). According to ARS studies, a score in this range would not have any positive impact on Doan's sales (Stewart Tr. 3514).

156. Nevertheless, Ciba decided to run this commercial because the "prior ad we had been running I think at this point was worn out, was equally as ineffective as this one" (Peabody Tr. 429).

157. In addition to the "abysmal" persuasion scores, only 4% of the 201 male and female backache sufferers who viewed the "Activity–Playtime" commercial recalled -- 72 hours after exposure -- that the commercial communicated "works/effective/more effective" (Peabody Tr. 433; RX 33-Z-4). Three percent of these respondents recalled that the commercial communicated "good product/better/ best" (Peabody Tr. 434; RX 33-Z-4).

158. Less than ½ % of respondents recalled that "Activity–Playtime" communicated that Doan's "has an ingredient other pain relievers don't have" (Peabody Tr. 435; RX 33-Z-5). Less than ½ % of respondents recalled the commercial communicating that Doan's "has a special ingredient others don't have" (Peabody Tr. 435-36; RX 33-Z-5).

(8) The 1995 ARS Copy Test Of "Muscles"

159. In late March and early April 1995, ARS, an independent consumer research provider, implemented a 72-hour delayed recall

test of the "Muscles" ad (CX 11, 23) (CX 265; Peabody Tr. 191). ARS testing is done in a theater-type setting where respondents are pre-recruited to watch two pilot television shows. Prior to viewing the program, respondents are given a depiction of various products in each category in which the brands whose advertisements will be tested compete, and are asked to select one from each product category with the promise that one person will win their selections. They then view the program material, which is interspersed with pods of ads. At the end of the program, the product selection task is done again, with the promise that another respondent will win the products they select (Peabody Tr. 191-93; Stewart Tr. 3450-51).

160. An ARS test includes a total of 12 ads in the one hour of programming shown. The remaining 11 ads are in product categories unrelated to the ad being tested (CX 265-Z-23; Peabody Tr. 194).

161. From the data it obtains comparing the respondents' product selections made before and after exposure to the programming material and ads, ARS calculates a persuasion score for each ad tested. In making this calculation, ARS takes additional factors into account, such as the number of competitors in the product category and the degree of brand switching in that category. Positive scores are interpreted to mean that the ad will have a net persuasive affect (Stewart Tr. 3450-52; Peabody Tr. 191-93).

162. Seventy-two hours after the ARS test is conducted, respondents are recontacted by telephone. If they can remember an ad for the tested product and give some correct playback from that ad, they are considered to be a "related recaller" of the ad (Peabody Tr. 193; CX 265-Z-23). For evaluative purposes, ARS also provides a "norm" related recall score, which is an average calculated from scores obtained for all ads tested by ARS in the category in which the brand competes (Stewart Tr. 3452-53; *see* CX 265-L). The ARS "norm" against which the Doan's ads were compared was 23%+ related recall, *i.e.*, whether 23% or more of the respondents recalled the ad and gave some correct playback from it (CX 265-L). Recall above that level was viewed as more memorable than the average ad for the category, which is calculated mostly from 30-second ads. Dr. Stewart acknowledged that "Muscles," as well as "Black & White Back" and "Activity Playtime," although persuasive, were not memorable (Stewart Tr. 3449, 3452-53).

163. The persuasion scores for "Muscles" were in the low elasticity range with a low likelihood of generating a positive sales response (Peabody Tr. 441-42).

164. The results reported by ARS for the sample of "male and female back pain sufferers in past year" in the "Muscles" ad test was based upon the entire sample of 143 such respondents. Of that sample, 45% had any related recall of the tested ad and 8% were coded as having said "superiority" was a claim conveyed by the ad (CX 265-M; Peabody Tr. 196; Mazis Tr. 1064-65). As a percentage of the related recallers, however, 18% of the recalling sample took away the "superiority" claim (Mazis Tr. 1065-66; *see* Peabody Tr. 196).

(9) Doan's FSI Mail Panel Communication Test

165. In January 1991, Market Facts, an independent consumer research provider, undertook a communication study of several Doan's FSI's using its mail panel research methodology (CX 238; Peabody Tr. 207-15; CX 502 at 47-49 [Wright Dep.]).

166. The respondents who were surveyed by Market Facts had previously completed a mail panel questionnaire inquiring about backaches and how they are treated (CX 238-Z-126; Peabody Tr. 209). The survey was mailed to the members of the Market Facts mail panel with instructions to give the questionnaire to the person in the household who had completed the previous backache related questionnaire (CX 238-Z-126; Peabody Tr. 208-09). No verification procedure was undertaken to ensure that the individual completing this questionnaire was identical to the one who completed the earlier questionnaire (Peabody Tr. 209-10).

167. One purpose of the mail panel study was to determine the communication effect of five FSI's (CX 502 at 47-48 [Wright Dep.]). Question 5 of the questionnaire asked respondents to rate their agreement or disagreement with a list of statements on a five-point scale, "[b]ased on what this offer [FSI] said about Doan's" (CX 238-Z-128). One of those statements was: "Is better for back pain than other pain relievers" (*id.*).

168. The results of question 5 for the statement "Is better for back pain than other pain relievers" were presented at CX 238-Z-71 (Peabody Tr. 214-15). For an FSI that was identical to CX 32-A and nearly identical to CX 29-J and CX 29-Z-4 (CPF 165), 47.4% of the

respondents strongly or somewhat agreed that the FSI made that claim (CX 238-Z-71; *see* Peabody Tr. 212-13).

169. For FSI's that were substantially similar to CX 29-U and 29-W (CPF 165), 51.5% and 59.0%, respectively, of the respondents strongly or somewhat agreed that the FSI's made the superior efficacy claim (CX 238-Z-71; *see* Peabody Tr. 207-08, 213-14).

b. Dr. Mazis' Copy Test

170. U.S. Research, Inc. ("USR") conducted a mall intercept copy test designed by Dr. Mazis to determine if two of the challenged ads communicated the superiority claim. The Doan's ads tested were "Activity–Playtime" (CX 10) and an FSI entitled "Why treat general aches? Back pain needs the back specialist" (CX 53). Dr. Mazis' use of an FSI was appropriate because it contained an ad message as well as a coupon (Mazis Tr. 976, 1902, 2034-35).

171. The copy test used the "funneling" technique: it asked open-ended questions followed by filtering questions to focus the questioning and minimize guessing, and then close-ended questions (Mazis Tr. 1084-90). The test also used a screener, a main questionnaire, and, to eliminate bias, control ads and control questions (Mazis Tr. 1077, 1087, 1090; CX 419-K-Z-8).

172. USR pretested the main questionnaire to determine if any of the questions were confusing. Some changes were made to the questionnaire (Kloc Tr. 671, 708). USR also validated the test to ensure that there was no interviewer misconduct or cheating (Mazis Tr. 1128).

173. USR's coding department developed proposed codes after review of a portion of the open-ended questions. The codes were developed by professional coders at USR, each of whom had between six and twenty years of experience as coders. To develop the codes, the coders took samplings from each of the open-ended questions to ascertain the thoughts and ideas that respondents gave to those particular questions (Kloc Tr. 694-98). They then combined similar thoughts into categories and created a list of proposed codes. The proposed codes were then reviewed by Dr. Mazis (Mazis Tr. 1069).

174. Dr. Mazis' universe was comprised of men and women, twenty-five to seventy years old who had suffered back pain in the last six months and treated it with an OTC analgesic (CX 419-F;

Mazis Tr. 1070-71). His universe matched target audiences defined by Ciba (*see* JX 2 ¶ 27).

175. Dr. Mazis chose control ads (F 126) for analgesics which focused on back pain and excluded ads that made or implied superiority claims (Mazis Tr. 1079). He decided not to use a Doan's ad purged of superiority features, as did Dr. Jacoby in his study (Mazis Tr. 1079, 1370-72; Jacoby Tr. 2948-49).

176. The control ads were a Motrin TV commercial and an FSI for Nuprin (CX 540; CX 545).

177. The control ads did not include any references to "Extra Strength" while the Doan's ads did, but this language was unlikely to communicate a superiority claim since it was hardly visible in the tested TV ad (Mazis Tr. 1919-20). Furthermore, the "extra strength" language does not carry with it, in most cases, a superiority message (CX 419-Z-76). (*See* F 129, 130, 193.)

178. Dr. Mazis' copy test gradually filtered out those respondents who did not have anything relevant to offer, then asked the qualifying respondents a series of open-ended and close-ended questions (Mazis Tr. 1084-90).

179. USR tabulated the results of each open-ended question separately (Kloc Tr. 704; *see* CX 419-Z-29-37, Z-39-47, Z-49-55, Z-59-63). It also netted the results of all three open-ended questions for each coding category (Kloc Tr. 705-06; Mazis Tr. 1091-92). This "total ad communication" tabulation lists the total number of respondents who gave a particular response to the open-ended questions, without any double counting (Kloc Tr. 705-06).

180. For each of the two challenged ads shown to respondents in Dr. Mazis's copy test, the following is the percentage who responded in their own words to the open-ended questions (which may understate the total communication (Whitcup Tr. 2829-30)), that the ads communicated that Doan's is more effective than other pain relievers:

	"Total" open-ended communication of superior efficacy based on Q2, Q3b, and Q4b
"Activity–Playtime"	56.7%
"Why treat general aches?" FSI	40.1%

(Q2: "What does the commercial state or imply about Doan's?")
(Q3b: "What reason or reasons does the commercial state for buying Doan's?")
(Q4b: "What does the commercial state or imply about Doan's in comparison to other pain relievers?")

181. If the results of only the first two, broadest open-ended questions are tabulated, the following is the percentage of consumers who responded that the tested ads communicated that Doan's is more effective than other pain relievers:

	Open-ended communication of superior efficacy based on Q2 and Q3b
"Activity–Playtime"	39%
"Why treat general aches?" FSI	25%

(Mazis Tr. 1095-96). The open-ended responses that were coded as "more effective" for back pain included responses coded that Doan's was "better overall" or "better than other pain relievers" (RX 128-D-E; Mazis Tr. 1915-18). Respondents' expert, Dr. Jacoby, also coded "best/better" and "better than other pain relievers" to mean superior efficacy for back pain, since back pain is the subject of the ads (Jacoby Tr. 3063; Mazis Tr. 1920). This is the standard manner in which to code these responses in the context of these ads (Mazis Tr. 1920-21).

182. The magnitude of the superiority responses given in response to the open-ended questions in Dr. Mazis' copy test is extremely high and is consistent with data from the copy tests respondents performed in the ordinary course of business on other challenged ads and FSI's (Mazis Tr. 1093, 1096-97).

183. For each of the two challenged ads shown to respondents in Dr. Mazis' copy test, the following is the percentage of consumers who responded that the advertisement conveyed that Doan's was more effective than other OTC pain relievers for back pain relief in response to close-ended question 5a:

	Total close-ended communication of superior efficacy based on Q5a
"Activity–Playtime"	73.3%
"Why treat general aches?" FSI	57.9%

(Mazis Tr. 1098-99; CX 419-Z-56).

(Q. 5a: "Does the ad state or imply that Doan's is more effective than other over-the-counter pain relievers for back pain relief?")

184. To control for beliefs consumers might have that all back pain claims are akin to superiority claims and for yea saying bias, Dr. Mazis first subtracted the "yea saying" responses (consumers who responded "yes" to 5b, the headache control question) ("Does the ad state or imply that the product is more effective than other OTC products for headaches?") from the total percentage of consumers who took away a "more effective" claim from the test and control ads in response to question 5a. Dr. Mazis then subtracted the result of this calculation for the control ad from the result obtained for the test ad. The use of this double control procedure provides a conservative estimate of the superiority communication conveyed by close-ended question 5a (Mazis Tr. 1087, 1100-01).

185. The superiority playback of the tested ads from the close-ended question 5a, net of controls, is as follows:

	Close-ended communication of superior efficacy based on Q5a net of controls
"Activity–Playtime"	58.0%
"Why treat general aches?" FSI	42.7%

(Mazis Tr. 1100). This magnitude of results confirms that consumers take the challenged superiority claims from these ads (Mazis Tr. 1092).

c. Dr. Jacoby's Copy Test

186. Dr. Jacoby designed a survey on behalf of respondents for the purposes of this litigation (RX 5) which measured, in separate sections, both beliefs about Doan's and the communication of selected Doan's ads (Jacoby Tr. 2962, 2971). The belief portion of this study is discussed below. The copy testing portion of Dr. Jacoby's study measured the communication of two challenged Doan's ads, "Activity–Playtime" and "Muscles." Complaint counsel challenge Dr. Jacoby's conclusion with respect to close-ended question 8(a) ("Based on what the commercial said, showed or suggested, would you say that when it comes to relieving back pain, the advertised brand is as effective, less effective, or more effective than other brands") (RX 5-Z-61) because of "priming" by question 1(d) ("Do you believe any of the brands [of analgesics] that you mentioned [in response to questions 1a-c] is more effective for back pain than any of the other brands you mentioned") (RX 5-Z-57).

187. "Priming" refers to information given or concepts raised in earlier questions in an interview that sensitize respondents to that issue and result in respondents providing that information or concept as an answer to a later question only because they had been primed to think about it by the prior question (Mazis Tr. 1109; Jacoby Tr. 3217-18).

188. Complaint counsel claim that question 1d primed respondents to answer question 8a with the "more effective" response, with the result that the superiority claim playback could have been inflated (Mazis Tr. 1109).

189. Complaint counsel's argument may be valid, but the most significant aspect of Dr. Jacoby's study is the responses to its open-ended questions which provide the most reliable measure of ad communication that can be extracted from it (Mazis Tr. 1108-10). These questions asked for the main idea of the tested ad (Q6a) and what other points or ideas the ad communicated (Q6b).

190. These results provide reasonably reliable data which support the conclusion that the superior efficacy claim was conveyed to consumers by the "Activity–Playtime" and "Muscles" ads.

191. The data reported in RX 5 shows that 35% of the respondents who viewed the "Activity–Playtime" ad took the superior efficacy claim from it based upon their responses to the two open-

ended questions (RX 5-Z-123; Jacoby Tr. 3063-64; Mazis Tr. 1111-12). Dr. Jacoby characterized that figure as "high" (Jacoby Tr. 3065).

192. The data reported in RX 5 shows that 19% of the respondents who viewed the "Muscles" ad took the superior efficacy claim from it based upon their responses to the two open-ended questions (RX 5-Z-124; Mazis Tr. 1112).

193. In response to these open-ended questions (Questions 6a-b), only one percent of respondents exposed to the "Activity–Playtime" commercial played back a "strong/extra strength/need fewer" message, while 35% of respondents played back a superiority claim (RX 5-Z-123); Jacoby Tr. 3121-22; Mazis Tr. 1728-29). Similarly, after exposure to the challenged "Muscles" commercial, only 2% of respondents played back a "strong/extra strength/need fewer" message, while nineteen percent played back a superiority claim (RX 5-Z-124; Mazis Tr. 1728-29). These data indicate that the "Extra Strength" claim is not the reason respondents are taking a superiority message (*see* Mazis Tr. 1728, 1874, 1922).

194. Dr. Mazis undertook an independent review of the verbatims from the three open-ended questions (6a-b, 7d) in Dr. Jacoby's copy test, adding a third category entitled "Faster" because these responses are properly included in the net superior efficacy take away (Mazis Tr. 1114).

195. Netting the three coding categories across the three open-ended communication questions yields a net superior efficacy take away of 47.9% for the "Activity–Playtime" ad and 22.1% for the "Muscles" ad (CX 453-C-D; Mazis Tr. 1114-15).

d. Mr. Lavidge's Copy Test

196. Mr. Lavidge designed three studies on behalf of respondents for the purpose of this litigation (RX 23) which measured both the communication of certain Doan's ads and beliefs about Doan's (Lavidge Tr. 758-60). The belief portion of the studies is discussed below. The copy testing portion of Mr. Lavidge's studies attempted to measure the communication of the challenged "Muscles" ad and the unchallenged "New Muscles - Male" ad, immediately after exposure and eleven days later (RX 23-E).

197. Mr. Lavidge's three surveys were called Test 1, Test 2, and Test 3 (RX 23-E). Tests 1 and 2 were identical except with regard to the Doan's ad shown; Test 1 showed the challenged "Muscles" ad and

Test 2 showed the modified, "New Muscles - Male" ad. Test 3 was identical in ad exposure to Test 1, but obtained its recall and belief measures between 10 and 12 days after that exposure (Lavidge Tr 758-59).

198. In Tests 1, 2, and 3, respondents were exposed to advertising in the same way. The Doan's ad of interest was included on a so-called "clutter tape" with three other 15-second ads for Bufferin, Advil, and Extra Strength Tylenol Aches & Strains (Lavidge Tr. 758, 844). Each of these ads only promoted the advertised analgesic for the treatment of back pain. These commercials were shown twice and in random order (Lavidge Tr. 776-77; RX 23-F). Prior to this study, Mr. Lavidge had never used the clutter tape methodology, a procedure which was necessary here because of the combination of the belief and communication studies (Lavidge Tr. 759-60, 844-46).

199. All of the ads on the clutter tapes were for OTC analgesics to treat back pain, an unusual procedure, for clutter ads never use a product in the same category as the tested ad (Mazis Tr. 1264-66; Peabody Tr. 175-77).

200. Mr. Lavidge and Mr. Peabody testified that they would not recommend the placement of a Doan's ad in a group of other OTC ads because consumers would have difficulty recalling the Doan's message (Peabody Tr. 156; Lavidge Tr. 849). Thus, their use in the copy test would confuse respondents (Mazis Tr. 1266; Lavidge Tr. 851) with the result that it would likely discourage ad recall (Mazis Tr. 1265-67) Test 3 also discouraged ad recall by delaying questioning until, on average, eleven days after exposure to the clutter tape (Mazis Tr. 1267).

201. Copy tests seeking to determine whether implied claims are made usually ask that question (Mazis Tr. 1269; Whitcup Tr. 2829). Mr. Lavidge's communication question did not do so (Mazis Tr. 1064, 1269).

202. Tests 1, 2, and 3 did not employ close-ended ad communication questions; the result may have been to miss playback of all ad claims (Whitcup Tr. 2829; Mazis Tr. 1994).

203. The use of the clutter tapes, the eleven-day recall methodology in Test 3, the lack of close-ended communication questions and the failure to ask for implied claims, resulted in an understatement of the ads' communication of superiority claims (Mazis Tr. 1265-68).

F. Substantiation Of The Superiority Claim

204. According to accepted principles of scientific and medical practice, two well-controlled clinical studies are required to establish the therapeutic superiority of an OTC analgesic over competing OTC analgesics (JX 1 ¶ 6).

205. Although the Advisory Review Panel On OTC Internal Analgesic and Antirheumatic Products and the FDA concluded that magnesium salicylate is safe and effective for the treatment of backache and other pain (Peabody Tr. 313-14), the OTC Analgesic Monograph does not state that any approved analgesic ingredient is more effective for the relief of back pain than any other approved analgesic product (CX 415-A-Z-31).

206. No studies have been conducted regarding the efficacy of any Doan's product or the exact formulation contained in any Doan's product offered for sale to the public (JX 1 ¶ 8).

207. There are no specific studies demonstrating the therapeutic superiority of magnesium salicylate over aspirin, acetaminophen, ibuprofen, or naproxen sodium for the relief of back pain, or for any other approved OTC Analgesic Monograph indications (JX 1 ¶ 9).

208. Ciba's former Vice President of Marketing stated that there are no documents or studies in existence demonstrating that magnesium salicylate relieves back pain more effectively than acetaminophen, aspirin, ibuprofen or naproxen sodium (CX 584; *see also* CX 501 at 22 [Sloan Dep.]).

209. The only scientific review Ciba conducted prior to purchasing the Doan's brand was a review of FDA's OTC Analgesics Monograph (CX 501 at 25 [Sloan Dep.]).

210. Ciba's former Vice President of Marketing testified that during the time he was responsible for Doan's he knew that advertising claims required substantiation and that, while the OTC Analgesics Monograph was sufficient to support basic efficacy claims, superiority claims would require one or two well-controlled clinical studies (CX 501 at 27-28 [Sloan Dep.]). He also stated that he never saw any scientific evidence that Doan's was more effective than other analgesics (CX 501 at 22 [Sloan Dep.]).

211. In 1989, Ciba's legal counsel and the Marketing Manager for Doan's received a memorandum from Ciba's medical division stating that "clinical studies have shown that magnesium salicylate is an effective analgesic and is comparable to aspirin" and that "there are

no clinical studies of Doan's in combination with other over-the-counter medications" (CX 71-B; CX 519-A).

212. As part of the network review process, Ciba sometimes received comments from the TV networks that the way a claim was structured might imply superiority and requesting substantiation (CX 501 at 37 [Sloan Dep.]; CX 503 at 86-91 [Jackson Dep.]). Ciba did not provide the networks with substantiation for a superiority claim and, instead, revised its ads or withdrew them from consideration (*see e.g.*, CX 166-A; CX 177-A-B; CX 212-A; CX 501 at 37 [Sloan Dep.]).

213. In a 1994 letter addressed to the then-Marketing Director for Doan's, Jordan McGrath's Senior Vice President responsible for Doan's stated:

> Doan's cannot support product "superiority" . . . nor can it deliver a unique or seemingly superior consumer benefit. Hence, it's a challenge for the advertising execution to compensate and persuasively deliver a dimension of competitive "news."

(CX 169-D; CX 504 at 136 [Schaler Dep.]).

214. In a "demo exploratory" document attached to a summary of discussions between Jordan McGrath and Ciba regarding creative strategy for 1995, the agency noted:

> While we would like to *imply* that Doan's provides superior efficacy because of its unique ingredient, we cannot clinically support this since the other brands work equally as well as Doan's at relieving back pain.

(emphasis in original) (CX 147-J).

G. Materiality Of The Superiority Claim

215. Dr. Jacoby's study (RX 5) analyzed the impact which the ads "Activity–Playtime" and the old "Muscles" might have on respondents' [consumers'] future purchasing behavior (Jacoby Tr. 3053; RX 5-Z-112).

216. Specifically, after exposure to the commercials, Dr. Jacoby asked respondents the following questions: "Did seeing this commercial influence whether or not you would buy the advertised product in the future?"; "Did it make you more likely to buy this product, or less likely to buy this product?"; and "What is it about what the commercial said, showed or suggested that makes you more likely to buy it in the future?" (Jacoby Tr. 3055; RX 5-Z-112-13).

217. The percentage of consumers reporting that the test ad made them more likely to buy the advertised product were as follows:

"Activity–Playtime"	25%	Advil	28%
"Muscles" (challenged)	30%	Tylenol Aches & Strains	42%
"Muscles" (new & not challenged)	35%		

(RX 5-Z to Z-8).

Based on the measurements taken from these questions, the unchallenged Doan's commercials exerted a slightly greater impact on respondents' purchase decisions than the challenged "Activity–Playtime" and "Muscles" commercials (Jacoby Tr. 3057; RX 5-Z-112-13). The fact that the unchallenged Doan's "Muscles" commercial actually exerted more impact on respondents' purchase behavior is especially telling according to Dr. Jacoby (Jacoby Tr. 3057-58). Similar to the comparison between the two "Muscles" commercials, the Tylenol control commercial had a greater impact on respondents' purchase decisions than any of the Doan's commercials that were shown (Jacoby Tr. 3059-60; RX 5-Z-112).

218. Respondents were then asked what it was about the ad that made them more likely to buy (RX 5-Z-59). In response, only 2% out of 142 (2% of the 122 nonusers of Doan's and 0% of the 20 users of Doan's) who viewed the "Activity– Playtime" commercial attributed this reaction to a supposed claim in the ad that Doan's "works better/best/more/most effective." Only 3% of the same group indicated that the positive impact on their purchase interest was due to "Activity–Playtime" saying that Doan's had a "special/unique ingredient" (Jacoby Tr. 3058; RX 5-Z-114).

219. Two percent of the respondents who viewed the old "Muscles-Male" commercial indicated that the positive impact on their purchase interest was due to the commercial saying that Doan's "works better/best/more/most effective" (Jacoby Tr. 3059; RX 5-Z-115). Two percent of the same group indicated that the positive impact on their purchase interest was due to old "Muscles" saying that Doan's had a "special/unique ingredient" (Jacoby Tr. 3059; RX 5-Z-115).

220. Based on these measurements, Dr. Jacoby testified that any alleged more effective claim in the challenged Doan's advertising did not have a positive impact on relevant consumers' interest in purchasing Doan's (Jacoby Tr. 3061).

221. He also concluded that, to the extent that respondents in the Jacoby Study who indicated that the "Activity–Playtime" commercial communicated a more effective claim, the same respondents did not believe that such a claim would positively affect their purchase behavior (Jacoby Tr. 3338-42).

222. Of the 129 respondents who viewed the old "Muscles-Male" commercial, 4.7% reported that the commercial communicated a more effective claim and that the claim exerted a material impact on their purchase intentions (Jacoby Tr. 3341; RX 209-A). After controlling for noise by subtracting the response level from the new "Muscles-Male" commercial, the net amount of respondents who thought the old "Muscles-Male" commercial communicated a more effective claim that exerted a material impact on their purchase intentions was 1.9% (Jacoby Tr. 3341; RX 209-A).

223. Of the 142 respondents who viewed the "Activity–Playtime" commercial, 12.7% reported that the commercial communicated a more effective claim and that the claim exerted a material impact on their purchase intentions (Jacoby Tr. 3340; RX 209-A). After controlling for noise by subtracting the response level from the Tylenol control commercial, the net amount of respondents who thought that the "Activity–Playtime" commercial communicated a more effective claim that exerted a material impact on their purchase intentions was 7.9% (Jacoby Tr. 3341).

224. These data, according to Dr. Jacoby, demonstrate that even to the extent that consumers may have extracted a superior efficacy claim from the "Activity–Playtime" and old "Muscles-Male" commercials, the claims were not material (Jacoby Tr. 3342-43).

225. Furthermore, Mr. Peabody testified that the ARS persuasion scores for "Black and White Pan Rev. 15," "Activity–Playtime" and "Muscles" would not generate significant sales for Doan’s (Peabody Tr. 429, 437, 441-42).

226. Complaint counsel argue that the challenged ads were material because they involve information that is important to consumers and would likely affect their purchasing decisions.

227. Complaint counsel cite the following evidence in support of their claim:

The Bruno & Ridgeway copy test of "Graph" which found that the idea of "superiority" conveyed by the ad "seems to be an important and persuasive idea" to consumers (CX 224-L).

The conclusion of a market research company report discussing "Graph" which "appears to create the impression that Doan's may in fact be better than other brands, thereby promulgating a more favorable predisposition to trying Doan's" (CX 227-Z-3).

The Brand Equity study (CX 25a), (whose conclusions I reject (F 246)), shows that superior efficacy for back pain is an important attribute of OTC analgesics (Mazis Tr. 1618).

The fact that consumers were willing to pay a premium price for Doan's (F 15).

The 80% increase in Doan's dollar sales during the time the challenged ads were disseminated (JX 2 ¶ 17).

Despite the results of Dr. Jacoby's study, I am compelled by the strong presumption of materiality and the evidence cited by complaint counsel to find that the challenged ads were material.

H. The Need For Corrective Advertising

228. Complaint counsel's argument for the imposition of a corrective advertising order claims that: (1) there exists a misbelief about Doan's efficacy, (2) the misbelief was substantially created or reinforced by the challenged advertising, and (3) the misbelief is likely to linger unless respondents are compelled to engage in an advertising campaign which will correct the misapprehension created by Doan's eight year advertising campaign.

229. Complaint counsel argue that the need for corrective advertising can be inferred. They also cite three extrinsic "belief" studies -- the 1987 A&U study, the Brand Equity study, and the NFO study, in support of their argument.

230. Respondents, on the other hand, cite "advertising penetration data" as well as consumer belief studies conducted by Mr. Lavidge and Drs. Jacoby and Whitcup which, they say, lead to the conclusion that corrective advertising is not an appropriate remedy in this case.

1. The Impression Created By Doan's Ads

a. Ordinary Course Of Business Studies

(1) The ASI and ARS Tests

231. The 1990 ASI and 1991, 1993, 1994 and 1995 ARS copy tests revealed low 24 (ASI) and 72 (ARS) hour recall (2% to 8%) by respondents of a "more effective" or "good product/better/best" message (F 140, 148, 150, 155, 159).

232. Dr. Jacoby testified that if only a small percent of consumers recall a "more effective" or "good product/better/best" message within one to three days after exposure to a commercial in a test environment, it shows the absence of any widespread lingering misimpression by consumers (Jacoby Tr. 2996-97).

(2) The 1987 Attitude And Usage Study

233. In June and July 1987, Arbor, Inc., an independent consumer research provider, conducted an attitude and usage study ("A&U study") by telephone for Doan's among adults who were back pain sufferers (CX 221-I; Peabody Tr. 134). The A&U study was undertaken shortly after Ciba purchased the Doan's brand and was conducted to help Ciba understand the product category in which Doan's competed, to determine consumer awareness of the Doan's brand, and to determine the imagery and beliefs analgesic users held for Doan's and the brands with which it competed (CX 221-H; Peabody Tr. 133, 287; Mazis Tr. 979).

234. Question 22 of this study asked respondents to rate each of three selected brands of which they were aware on a list of 14 attributes, including one which stated "Is the most effective pain reliever you can buy for backaches" (CX 221-Z-120; Mazis Tr. 989-90; Peabody Tr. 141).

235. The mean results of respondents' ratings of the four brands (using a 1-7 scale) on the attribute "Is the most effective pain reliever you can buy for backaches" were: Doan's, 4.4; Extra-Strength Tylenol, 5.1; Advil, 4.8; Bayer, 4.2 (CX 221-Z-72). These ratings provide a measure of back pain sufferers/treaters' perceptions about the four brands on that attribute as of the time of the study (Peabody Tr. 141). They show that Doan's was rated below Extra-Strength Tylenol and Advil and about the same as Bayer on this attribute (*id.* at 143).

236. Ciba's marketing research department's analysis of the A&U study results concluded that "Extra-Strength Tylenol is clearly the gold standard for backache pain relief followed by Advil. Bayer and Doan's are consistently perceived weakest" (CX 221-C). That conclusion was based, in part, on the attribute rating for "Is the most effective pain reliever you can buy for backaches" (Peabody Tr. 144). The marketing research department further concluded that "Doan's has a weak image in comparison to the leading brands of analgesics

and would benefit from positioning itself as a more effective product that is strong enough for the types of backaches sufferers usually get" (CX 221-C-D).

237. The results of the Doan's A&U study were used to help create new Doan's advertising. The first new Doan's ad that was created and disseminated after Ciba's receipt of the Doan's A&U study results was the "Graph" ad (Peabody Tr. 146).

(3) The Brand Equity Study

238. In July 1993, five years after the ad campaign at issue in this case began, CLT Research Associates, Inc., an independent consumer research company, implemented a research project called the Brand Equity study for Ciba. The study was conducted, in part, to help Ciba understand the strengths and weaknesses of the Doan's brand and establish the current equity and brand image of Doan's compared to its competitors in the backache market (CX 256-C; Peabody Tr. 217; Mazis Tr. 1042).

239. One purpose of the Brand Equity study was to evaluate how Doan's was perceived on a set of attributes compared to other analgesics used to treat back pain (Mazis Tr. 1042; *see* CX 259-B-C).

240. Question 2b of the study used an answer booklet (CX 259-B; CX 260) which consisted of a list of the 21 attributes and a grid of six boxes adjacent to each of the attributes (CX 260-B). The left hand box was labeled "Unacceptable, brand couldn't be worse," the right hand box was labeled "Ideal, nothing could make brand better," and in the middle above the dividing line between the third and fourth box was the label "Good" (*id.*). Respondents were asked to rate each of a group of analgesic products they were aware of for the treatment of back pain on each of the 21 attributes using this grid (Peabody Tr. 222-23; Mazis Tr. 1047).

241. The report of the Brand Equity study does not contain a detailed discussion of the results of question 2b (Mazis Tr. 1048-49). That data was contained in CX 486 and CX 507, which were massive printouts of the Brand Equity data. CX 480 contains a summary of some of the data obtained from question 2b, taken from those computer printouts.

242. The data in CX 480 is presented separately for users and aware non-users of Doan's, Extra-Strength Tylenol, Advil, and Motrin IB. This is appropriate since it takes account of the "usage

effect" *i.e.*, the tendency of users to rate a product higher than do non-users (Mazis Tr. 992, 1055, 1158).

243. The data for both users and aware non-users in CX 480 is presented both in terms of "top box" results and "top two box" results. Top box results are the percentages of respondents giving the highest rating to the product. In this case, top box refers to the proportion marking the boxes labeled "Ideal, nothing could make brand better." Top two box results are the percentage of individuals who selected either the "Ideal" rating or the box to its immediate left. Hypothetically, if the scale were rated from one to six with the "Ideal" box given a rating of six, the top two box figures reflect the percentage of respondents who rated a product with either a five or a six (Mazis Tr. 1051).

244. The following are the ratings of users of the products on the attribute "Being particularly effective for back pain":

	Doan's	ES Tylenol	Advil	Motrin
Top Box	44.7%	20.7%	18.9%	22.6%
Top Two Box	72.7%	50.0%	41.9%	54.7%

(CX 480-A-B).

245. The following are the ratings of aware non-users of the products on the attribute "Being particularly effective for back pain":

	Doan's	ES Tylenol	Advil	Motrin
Top Box	20.0%	7.1%	5.3%	6.6%
Top Two Box	36.0%	27.1%	16.8%	23.0%

(CX 480-C-D).

246. Dr. Mazis testified that the attribute "Being particularly effective for back pain" is similar to the attribute "Is more effective than other OTC pain relievers for back pain relief" (Mazis Tr. 1058). I disagree. "Particularly effective for back pain" probably reflects consumers' association of Doan’s with back pain relief. It does not necessarily imply equivalence to the phrase "more effective" and this study, therefore, is not probative on the issue of belief.

b. The NFO Belief Study

247. NFO is a marketing research company which provides mail panel research. Mail panel research involves mailing research instruments to individuals, who have previously agreed to serve as survey respondents, for them to complete and return to NFO by mail. Over 500,000 households participate in NFO research projects (Clarke Tr. 8-9).

248. NFO conducts over 3,000 consumer research studies annually using the mail panel methodology for major corporate clients, including 45 of the top 100 companies listed in the Fortune 500 (Clarke Tr. 9). Its research includes tracking studies, consumer attitude studies, advertising studies, concept studies, etc. These corporate clients, including Ciba and Novartis, rely on mail panel research by NFO and its competitors to make business decisions (Clarke Tr. 10; Peabody Tr. 203, 520-21, 196-98, 206-07, 215).

249. A NFO multi-card survey is an omnibus mailing of various questionnaires to a large group of panelists (Clarke Tr. 10). NFO mailed a multi-card questionnaire to 40,000 households (8 panels) in October 1996 on behalf of complaint counsel (Clarke Tr. 10-14; CX 420-H) and prepared a report tabulating the results of that survey (CX 420). The multi-card survey was intended to identify back pain sufferers/treaters who were Doan's users or aware non-users who could be sent a follow-up questionnaire to determine whether they held the belief that Doan's was more effective than other OTC pain relievers for back pain relief (Mazis Tr. 1118; Clarke Tr. 14).

250. None of the additional survey questionnaires that were included in the multi-card mailout with complaint counsel's questionnaire related to OTC medications or pain-related products. NFO received 30,025 completed questionnaires of the 40,000 mailed out (Clarke Tr. 18-20; CX 420-H).

251. Dr. Mazis decided to employ a mail panel to screen for Doan's users and aware non-users because it is a very cost effective method by which to locate users of a niche product like Doan's (Mazis Tr. 1117-18; Clarke Tr. 11; Peabody Tr. 518). Dr. Mazis has had experience using mail panel research and he has found it to provide useful and reliable results (Mazis Tr. 1119).

252. The survey, which was designed by Dr. Mazis (Tr. 1117), used a screening questionnaire to exclude respondents who did not meet the criteria established by him. An identical screening process

was used in Doan's Brand Equity study (Mazis Tr. 1117-20; CX 258-C). Telephone validation of the NFO screening questionnaire was not conducted because there was no interviewer in this mail panel who might engage in misconduct (Mazis Tr. 1128).

253. In December 1996, NFO conducted a follow-up study for complaint counsel to assess beliefs of Doan's users and aware non-users (CX 421-H; Clarke Tr. 32; Mazis Tr. 1121-22, 1129). The sample of this survey consisted of 400 Doan's users and 400 Doan's aware non-users selected on a random basis from the larger population of both groups identified in the multi-card screening survey (Mazis Tr. 1130; Clarke Tr. 34-35). Dr. Mazis excluded consumers unaware of Doan's from his study because they do not hold any opinions about the product (Mazis Tr. 1122). Mr. Peabody confirmed the importance of obtaining data from users of Doan's (Peabody Tr. 377, 398).

254. At the time he designed the NFO belief study, Dr. Mazis planned to analyze the data that he obtained by comparing the belief measures of (1) users of Doan's to users of other analgesics for back plain relief, and (2) aware non-users of Doan's to aware non-users of other analgesics. The purpose of such matched comparisons was to take into account and control for the usage effect (Mazis Tr. 1129, 1158, 1199-1201). Novartis' expert statistician agreed that this sort of paired analysis is appropriate and necessary to remove the impact of the usage effect (Jaccard Tr. 1527-28; *accord* Lavidge Tr. 879).

255. The belief questionnaire presented to the respondents ten attribute statements, including "Is more effective than other over-the-counter pain relievers for back pain relief" (CX 421-Z-12; Mazis Tr. 1131) as well as "Has an ingredient for back pain" and "Is just for back pain." The remaining belief statements were included so as not to focus undue attention on the belief measures of interest, resulting in a list which was unbiased (Mazis Tr. 1134-35).

256. About 20% of respondents gave inconsistent answers, agreeing that the same product was both just for headaches and just for back pain, but Dr. Jaccard agreed that this was no cause for concern about responses to other survey questions (Jaccard Tr. 1539).

257. NFO's analysis of its belief study (CX 421-N-W) was recalculated by Dr. Mazis to exclude those respondents (38) who were unaware of any analgesic other than Doan's. This made the results of the NFO study more balanced (CX 481; Mazis Tr. 1139-40).

258. The results for three belief statements, "Is more effective than other over-the-counter pain relievers for back pain relief," "Has an ingredient especially for back pain," and "Is just for back pain" are summarized in CX 482 (Mazis Tr. 1147-51). That summary contains an aggregation of the percentages of respondents who agreed with each of those belief statements for each product by combining the data for the "strongly agree," "agree," and "somewhat agree" responses (*id.* at 1148). That data is reported both for users of each product and for aware non-users of each product (CX 482). The results for the belief statement "Is more effective than other over-the-counter pain relievers for back pain relief" are as follows:

	Doan's	Advil	Aleve	Bayer	Motrin	Tylenol
Users	77%	62%	51%	41%	61%	43%
Non-Users	45%	31%	20%	17%	35%	22%

(CX 482).

259. Users of a brand tend to have more favorable beliefs about brands they use. It is inappropriate to look at the overall ratings for each brand by the whole sample regardless of usage, because usage behavior can exert influences on perceptions (Jaccard Tr. 1528). To account for this usage effect, one must compare the beliefs of users of Doan's to the beliefs of users of the other brands. Similarly, the beliefs of Doan's aware non-users must be compared to the beliefs of aware non-users of the other brands. Dr. Mazis conducted a statistical analysis of the NFO data to account for the usage effect.

260. For each of the five comparison analgesic products, Advil, Aleve, Bayer, Motrin, and Tylenol, Dr. Mazis' analysis looked at the subgroup of individuals who used that brand and Doan's ("joint users") (CX 424-A-Z-25; CX 422-A-F; Mazis Tr. 1158-59). Then, for each set of joint users of Doan's and a comparison product, he compared those individuals' beliefs about Doan's to their beliefs about that comparison product (a "user-to-user comparison"). For example, one of the analyses looked at individuals in the NFO sample who used both Advil and Doan's and compared their beliefs about Advil to their beliefs about Doan's (Mazis Tr. 1159-61). A similar analysis was done for each set of joint users (*e.g.*, Aleve and Doan's joint users) (Mazis Tr. 1158-59, 1199-1201). Dr. Mazis conducted a

similar analysis for aware non-users (CX 424-A-Z-25; CX 422-A-F; Mazis Tr. 1159).

261. Dr. Mazis' analysis focused on whether respondents agreed or did not agree that a brand they rated "is more effective than other over-the-counter pain relievers for back pain relief." If the respondent either "strongly agreed," "agreed," or "somewhat agreed" on the seven-point scale, they were treated as an "agreer." If he or she "strongly disagreed," "disagreed," "somewhat disagreed," or "neither agreed or disagreed," that respondent was treated as a "non-agreer." The analysis concentrated on the percentages or proportions of joint users and joint aware non-users "agreeing" that a product was more effective for back pain than other OTC analgesics (Mazis Tr. 1162-63).

262. The following table presents the percentages of joint users who agreed that Doan's or another of the five comparison brands was more effective than other OTC pain relievers for back pain relief.

Among joint users of both Doan's and comparison brand	Doan's is more effective than other OTC pain relievers for back pain relief	Comparison brand is more effective than other OTC pain relievers for back pain relief	Difference in % agreeing
Doan's & Advil	74%	57%	17%
Doan's & Aleve	77%	46%	31%
Doan's & Bayer	70%	33%	37%
Doan's & Motrin	72%	54%	18%
Doan's & Tylenol	76%	48%	28%

(CX 424-Z-16-20; CX 422-E-F; *see* Mazis Tr. 1171-73).

263. On average, the proportions of joint users agreeing that Doan's is more effective for back pain than other OTC analgesics is 26% higher than the proportions agreeing that the other brands are more effective (Mazis Tr. 1173-74).

264. The following table presents the percentages of joint aware non-users who agreed that Doan's or another of the five comparison brands was more effective than other OTC pain relievers for back pain relief.

Among those aware of both Doan's and comparison brand but who use neither	Doan's is more effective than other OTC pain relievers for back pain relief	Comparison brand is more effective than other OTC pain relievers for back pain relief	Difference in % agreeing
Doan's & Advil	43%	30%	13%
Doan's & Aleve	41%	19%	22%
Doan's & Bayer	47%	14%	33%
Doan's & Motrin	39%	35%	4%
Doan's & Tylenol	42%	17%	25%

(CX 424-Z-16-20; CX 422-E-F; Mazis Tr. 1175-76).

265. On average, the proportions of joint aware non-users agreeing that Doan's is more effective for back pain than other OTC analgesics was 20% higher than the proportions agreeing that the other brands were more effective (Mazis Tr. 1176).

266. Dr. Mazis conducted a statistical analysis to determine whether the differences in beliefs about Doan’s and other brands could have occurred by chance (Mazis Tr. 1178-81).

267. A statistical significance test determines whether the "null hypothesis" of no real difference is rejected. For example, in this case the null hypothesis might be that the proportion of joint users who believe Doan's is superior for back pain is not different than the proportion believing other brands superior. If the null hypothesis is rejected, one concludes that the observed difference is real and did not occur by chance (Mazis Tr. 1178-81; Jaccard Tr. 1421-22).

268. Usually, statistical analysis accepts a result, *i.e.*, rejects the null hypothesis, when the likelihood of that result occurring by chance is less than five percent (Mazis Tr. 1178-79, 1181; Jaccard Tr. 1489). This is referred to as a "p value" of less than .05 (Mazis Tr. 1178-79). The p value is also known as an "alpha level" (Jaccard Tr. 1488-89). Dr. Mazis used .05 as the p value for his analysis of the NFO belief study data (Mazis Tr. 1182).

269. Dr. Mazis's analysis of the NFO belief study data used a "two-tailed" statistical significance test to measure the p value rather than a "one-tailed" approach (Mazis Tr. 1180; Jaccard Tr. 1487).

270. A "two-tailed" test is equally concerned about a difference in either direction, *e.g.*, whether the percentage of joint users believing Doan's is superior is statistically significantly higher or lower than the percentage believing that the other product is superior (Mazis Tr. 1182). A "one-tailed" test is only concerned with a difference in one pre-determined direction (Mazis Tr. 1183; Jaccard Tr. 1486).

271. A two-tailed test is more conservative than a one-tailed test because using the former makes it more difficult to achieve a p value of .05 or less and, therefore, more difficult to conclude that there is a real difference (Mazis Tr. 1180-81; Jaccard Tr. 1488).

272. Because the issue in this proceeding is only whether there is a disproportionate belief that Doan's is more effective, a one-tailed test would have been appropriate (Mazis Tr. 1183). Dr. Jaccard agreed that the hypothesis at issue is concerned only with a result in that one direction and testified that it might be appropriate to use a one-tailed test to analyze the NFO data (Jaccard Tr. 1485-88).

273. Dr. Mazis calculated that all of the observed differences in the user-to-user comparison for the attribute "more effective for back pain" were statistically significant at the .05 level, as were the p values for four of the five aware non-user to aware non-user comparisons for the attribute "more effective for back pain" (CX 424-Z-16-20; CX 422-E-F; Mazis Tr. 1187-89; Jaccard Tr. 1496-98).

274. Dr. Mazis also analyzed the NFO data by applying the so-called Bonferroni adjustment to correct for experiment-wise error which may occur when statistical analyses involve hypotheses based on multiple statistical tests (Mazis Tr. 1190-94). Even after making these adjustments, the results were not that much different than in his other analysis (Mazis Tr. 1195-96).

275. There is often more than one acceptable statistical model for analyzing a data set (Mazis Tr. 1163; Jaccard Tr. 1484). Dr. Mazis used a repeated measures loglinear statistical analysis to analyze the NFO belief study data (Mazis Tr. 1157). Dr. Jaccard, who has used the loglinear approach to analyze data in his research, reanalyzed the NFO belief study data using a statistical analysis based on the general linear model which makes the assumption that the distribution of the difference scores has "normal" bell-shaped distribution (Mazis Tr. 1166-67; Jaccard Tr. 1484). If the data are not normally

distributed, the results of an analysis based on the general linear model may be unreliable (Jaccard Tr. 1532-33).

276. The results of Dr. Jaccard's re-analysis of the NFO belief study data using the general linear model and mean ratings are consistent with the loglinear model analyses conducted by Dr. Mazis (Mazis Tr. 1839, 1845-46). The loglinear and general linear analyses are also consistent after applying a Bonferroni adjustment for experiment-wise error (Jaccard Tr. 1510; Mazis Tr. 1845-46).

277. Dr. Jaccard also criticized Dr. Mazis' loglinear analysis for collapsing his scale into "agreers v. non-agreers" (Jaccard Tr. 1423-25) rather than using mean scales but other researchers have used this procedure (Peabody Tr. 142-43; Jaccard Tr. 1520-21; Whitcup Tr. 2846-48).

c. Respondents' Belief Studies

(1) The Jacoby Study

278. Dr. Jacoby designed a survey for this litigation to determine whether consumers believe that Doan's is superior in efficacy for back pain relief and, if so, whether the belief arose from Doan's advertising (RX 5).

279. Dr. Jacoby's study included some respondents who were not back pain sufferers and who were unaware of Doan's (Jacoby Tr. 2959, 3138-39, 3140; Mazis Tr. 1120; Lavidge Tr. 770; Whitcup Tr. 2109).

280. Although those who were unaware of Doan's could not express an opinion about its efficacy, Dr. Jacoby included them because they were potential purchasers (Jacoby Tr. 3139, 3377-78).

281. Dr. Jacoby also excluded Doan's non-users (79% of the respondents) because they would have no basis for forming efficacy beliefs except from personal use (Jacoby Tr. 3151).

282. Other exclusions of some respondents for questions about efficacy probably resulted in understatement of those who would have expressed efficacy opinions (RX 5-Z-56-57; Jacoby Tr. 2963, 2965, 3153-54, 2989; Mazis Tr. 1297, 1274-75).

283. Despite these flaws, complaint counsel rely on results of the Jacoby study which indicates that 38% of the Doan's users in the sample believed that Doan's is more effective for the relief of back pain, whereas 23% of Advil users and 17% of Tylenol users believed their brand is superior. Dr. Mazis testified that the results of user-to-

user comparisons are consistent with the results of the 1993 Brand Equity study and the NFO belief study, which demonstrated that there is a clear, long-term, disproportionately strong belief that Doan's is more effective for back pain than other pain relievers (Mazis Tr. 1155-57).

284. The survey's questionnaire also presents some problems. Question 1f was an open-ended question directed to respondents who stated that a particular brand was more effective than others for back pain in response to questions 1d-e. It asked those respondents to tell the interviewer what made them say that brand was more effective (RX 5-Z-57). The interviewer was permitted to follow-up only once with the probe, "Anything else" (Jacoby Tr. 3158-59). Dr. Jacoby acknowledged that limiting the interviewer to one follow-up probe would not fully capture all of the reasons some respondents had for believing one brand was more effective than another. He also agreed that for open-ended questions in this study that he believed to be important, he permitted unlimited probing by the interviewer (Jacoby Tr. 3158-60, 2974-75).

285. In response to question 1f, 8% of the respondents who had previously identified Doan's as more effective for the treatment of back pain gave advertising as a reason they held that belief (RX 5-Z-107), but Dr. Mazis testified that this was not an insignificant amount (Mazis Tr. 1299-1300) given the fact that some consumers are reluctant to admit that they are influenced by advertising (Whitcup Tr. 2805-06; Lavidge Tr. 890-91); furthermore, it is a well known marketing principle that consumers are often not aware that their views are shaped by advertising (Mazis Tr. 1300-03; Lavidge Tr. 890-91; Jacoby Tr. 3194).

286. Dr. Jacoby concluded that the superiority beliefs elicited in his survey for Doan's, Advil and Tylenol were caused by past product usage and not the lingering effects of advertising (RX 5-Z-106; Jacoby Tr. 2984-85). He based this conclusion on the fact that 218 of 220 respondents (99%) who said one of those brands was superior in efficacy for back pain in response to question 1e were users of those brands. However, this result occurred in part because of the design of question 1d which excluded non-users (RX 5-Z-56-57).

287. Question 2b asked users of a particular brand why they used that brand. Eleven percent cited advertising as the reason (Jacoby Tr. 3209-11; RX 5-Z-58). Some of this response may be due to the fact

that Doan's users had a stronger recall of Doan's ads than did users of Tylenol or Advil (Jacoby Tr. 3209-11). Also, the 11% of Doan's users who cited advertising was higher than the 1% or less who cited advertising as the reason they used Tylenol or Advil (*see* RX 5-Z-109).

288. Question 3b asked those respondents who recalled advertising for a brand to state what the advertising communicated. Based on the fact that only 3% of the Doan's users gave responses that were coded as a superior efficacy claim, Dr. Jacoby concluded that there were few, if any, lingering effects of advertising related to the challenged claim (RX 5-Z-58), although he agreed at trial that the fact that respondents played back a general recall of Doan's ads, does not establish that they did not form a superiority belief from their exposure to Doan's ads (Jacoby Tr. 3208-09; *see also* Mazis Tr. 2017-19). He also agreed that people who see an ad can have beliefs based on the ad, hold those beliefs and yet not recall the ad (Jacoby Tr. 3201).

(2) The Whitcup Study

289. Dr. Whitcup designed a survey for this litigation to determine whether consumers believe that Doan's is superior in efficacy for back pain relief and whether any such belief arose from Doan's advertising (RX 2).

290. The universe for Dr. Whitcup's survey consisted of men and women aged 18 and older who were back pain sufferers/treaters within the past year (Whitcup Tr. 2109-10; RX 2-Z-8-10). He did not exclude back pain sufferers/treaters who were unaware of Doan's for the treatment of back pain (Whitcup Tr. 2111). According to Dr. Mazis, this made the universe over inclusive (Mazis Tr. 1273).

291. Dr. Whitcup did not supplement his sample, with the result that only 35 Doan's users were in it, compared with 190 Tylenol users and 121 Advil users (RX 2-Z-49).

292. As a result of the small number of Doan's users in his study, Dr. Whitcup added the letter "c" ("caution small base") whenever he presented data based on their responses (RX 2-Z-49; RX 2-Q-S, V-W, Z-1).

293. In contrast, Mr. Peabody testified that when Doan's marketing research department wanted to analyze the responses of Doan's users in a consumer research study, it sought a large enough

sample to perform a proper analysis (preferably at least 100 Doan's users per cell) (Peabody Tr. 297).

294. Dr. Mazis testified that because of the small number of Doan's users in this study, the usage effect resulted in understatement of the superiority beliefs for Doan's (Mazis Tr. 1290-91), making the data unreliable. Questions 1a-b and 1c-d, did not mention back pain, with the result that respondents were primed to think of all-purpose rather than back pain drugs, thus causing an understatement of Doan's awareness caused by advertising (Mazis Tr. 1280-81).

295. The main reason given -- that Dr. Whitcup did not want to poison respondents' minds (Whitcup Tr. 2148-49) -- did not dissuade other experts from referring to "back pain" in their screening questionnaires (CX 420-Z-34; RX 23-Z-398; RX 5-Z-6), although Dr. Jacoby stated that asking respondents first about awareness or use of OTC analgesics for back pain would not poison their minds (Jacoby Tr. 3146).

296. Based upon unaided questions 1c-d of his questionnaire, Dr. Whitcup concluded that awareness of Doan's ads is virtually nil and that they are unmemorable (RX 2-Z-3; *see* Whitcup Tr. 2160) but Dr. Mazis concluded that, because of priming, they understate respondents' recollection of Doan's advertising (Mazis Tr. 1647). Furthermore, Dr. Whitcup acknowledged that a respondent's failure to mention Doan's ads on an unaided basis does not mean that they were unaware of Doan's ads (Whitcup Tr. 1280-81).

297. Question 1f asked respondents who had indicated that they used multiple brands to treat back pain which brand they used most often (RX 2-Z-11). Question 2 asked respondents, if they used only one brand of pain reliever to treat back pain, why they used that brand (*id.* at Z-12). If respondents used more than one brand, they were only asked question 2 with regard to the brand they used most often (*id.*). Thus, if a Doan's user used another brand more often, he or she was not asked why they used Doan's. This design resulted in question 2 not fully eliciting the magnitude of the belief among the few Doan's users surveyed that Doan's is more effective for back pain relief (Mazis Tr. 1283; Whitcup Tr. 2789). Dr. Whitcup agreed that the underlying questionnaires contain examples of Doan's users who were not asked question 2 but who responded to later questions that Doan's was more effective than other pain relievers for back pain

relief but he argued that most respondents did not mention superiority (Whitcup Tr. 2790-95).

298. Dr. Mazis concluded, after analyzing the questionnaire, that it biased the outcome toward understating the playback of Doan's related information (Mazis Tr. 1289).

(3) The Lavidge Study

299. Mr. Lavidge designed a survey for this litigation to determine what claims the "Muscles" ad conveyed and whether consumers held a belief that Doan's was superior in efficacy for back pain relief (RX 23).

300. Mr. Lavidge did not limit the universe in this study to Doan's users and aware non-users (Lavidge Tr. 755-56; *see* RX 23-Z-395-98); he included respondents who were not aware of Doan's because they were potential purchasers (Lavidge Tr. 755-56), but Dr. Mazis testified that a belief study for a niche brand like Doan's should not include respondents who are unaware of the product, and thus could have no beliefs about it (Mazis Tr. 1273). The data collected in this survey shows that 71% of the sample were unaware of Doan's for the treatment of back pain (RX 182). In contrast, 79% of the sample were aware of (and 70% used) Tylenol; and 68% were aware of (and 59% used) Advil (RX 182). The inclusion of respondents who were unaware of Doan's caused different awareness rates and made it impossible to determine if there is a disproportionate belief regarding Doan's (Mazis Tr. 1273, 1279).

301. Mr. Lavidge's copy test asked belief questions subsequent to the viewing of a clutter tape which included the challenged "Muscles" ad (CX 23) (Tests 1 and 3) or the "New Muscles - Male" ad (RX 24-A) (Test 2) and three other 15-second ads for analgesic products being promoted for back pain relief. Question 13, which was asked after two exposures to the clutter reel, purports to measure beliefs about product efficacy.

302. Exposure to the Doan's ad in the midst of a clutter tape containing three similar back pain-oriented ads for other analgesics does not reflect how consumers are exposed to Doan's ads in natural surroundings (Peabody Tr. 156; Lavidge Tr. 849).

303. The appropriate way to measure whether lingering beliefs exist is to measure them without exposure to an ad (Mazis Tr. 1276). Dr. Jacoby repeatedly testified with regard to the belief study portion

of his methodology that lingering beliefs cannot properly be measured after exposure to an ad (Jacoby Tr. 2962, 2968, 3155).

304. The belief question (13a) began by asking respondents "Do you think any non-prescription pain killer product is more effective in relieving back pain than the other non-prescription products which are sold for that purpose, or don't you have an opinion about that?" For respondents who answered affirmatively, question 13b was asked: "Which non-prescription product do you think is more effective than others in relieving back pain?" This was followed by a question asking what respondents thought made that product more effective (RX 23-Z-401).

305. Question 13a does not provide respondents with a list of brands to be rated on the more effective for back pain attribute, or any other attributes (*id.; see* RX 23-Z-401). This requires respondents to sort through a mental list, a processing requirement that is difficult for many consumers to perform. This form of questioning can result in an understatement of consumer beliefs (Mazis Tr. 1274-76).

306. A better way of asking such a question is to ask respondents what their beliefs are for a list of brands with regard to certain attributes, as was done in the A&U study, the Brand Equity study, and the NFO belief study (Mazis Tr. 1274-75). This procedure is the one most commonly used in the consumer research industry (Mazis Tr. 1274; Peabody Tr. 412).

307. Question 13a uses the term "any non-prescription pain killer product" and 13b uses the term "which non-prescription product" (RX 23-Z-401; Lavidge Tr. 889). Mr. Lavidge acknowledged that the term "product" in both questions was singular and that he was asking respondents to identify only one product they believed to be more effective (Lavidge Tr. 889-90). This question is flawed because it limits respondents to giving only one product when they may believe that more than one are more effective. This is particularly limiting for a niche product such as Doan's, which could be one of multiple products a respondent believes to be more effective, but does not come immediately to mind (Mazis Tr. 1275-76).

308. Novartis' other consumer research experts recognized the problem inherent in such a limitation and permitted respondents to provide multiple products in response to their belief question (RX 2-Z-13; Whitcup Tr. 2811; RX 5-Z-57; Jacoby Tr. 3158). Dr. Whitcup testified that 15% of the respondents answering his belief question

identified multiple brands (Whitcup Tr. 2811). The singular wording of the term "product" in questions 13a-b of the Lavidge study may have resulted in those questions understating the number of products that respondents believed to be more effective for the treatment of back pain.

309. Because there were only a small number of Doan's users in Mr. Lavidge's study, the usage effect probably resulted in the superiority beliefs for Doan's being understated according to Dr. Mazis (Mazis Tr. 1271, 1291).

310. The presentation of the data in the Lavidge study does not break down the superiority belief into those held by users of each product or aware non-users of each product (Mazis Tr. 1271; *see id.* at 1291). Such comparisons are the only reliable way to equalize any usage effects (Mazis Tr. 1158-59, 1199-1200; Jaccard Tr. 1528-29). There is no reliable data or data analysis in RX 23 that permits one to draw any conclusions regarding the existence of a superior efficacy belief with regard to the Doan's product (Mazis Tr. 1272-73; *see id.* at 1295-96). Mr. Lavidge acknowledged this at the hearing (Lavidge Tr. 879).

d. The Creation Of Consumer Misbelief By The Challenged Ads

311. The NFO Belief study shows that Doan's ad campaign created a consumer misbelief about the efficacy of Doan's -- *i.e.*, that Doan's is more effective than other OTC analgesics for the relief of back pain.

312. That belief, however, has no significance unless complaint counsel establish that it has been substantially created or reinforced by the challenged ads (CPF 314).

313. Factors other than advertising, such as experience, word-of-mouth, doctor recommendations and packaging may have played some role in consumer belief about the efficacy of Doan's (Mazis Tr. 1606-09; CX 502 at 123-24 [Wright Dep.]; Lavidge Tr. 750-52; RX 179), but the evidence leads to the conclusion that advertising was also a factor in the creation of that belief (Mazis Tr. 1201-02, 1609; Stewart Tr. 3468-69).

314. The purpose of Doan's ads was to convince consumers that it was superior to other OTC analgesics for relieving back pain and, to that end, Ciba spent $55 million from 1988 through 1996 for Doan's broadcast ads and $10 million for consumer promotions (JX 2 ¶ 21).

315. Doan's is a "niche" product which competes in the back pain segment of the OTC analgesics market and its ads target that audience (Stewart Tr. 3478; CX 501 at 68 [Sloan Dep.]). Marketers using niche ads can reach their intended audience with less ad dollars than marketers who target a broader audience (Stewart Tr. 3476, 3478).

316. Doan's ad agencies estimated that it reached between 80 and 90% of its target audience 20 to 27 times per year between 1988 and 1996 (JX 2 ¶ 25; Stewart Tr. 3413-14).

317. For most of the period in which the challenged Doan's ads were aired, Ciba used a "flighting" strategy. Flighting is a common method of scheduling in which the advertiser is on the air for a period of time, and off the air for other periods (Stewart Tr. 3421). Ciba started flighting in 1991"to increase visibility and reach in order to attract additional users to the brand" (CX 514-C; Stewart Tr. 3420). Flighting works especially well for niche brands if the advertiser's objective is both to persuade new users to try the brand and to reinforce the preferences of current users (Stewart Tr. 3422).

318. Ciba produced 15-second rather than 30-second ads for Doan's after it acquired the brand (JX 2 ¶ 25; CX 508-Z-13). Ingrid Nagy, who was Doan's Business Unit Manager from 1988-1991 and its Marketing Director from 1994-1995, believed that the 15-second format was an effective strategy for Doan's ad campaign (CX 499 at 135 [Nagy Dep.]).

319. One means of determining whether a 15-second ad is as effective as a 30-second ad is to test it in a copy test (Stewart Tr. 3446-47, 3461-62; CX 506 at 87-88 [M. Seiden Dep.]). If a 15-second ad performs as well as a 30-second ad, it makes sense to use it because it costs half as much (Stewart Tr. 3449; CX 506 at 87-88 [M. Seiden Dep.]).

320. Ciba tested the first ad it created for Doan's, "Graph," through an ASI test. It achieved a 19% recall score (Stewart Tr. 3448; CX 335-Z-7). This exceeded the average (or "norm") for 15-second ads for drug and health products by 5% (CX 335-Z-7; CX 120-C). The score equaled the norm for the average 30-second ad in the drug and health products category (Stewart Tr. 3448-49; Peabody Tr. 258; CX 335-Z-7; Mazis Tr. 2010), indicating that "Graph" was as memorable as the typical 30-second ad in the category (Stewart Tr. 3448-49; Mazis Tr. 2010-11).

321. Ciba tested the second ad it created for Doan's, "Black & White Back," through ASI. This ad also achieved a related recall score of 19% (RX 98-F).

322. Another Doan's ad, "Ruin A Night's Sleep," was tested by ARS in 1991 and achieved a recall score of 42%, 19% above the category average (RX 89-L; Mazis Tr. 2008-09). "Black & White Back Pan" was tested by ARS in 1993 and achieved a recall score of 38%, 15% above the average of the OTC analgesics category. "Activity–Playtime" was tested by ARS in 1994 and achieved a recall score of 34%, 11% above the average (Stewart Tr. 3452-53; CX 393-Z-30). "Muscles" was tested by ARS in 1995 and achieved a recall score of 45%, 22% above the average (*id.*; Peabody Tr. 196).

323. Dr. Stewart testified that these ARS recall scores indicate that the tested 15-second Doan's ads were more memorable than the average for the category, which is calculated mostly from 30-second ads (Stewart Tr. 3449, 3452-53), and he concluded that Ciba's use of 15-second ads for Doan's was a very effective strategy (Stewart Tr. 3462).

324. Dr. Jacoby's study (RX 5) shows that the Doan's advertising campaign was memorable among back pain sufferers/treaters when compared to the more extensive advertising campaigns for Advil and Tylenol during the same period. In the Jacoby study, before exposure to any test ad, respondents were asked about their recall of ads for the brands they used (RX 5-Z-58). Fifty-two percent of Doan's users said they recalled Doan's advertising (RX 5-Z-111) but only 3% of them recalled any superiority claim in Doan's ads (Jacoby Tr. 2996).

325. Dr. Stewart testified that the only way to differentiate Doan's and affect its market performance is through advertising; and, in fact, the Doan's brand group and its ad agency frequently referred to Doan's as an ad-driven brand (Stewart Tr. 3468). Other statements by Doan's employees and its ad agency confirm that the brand is advertising sensitive (CX 335-D; Peabody Tr. 257; CX 514-C; CX 499 at 82 [Nagy Dep.]; CX 120-A; CX 497 at 38 [Esayian Dep.]; CX 407-A; CX 496 at 104-05 [Caputo Dep.]).

326. Other Ciba documents refer to the crucial role advertising played in the marketing of Doan's and in driving Doan's sales (CX 404-A-B; CX 499-A). The "Doan's 1996 1st Half Brand Update" states: "Doan's support continues to drive strong volume and share performance despite competitive activity." This document also states

that "Doan's advertising has historically improved category performance, as well as Doan's share/volume."

327. Mr. Peabody testified that Doan's P.M. sales were "very sensitive to advertising" (Peabody Tr. 566; *see also* CX 157-B; Peabody Tr. 567; CX 185-E; CX 504 at 138 [Schaler Dep.]; Peabody Tr. 626-27; CX 144-B).

328. ARS also tested "Ruin A Night's Sleep," "Black & White Back," "Activity Playtime," and "Muscles" for persuasion (CX 393-Z-30; RX 98; RX 32; RX 33; CX 265). The persuasion measure is calculated based on the test respondents' choice of a "prize" grocery basket of products the respondents select prior to and after the one hour of "pilot" television shows they view. In calculating the persuasion score, ARS takes additional factors into account, such as the number of competitors in the product category and the degree of switching in the category. Persuasion scores can be negative or positive; a positive score reflects the fact that the ad is having a net persuasive effect on the market, over and beyond what one might expect given various marketplace conditions (Peabody Tr. 191-93; Stewart Tr. 345-52).

329. All of the Doan's ads tested by ARS received positive scores, ranging from 1.5 for "Activity–Playtime" to 6.8 for "Ruin A Night's Sleep" (CX 393-Z-30; RX 89-K). All of the tested ads would be expected to have a net persuasive effect on the market (Stewart Tr. 3452).

330. Dr. Stewart testified that Doan's competes in the analgesics market, which is a "mature market." In such markets, it is difficult to persuade long-time customers to switch brands on the basis of one exposure to a competing ad. For a niche brand in the category, the persuasion scores achieved by the Doan's ads were quite good (Stewart Tr. 3452).

331. The ad which achieved the lowest, but still net positive persuasion score, "Activity Playtime," was very successful in generating sales for Doan's. In this instance the persuasion score was not a good predictor of what occurred in the real world (CX 504 at 55-57, 138 [Schaler Dep.]; Stewart Tr. 3472).

332. Between 1987, when Ciba bought the brand, and 1996, Doan's factory sales have increased by approximately 80%, from $10.2 million to a high of $18.9 million in 1994 (with a small drop from 1994 to 1995) (JX 2 ¶ 17; Mazis Tr. 2026; Stewart Tr. 3469;

Peabody Tr. 141-42). Consumer sales, which were first tracked in 1992, rose from $21.5 million in 1992 to $23.3 million in 1995.

333. Consumer sales of Doan's products increased at approximately the same rate as consumer sales of all analgesic products between 1992 and 1995 (JX 2 ¶¶ 16, 19; Stewart Tr. 3481). This parallel growth occurred even though advertising spending for all analgesic products increased by almost one third during this period, while advertising expenditures for Doan's remained relatively constant (JX 2 ¶¶ 21, 23). Doan's successfully maintained its sales without increasing advertising expenditures by focusing effectively on its niche of back pain sufferers (Stewart Tr. 3481-82).

334. The "contribution" for a brand refers to the amount it contributes to Ciba's profits. "Contribution" is calculated by subtracting the brand's expenses from its sales (CX 496 at 93 [Caputo Dep.]). Doan's contribution to Ciba's profits remained relatively constant between 1990 and 1997, delivering approximately 22 to 25% of sales as contribution (Peabody Tr. 549-50). This percentage equaled or exceeded the contribution from Ciba's other OTC pharmaceutical brands (CX 496 at 93 [Caputo Dep.]; CX 401-A-B).

335. In "mature" product categories such as analgesics, a central purpose of advertising is to retain current users. This is because the overall market for the products in the category may not be growing appreciably. In these categories, sales increases are not the only measure of the success of an advertising campaign. A key criterion for success of the advertising is whether it is succeeding in maintaining share, particularly in the case of a competitive onslaught (Stewart Tr. 3467; Mazis Tr. 1202; CX 597).

336. Since Ciba acquired Doan's, several new entrants have entered the back pain specific category (which consists of analgesics that are marketed only for back pain) and the general analgesics category (CX 393-R; CX 97-B). Despite these competitive pressures, Doan's was able to maintain and even increase its sales (Stewart Tr. 3468).

337. Doan's responded to these competitive entries partially through the use of advertising (Stewart Tr. 3434-37; Mazis Tr. 2028-32). When Nuprin Backache was introduced in the first half of 1993, Ciba's media planners increased Doan's television advertising budget by approximately $500,000 to respond to this competitive threat (CX 357-B; Mazis Tr. 2033-34; Stewart Tr. 3434). Similarly, when Bayer Select Backache was introduced, Ciba increased spending to

run more advertising during the introductory period for Bayer Select (CX 378-K; Stewart Tr. 3434-35). Doan's Marketing Director wrote that both the Nuprin Backache and Bayer Select Backache products were unsuccessful because Doan's used a "consistent, strong advertising campaign to defend and even build share in the face of these competitors" (CX 399-B). Both products had been withdrawn from the market by 1996 (CX 496 at 24 [Caputo Dep.]).

338. At the time that Aleve was being introduced in mid-1994, Ciba directed its advertising agency to include the Aleve package in the competitive "set" in the "Activity" commercials that were then being produced. Ciba carefully tracked the entry of Aleve and consulted with its advertising agency regarding the most appropriate ways to defend Doan's during Aleve's introduction (CX 168-A-M).

339. Drs. Mazis and Stewart testified that the numerous references in the Doan's marketing and strategy documents to the fact that the brand is advertising driven, indicates that the challenged ads must have played an important role in sustaining and growing the Doan's brand (Mazis Tr. 2026; Stewart Tr. 3408-09).

340. It is not surprising that the challenged ads were successful, because academic research has shown that ads for low share brands which include explicit comparative references to high share brands in the same category are very effective. Such ads succeed in attracting more attention to the low share brand and increase purchase intention for the low share brand relative to the high share brand. This comparative reference strategy was employed in all of the challenged Doan's ads (Stewart Tr. 3458-61; CX 595-A-L; CX 596-A-I).

341. The advertising campaign for Doan's was a highly successful one for a niche brand (Stewart Tr. 3485).

342. Dr. Stewart testified that the ad expenditures for Doan's, the media strategies employed, and the type of ads that were used, created or reinforced consumers' beliefs that Doan's is more effective than other analgesics for back pain (Stewart Tr. 3485-86).

e. Consumer Research Into The Creation Of The Superiority Belief

343. The NFO study shows that more Doan's users and aware non-users believe that Doan's is superior for back pain than do those users and aware non-users of other brands who believe those brands are superior (CPF 347-52, 395-429). The similarity in the beliefs of

users and aware non-users is evidence that Doan's advertising played a role in creating and reinforcing that superiority belief, since by definition the beliefs of aware non-users about Doan's stem from factors other than their usage experiences with the product (Mazis Tr. 1203-08; CX 502 at 123-25 [Wright Dep.]). And, the superiority beliefs among Doan's users cannot be explained by usage experience because of the inability of consumers to evaluate the comparative efficiency of analgesics (CPF 546-47).

344. Further evidence that advertising created or reinforced superiority beliefs is that Doan's users and aware non-users have beliefs that track other claims conveyed by Doan's advertising -- Doan's "has an ingredient especially for back pain" and "just for back pain" (Mazis Tr. 1210-18).

345. The NFO belief study demonstrates that there is a strong and disproportionate belief among both Doan's users and Doan's aware non-users that Doan's "has an ingredient especially for back pain" and "is just for back pain." In that study, survey respondents rated their levels of agreement or disagreement with these attributes for each of the brands of OTC back pain relievers of which they were aware (CX 422-A-D).

346. Dr. Mazis conducted the same statistical paired comparison analyses regarding these attributes, looking at joint users and joint aware non-users, that he conducted for the attribute "more effective for back pain than other OTC analgesics" (CX 424-G-K, Q-U; CX 422-D; Mazis Tr. 1208). Across the five user-to-user comparisons, the proportions of joint users agreeing that Doan's "has an ingredient especially for back pain" is on average 54% higher than the proportions agreeing that each of the other brands (Advil, Aleve, Bayer, Motrin, or Tylenol) has that attribute (*see* CX 424-A-U; CX 422-C-D). Across the five aware non-user-to-aware non-user comparisons, the proportions agreeing that Doan's "has an ingredient especially for back pain" is on average 46% higher than the proportions agreeing that each of the other brands has that attribute. For the attribute "just for back pain," on average 62% more joint users and 54% more joint aware non-users agreed that Doan's has that attribute (*see* CX 424-G-K; CX 422-A-B). Each of the differences in beliefs among every user-to-user and aware non-user-to-aware non-user comparison is large and highly statistically significant (Mazis Tr. 1209).

347. The eight year advertising campaign claiming that Doan's "has an ingredient especially for back pain" and that it "is just for back pain" played a substantial role in the creation or reinforcement of beliefs that mirror those claims (Mazis Tr. 1217). Mr. Peabody testified that Doan's advertising is likely one of the sources of the beliefs that Doan's "has an ingredient especially for back pain" and that it "is just for back pain" (Peabody Tr. 226-28) and Dr. Mazis concluded that consumers would not infer that a product had a special ingredient for back pain simply from the fact it is only advertised and marketed for back pain (Mazis Tr. 1621). The fact that the ads created beliefs consistent with these claims further supports the conclusion that they played a role in creating or reinforcing the belief that Doan's is more effective for back pain than other OTC analgesics (Mazis Tr. 1217; *see id.* at 1057-58; *see also* CX 480-A-D; Mazis Tr. 1054-58 (1993 Brand Equity Study)).

348. The 1987 A&U study and the 1996 NFO belief study measured the beliefs of users and aware non-users of Doan's, Extra-Strength Tylenol, Advil, and Bayer regarding the product attribute "most effective" (the A&U study) and "more effective" than other OTC pain relievers for back pain relief (CX 421-Z-12; CPF 383).

349. Since the A&U study was conducted just before the challenged ads were disseminated (CPF 326, 336), Dr. Mazis felt that comparing its results with those of NFO's 1993 belief study, which took place six months after they were abandoned, would permit him to determine if beliefs among users and non-users of these products had changed over the years and to measure the impact of the Doan's ad campaign on consumer beliefs (Mazis Tr. 1219-20).

350. I agree with respondents' experts that Dr. Mazis' comparison of these two studies is unsound since there are a number of differences in the methodologies and questions used in the 1987 A&U study and 1996 NFO study that could be responsible for the change in reported attribute ratings (Jaccard Tr. 1461-73; RX 133-B-E).

351. These include: (1) a difference in the wording of the key attribute in the two studies (CX 221-Z-120; CX 421-Z-12); (2) differences in the structure of the studies' questionnaires (Jaccard Tr. 1462-71); (3) differences in the response dimensions (how much attributes "applied" to a brand v. how much respondents "agreed" that the attributes described the tested brands) (Jaccard Tr. 1465; RX 133-B); and, (4) differences in the studies' response scales (Jaccard Tr. 1465-67; Jacoby Tr. 3021-22; RX 133-C).

352. The methodologies of the studies were also different. The 1987 A&U study was a telephone survey; the NFO study was a mail survey (Jaccard Tr. 1468-69; RX 133-C).

353. Finally, the samples in the two studies differed in terms of the nature of respondents' back pain (*i.e.*, suffered "in an average six month period" versus "on a regular basis"), the usual type of treatment (*i.e.*, "prescription or non-prescription medication" versus "over-the-counter medication"), and respondents' role in the purchase of the treatment product. Other key demographic variables -- such as age, gender, income, education, occupation, geographic location, and household size -- are not specified in the 1987 A&U study and could have varied from the demographics of the sample surveyed in the 1996 NFO Mail study. These many differences between the samples of respondents surveyed in the two studies could account for the discrepancy in respondents' attribute ratings (Jaccard Tr. 1470-71; RX 133-D, D)

354. Given the many differences in the questions, response dimensions, response scales, methodology, and samples in the 1987 A&U study and the 1996 NFO Mail study, I find that the attempted comparison of the two studies to draw inferences regarding the impact of the challenged advertising on consumer beliefs has no methodological merit (Jaccard Tr. 1577-78; RX 133-A).

f. The Lingering Effect Of The Challenged Ads

355. The challenged ads which were widely disseminated for several years communicated a message which created a disproportionate belief in the target audiences that Doan's is superior to other OTC analgesics for back pain.

356. Dr. Jacoby testified about the lingering effects of advertising in *American Home Prods.*, 98 FTC 283 (Initial Decision). He stated that beliefs concerning attributes that had been stressed in analgesic product ads can endure long after they have ceased (*American Home Prods.*, 98 FTC at 293 (IDF 592) (Initial Decision). Dr. Jacoby also testified that among users of an analgesic product that was advertised as superior to its competitors, that superiority belief would linger long after the cessation of the advertising because product usage will continually reinforce that image (*id.* at 284).

357. The NFO belief study was conducted in December 1996, six to seven months after the last challenged ad was disseminated (Mazis Tr. 1254-55; CX 421-H; JX 2 ¶ 25), and it shows, according to

Dr. Mazis, that a strong superior efficacy belief lingered, and is likely to linger (Mazis Tr. 1254-55).

358. Dr. Mazis' conclusion is echoed by three empirical studies of the lingering effect of ads. The first study, authored by Kinnear, Taylor and Gur-Arie, was a follow-up study of the effect of a Commission corrective advertising order in *RJR Foods, Inc.*, 83 FTC 7 (1973). The purpose of the study was to measure the change in consumers' beliefs regarding the fruit juice content of Hawaiian Punch (Mazis Tr. 1257-59; CX 536-N-O).

359. This research continued for eight and one-half years (Mazis Tr. 1259; CX 536-N) and found that the percentage of the tested population that held the factually correct belief, the result the corrective advertising was intended to achieve, increased from 20% to 40% in a year's time, improved to 50% by the fifth year, and increased to 70% after eight years. This data shows that advertising based beliefs that are imbedded in consumers' minds can last a very long time, even in the face of corrective advertising. Such ad-created beliefs would have remained at even higher levels for a longer period of time, if the challenged advertising had ceased and no corrective advertising was required (Mazis Tr. 1259-61).

360. Two studies of the corrective advertising order in Listerine -- one conducted by Armstrong, Russ, and Gurol and the other by Dr. Mazis, -- tracked the effect of the corrective advertising requirement over time. These studies showed a reduction of between 11% and 20% in the false beliefs over the course of the approximately one and one-half year corrective advertising effort, according to Dr. Mazis, and support the conclusion that embedded advertising-based beliefs do not change quickly, even in the face of corrective advertising (Mazis Tr. 1261-63).

III. CONCLUSIONS OF LAW

A. Introduction

Doan's has been marketed for over 90 years. Ciba purchased the Doan's brand in early 1987 for approximately $35 million because it believed that Doan's could be successfully marketed if its old fashioned image could be changed (F 8-10).

The so-called Attitude & Usage study ("A&U") which was conducted for Ciba shortly after its purchase of Doan's tested consumer awareness of Doan's and its competitors (F 233). Among

other things, the study concluded that Doan's should position itself "as a more effective product." The results of this study convinced Ciba to embark on the eight year comparative ad campaign which featured the challenged ads (F 236-37).

B. The Challenged Ads Conveyed The Superiority Claims

1. Legal Standard

Section 5 of the FTC Act prohibits material and deceptive representations or omissions which are likely to mislead reasonable consumers into unwarranted beliefs about the advertised product. *Cliffdale Associates, Inc.*, 103 FTC 110, 164-65 (1984). *Appeal dismissed sub nom. Koven v. FTC* No. 84-5337 (11th Cir. Oct. 10, 1984) ("Deception Statement").

The Commission deems an ad to convey a claim if consumers, acting reasonably under the circumstances, would interpret it to convey that claim, even if a challenged, misleading claim is accompanied in the same ad by non-misleading claims. *Kraft, Inc.*, 114 FTC 40, 120 n.9 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Thompson Medical*, 104 FTC at 789 n.7, 818 (1984).

Both express and implied ads may be deceptive, *Fedders Corp. v. FTC*, 529 F. 2d 1398, 1402-03 (2nd Cir.), *cert. denied*, 429 U.S. 818 (1977), and intent to convey a claim need not be established, *Kraft, Inc.*, 114 FTC at 121; however, if an advertiser intends to make a claim, it is reasonable to conclude that the ads make that claim. *Thompson Medical*, 104 FTC at 791.

2. Facial Analysis

Despite Dr. Jacoby's and respondents' argument to the contrary (F 97), the Commission has often held that facial analysis of a challenged ad may be the basis for concluding that it conveys a challenged claim to consumers, and that extrinsic evidence of its meaning is not necessary. *Kraft, Inc.*, 114 FTC at 121; *Thompson Medical*, 104 FTC at 789.

Facial analysis of the challenged ads supports the conclusion that they make a claim of superior efficacy by referring to Doan's as the "back specialist" which has an ingredient not found in competing analgesics (F 88-89, 91, 93). *See American Home Products Corp. v. Johnson & Johnson*, 654 F. Supp. 568 (S.D.N.Y. 1987).

Dr. Mazis also concluded that several of the challenged ads made the superiority claim. For example, he testified that the "Graph" ad, which refers to an "ingredient that [other] pain relievers don't have" conveys the message that Doan's is unique and different, and coupling the claim with references to back pain, conveys the net impression that Doan's is more effective for back pain relief than other pain relievers mentioned in the ad (F 98).

3. Copy Test Evidence

Methodologically sound copy tests of challenged ads are often resorted to as evidence of the messages which they convey. *Thompson Medical*, 104 FTC at 790.

The parties rely on two kinds of copy tests: Those which were conducted in the ordinary course of business by or for Ciba, and those which were designed and administered for purposes of this proceeding.

Prior to their dissemination, the "Graph," "Black & White Back" and "Ruin A Night's Sleep" ads were copy tested by Bruno & Ridgeway, a consumer research company.

If its "main idea" and "other idea" questions are netted, the copy test of the "Graph" ad indicates that 38% of respondents exposed to it were coded as answering that it communicates the claim that Doan's was "Superior to other products" (F 122), a quite high response to open-ended questions (F 124). *Stouffer Food Corp.*, Dkt 9250 (Sept. 26, 1994).

The "Black & White Back" copy test found that 46% of the respondents who saw this ad gave answers that were coded as "superiority over other products." If responses to all of the open-ended questions are netted, 62% of the respondents took away a superior efficacy claim (F 137-38).

The copy test for the "Ruin A Night's Sleep" ad produced similar results: 25% of respondents gave answers that were coded "superiority over other products" (F 146).

The 1991 copy test of the challenged FSI's revealed that between 47% and 59% of respondents strongly or somewhat agreed that Doan's is better for back pain than other pain relievers, a response whose magnitude confirms that the claim was conveyed (F 168-69). *See Thompson Medical*, 104 FTC at 797, 805-06 (22% of those

viewing the ad believed Aspercreme contained aspirin). *See also Warner-Lambert*, 86 FTC 1398, 1504 (1975).

U.S. Research conducted a mall test of a Doan's ad, "Activity–Playtime" and an FSI. Fifty-seven percent of the "Activity–Playtime" and 40% of the FSI respondents took the superior efficacy claim from these ads (F 180). *See also* F 181, 183, 185.

The part of Dr. Jacoby's copy test for respondents which measured the communication of the challenged ads "Activity–Playtime" and "Muscles" showed that 35% of the respondents viewing "Activity–Playtime" and 19% of those viewing "Muscles" took away the superiority claim from open-ended questions (F 191-92).

The results of the copy tests relied on by complaint counsel provide solid evidence that the challenged ads conveyed the superiority message, as did Ciba's dissemination of ads which it knew conveyed a false superior efficacy claim. *ABSI*, Dkt 9275, slip op. at 40 (March 3, 1997); *Thompson Medical*, 104 FTC at 791. (If an advertiser intends to make a particular claim, it is reasonable to interpret the ads as making that claim.) Furthermore, the ads were a significant factor in creating the superiority belief (F 342). *Warner-Lambert*, 86 FTC at 1503.

C. The Superior Efficacy Claim Is Unsubstantiated

The parties have stipulated that two well controlled clinical studies are required to substantiate a superiority claim for an analgesic like Doan's. JX 1 ¶¶ 6, 9; *see Thompson Medical*, 104 FTC at 822-825. The parties also stipulated that there are no scientific studies demonstrating the therapeutic superiority of magnesium salicylate (Doan's active ingredient) over aspirin, acetaminophen (the active ingredient in Tylenol), ibuprofen (the active ingredient in Advil and Motrin) or naproxen sodium (the active ingredient in Aleve) for the relief of back pain. JX 1 ¶ 9. Nothing in the FDA analgesics monograph supports the superior efficacy of magnesium salicylate. Respondents knew that they possessed no substantiation for the superior efficacy claim (F 101, 102, 103).

D. The Superior Efficacy Claim Is Material

For deception to occur the challenged representation or omission must be material, *i.e.*, likely to affect consumer choice or conduct with respect to a product.

Respondents' ads make claims regarding the efficacy or comparative efficacy of Doan's. They may be considered presumptively material because they relate to the central characteristics of that product, Deception Statement, 103 FTC at 182, because they involve an important health claim, *Kraft, Inc.*, 114 FTC at 135-36, and because respondents intended to make a superior efficacy claim (F 104).

E. Corrective Advertising Is Not Warranted

In *Warner-Lambert*, 86 FTC at 1499-1500, the only litigated case in which corrective advertising was ordered, the Commission stated with respect to Listerine's forty-year deceptive ad campaign:

> [I]f a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertising ceases, there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief. Since the injury cannot be averted by merely requiring respondent to cease disseminating the advertisement, we may appropriately order respondent to take affirmative action designed to terminate the otherwise continuing ill effects of the advertisement. 86 FTC at 1499-1500.

There is strong academic support for the imposition of corrective ads in the appropriate circumstances (F 356, 358-60), and the NFO belief study shows that a superior efficacy belief lingered for six months after the last challenged ad was disseminated (F 357).

However, given the difference between the length of time that the false Doan's and Listerine ads ran, there is no certainty that the belief at issue requires corrective advertising and I reject Dr. Mazis' contrary conclusion (F 357) as well as complaint counsel's claim that the need for a corrective advertising order can be inferred.

In fact, there are indications in the record that the belief in Doan's superiority may be transitory.

The ASI and ARS copy tests reveal low 24 and 72 hour recall (2% to 8%) by respondents of a "more effective" or a "good product/better/best" message (F 231-32) and Dr. Jacoby testified that this shows that the ads did not create any widespread, lingering

misimpression by consumers. Dr. Whitcup and Dr. Stewart testified that Doan's ads were not memorable, a further indication that the effect of the ads which they analyzed will not linger for a substantial period of time (F 162, 296)

That the remedy sought by complaint counsel is drastic[2] is shown by the Commission's failure to enter a corrective advertising order in cases where some or all of the conditions for doing so existed. *See e.g., Bristol Myers Co.*, 102 FTC at 21 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *Sterling Drug, Inc.*, 102 FTC 395 (1983), *aff'd*, 741 F.2d 1146 (9th Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *American Home Prods. Corp.*, 98 FTC 136 (1981), *aff'd as modified*, 695 F.2d 681 (3d Cir. 1982).

The parties agree that not every case of deception warrants corrective advertising: some unique circumstances must exist before that remedy is adopted. Complaint counsel have not shown what is memorable about an ad campaign, which, while successful in retaining market share (F 333), created no significant increase in sales (JX 2-B, ¶¶ 16, 19; Scheffman Tr. 2543-46).

I therefore reject corrective advertising as an appropriate remedy in this case.

F. The Appropriate Order

1. Introduction

Because respondents' violations were serious, deliberate, and transferable, a comprehensive "fencing-in" order is appropriate. *See Thompson Medical*, 104 FTC at 843-44.

2. The Violations Were Serious And Deliberate

The challenged ads ran for eight years and were extensively disseminated (F 23). Total expenditures of the campaign were sizeable -- $55 million for broadcast advertising and $10 million for consumer promotions (JX 2 ¶ 21).

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[2] Although both corrective advertising and affirmative disclosure are forms of fencing-in relief ..., the standard for imposing corrective advertising is significantly more stringent than that for an affirmative disclosure .... [which] requires only that the disclosure be 'reasonably related' to the alleged violations. In my view, it is important to distinguish between corrective advertising and affirmative disclosures because the Commission should not evade the more demanding standard for corrective advertising where it is clearly applicable.
California SunCare, Inc., 61 Fed. Reg. 64521, at 64523-24 (Dec. 5, 1996) (Statement of Commissioner Roscoe B. Starek, III) (concurring in part, dissenting in part).

The challenged claims were health related and consumers suffered economic injury because Doan's products are significantly more expensive than other OTC analgesics (F 15).

Consumers could not evaluate the efficacy of Doan's and could not make informed decisions about purchasing the product. *Thompson Medical*, 104 FTC at 834; *American Home Prods v. FTC*, 695 F.2d at 707.

Ciba's violations were serious and deliberate, for it designed ads which it knew would convey a superiority message which was unsubstantiated (F 100-113).

3. The Violations Are Transferable

Ciba's violations -- false and unsubstantiated superiority claims -- are transferable to other OTC analgesics and an order prohibiting transference is appropriate. *Sears & Roebuck*, 676 F.2d at 394-95.

4. The Injunctive Provisions Of The Notice Order

The injunctive provisions of the proposed order are necessary and appropriate to address respondents' violations.

Part I of the proposed order addresses the specific violation in this case, requiring competent and reliable scientific substantiation for any claim that any OTC analgesic is more effective than any other OTC analgesic for pain relief. It specifies that the substantiation required for these claims must include at least two well-controlled clinical studies. This is the appropriate standard for comparative efficacy claims for OTC analgesics. *Thompson Medical*, 104 FTC at 821-26, 832.

Part II of the proposed order contains the fencing-in relief, prohibiting unsubstantiated efficacy, safety, benefits, or performance claims for any OTC analgesic drug.

Part III of the proposed order contains a "safe harbor" provision for claims approved by FDA under a tentative or final monograph, or pursuant to an approved new drug application.

Parts IV-VIII consist of standard compliance, record keeping and sunsetting provisions.

IV. SUMMARY

A. The Federal Trade Commission has jurisdiction over the advertising of Doan's analgesic products under Sections 5 and 12 of the Federal Trade Commission Act.

B. Respondents disseminated advertisements for Doan's analgesic products that falsely represented to reasonable consumers that Doan's analgesics products are more effective than other analgesics for relieving back pain.

C. At the time respondents made these representations, they did not possess or rely upon a reasonable basis that substantiated such representations.

D. Respondents' representations were material.

E. The acts and practices of respondents as herein found were all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices and false advertisements in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

F. The accompanying order is necessary and appropriate under applicable legal precedent and the facts of this case.

ORDER

For purposes of this order:

1. "*Doan's*" shall mean any over-the-counter analgesic drug, as "drug" is defined in the Federal Trade Commission Act, bearing the Doan's brand name, including, but not limited to, Regular Strength Doan's analgesic, Extra Strength Doan's analgesic, and Extra Strength Doan's P.M. analgesic.

2. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

3. "*Advertisement*" shall mean any written, oral or electronic statement, illustration or depiction which is designed to create interest in the purchasing of, impart information about the attributes of, publicize the availability of, or effect the sale or use of goods or services, whether it appears in a brochure, newspaper, magazine, free standing insert, marketing kit, leaflet, circular, mailer, book insert,

letter, catalogue, poster, chart, billboard, public transit card, point-of-purchase display, package insert, package label, product instructions, electronic mail, website, homepage, film, slide, radio, television, cable television, program-length commercial or "informercial," or in any other medium.

I.

It is ordered, That respondents Novartis Corporation, and Novartis Consumer Health, Inc., corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Doan's or any other over-the-counter analgesic drug, in or affecting commerce, as "drug" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that such product is more effective than other over-the-counter analgesic drugs for relieving back pain or any other particular kind of pain, unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of Part I of this order, "competent and reliable scientific evidence" shall include at least two adequate and well-controlled, double-blinded clinical studies which conform to acceptable designs and protocols and are conducted by different persons, each of whom is qualified by training and experience to conduct such studies, independently of each other.

II.

It is further ordered, That respondents Novartis Corporation, and Novartis Consumer Health, Inc., corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any over-the-counter analgesic drug in or affecting commerce, as "drug" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, regarding such product's efficacy,

safety, benefits, or performance, unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for any such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

IV.

It is further ordered, That for a period of five (5) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representations; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

V.

It is further ordered, That respondents shall:

A. Within thirty (30) days from the date of entry of this order, provide a copy of this order to each of their current principals, officers, directors and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order; and

B. For a period of ten (10) years from the date of entry of this order, provide a copy of this order to each of their future principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order who are associated with them or any subsidiary, successor, or assign, within three (3) days after the person assumes his or her position.

VI.

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

VII.

It is further ordered, That this order will terminate twenty (20) years from the date of its issuance, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondents did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

VIII.

It is further ordered, That respondents shall, within sixty (60) days from the date of entry of this order, and at such other times as the Federal Trade 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.

OPINION OF THE COMMISSION

BY ANTHONY, *Commissioner*:

This case is about a company that chose to market an over-the-counter ("OTC") analgesic by advertising that the product was superior to others in the treatment of back pain without any basis for that claim. Respondents Novartis Corporation and Novartis Consumer Health, Inc.[1] (collectively "Novartis") appeal from an Initial Decision and Order of Administrative Law Judge Lewis F. Parker (the "ALJ"), holding that superiority claims in advertisements for Doan's products were material and therefore deceptive in violation of Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. 45, 52. Complaint counsel cross-appeals the ALJ's decision not to order a corrective advertising remedy.

We affirm the ALJ's holding that the unsubstantiated superior efficacy claims for back pain relief were material and thus deceptive. We reverse the ALJ's holding regarding corrective advertising. We agree with the ALJ's findings and conclusions to the extent that they are consistent with those set forth in this opinion, and, except as noted herein, adopt them as our own.[2]

I. FACTUAL BACKGROUND

Novartis Corporation is a New York corporation and Novartis Consumer Health, Inc. is a Delaware corporation. Both are subsidiaries of Novartis AG, a Swiss corporation, and successors-in-interest to Ciba-Geigy Corporation and Ciba Self-Medication, Inc. (collectively "Ciba").[3] JX 2A ¶ 11.[4] In addition

[1] Novartis is the successor-in-interest to Ciba-Geigy Corporation and Ciba Self-Medication, Inc. On April 23, 1997 the ALJ issued an order, pursuant to the agreement of the parties, substituting Novartis for Ciba as respondent in this proceeding.

[2] We are in general agreement with the dissent regarding the applicable legal standards. The disagreements are over differing interpretations of the evidence.

[3] Ciba acquired the Doan's brand from DEP Corporation in early 1987. DEP Corporation had acquired the brand from Jeffrey Martin, Inc. shortly before. JX 2A ¶ 12. From January 1987 to December 1994, Ciba was responsible for the marketing and advertising of Doan's analgesic products. In December 1994, Ciba transferred the Doan's line of products to CSM, a wholly-owned subsidiary. CSM was responsible for the marketing and advertising of Doan's analgesic products from December 1994 to March 1997. JX 2A ¶ 13.

[4] References to the record are abbreviated as follows:

IDF	Initial Decision Finding	JX	Joint Exhibit
ID	Initial Decision	RAB	Respondents' Appeal Brief
Tr.	Transcript of Trial Testimony	CCAB	Complaint Counsel's Answering and Cross-Appeal Brief
CX	Complaint Counsel's Exhibit	RRAB	Respondents' Reply and Answering Brief
RX	Respondents' Exhibit	CCRB	Complaint Counsel's Reply Brief

to the Doan's line, Novartis manufactures and sells other OTC products.[5]

Doan's has been marketed and sold for over 90 years and has always been advertised as a backache product. IDF 8; Peabody Tr. 286. The active analgesic ingredient in the Doan's products is magnesium salicylate. IDF 14; JX 1 ¶ 11. While no other brand of OTC analgesic contains magnesium salicylate as an active ingredient, IDF 22; Peabody Tr. 314, there are no scientific studies demonstrating that magnesium salicylate is more efficacious than other analgesics.IDF 22; JX 1 ¶ 9. The Food and Drug Administration (the "FDA") regulates product labeling for Doan's pursuant to its *Tentative Final Monograph on Internal Analgesic, Antipyretic, Antirheumatic Products for Over-the-Counter Human Use* (the "Monograph"). Under the Monograph, an OTC analgesic drug may be labeled as indicated for the temporary relief of minor aches and pain associated with one or more of the following: cold, sore throat, headache, toothache, muscular aches, backaches, and arthritis. JX 1 ¶ 5.

Doan's is a relatively small player in a large market. In 1987, the total advertising spending for all OTC analgesic products was $299 million; for the first half of 1996 it was $351.1 million. JX 2D ¶ 23. Doan's advertising expenditures were a small fraction (1 to 3%) of the total analgesic advertising spending from 1988 to 1996. JX 2E ¶ 24. Between 1988 and 1994, Doan's share of the back pain advertising spending ranged from 8 to 12%. *Id.* Doan's analgesic products sell at a significant price premium over general purpose analgesic products at both the factory level (the retailer's purchase price) and the retail level (the consumer's purchase price). IDF 15.

After Ciba acquired the Doan's line in 1987, it commissioned a study, the Attitude and Usage Telephone Study (the "A&U Study"), CX 221, to find out how consumers perceived Doan's and to direct future marketing efforts. *See* Peabody Tr. 133-34. The A&U Study surveyed users of the Doan's product and non-users who were aware of the product. After analyzing the results of the A&U Study, Ciba's Marketing Research Department concluded that "Doan's has a weak image in comparison to the leading brands of analgesics and *would benefit from positioning itself as a more effective product* that is

[5] These products include Ascription, Ciba Vision, Desenex, Dulcolax, ExLax, Gas-X, Habitrol, Maalox, Sunkist Vitamin C, Tavist-D, Theraflu, and Triaminic. IDF 5.

strong enough for the types of backaches sufferers usually get." CX 221-c,d (emphasis added). It further concluded that "Extra-Strength Tylenol is clearly the gold standard for backache pain relief followed by Advil. Bayer and Doan's are consistently perceived weakest." CX 221-c.

Ciba used the results from the A&U Study to create a new Doan's advertising strategy. Peabody Tr. 146. The strategy of this new campaign was to compare Doan's to other general analgesics. Comparative claims for small-share niche brands like Doan's are especially effective according to one of complaint counsel's experts, Dr. David Stewart. Stewart Tr. 3457. Specifically, Dr. Stewart explained that explicit comparative references made by low-share brands attract more attention to, and increased purchase intention for the low-share brand relative to the high share brand. Stewart Tr. 3458-59.

Ciba's marketing plans showed that its goals were to maintain its existing customers, to regain lapsed users and, of course, to attract new users. *See* CX 335-z-12; CX 343-z-65; CX 351-z-59. In the fourth quarter of 1987, Ciba introduced "Extra Strength Doan's," containing a larger dose of the active analgesic ingredient, and renamed the original product "Regular Strength Doan's." After its introduction, the Extra Strength product captured more than half of the Doan's product sales. JX 2B ¶18. In September 1991, Ciba introduced Doan's P.M., which contains a sleep aid.

Increasingly, Doan's faced competition from new back pain products, general analgesics, and private label brands. *See* CX 335-d; CX 343-f; CX 351-c; Peabody Tr. 146. The marketing plans outlined strategies to deal with such competition. For example, in August 1992, Ketchum Advertising prepared a "Doan's Defense Plan" intended to respond to the anticipated 1993 introduction of Nuprin Backache. *See* CX 357. The 1996 Marketing Plan reports that in 1994 Ciba regained its 1993 loss. CX 400-h.

To send its message, Ciba used national television ads and, to a lesser extent, free standing inserts ("FSIs"). Ciba disseminated FSIs in Sunday newspaper supplements two to three times per year. JX 2I ¶36. From 1987 through 1996, Ciba spent $55 million for broadcast ads and $10 million for FSIs. JX 2C ¶21. Doan's television ads appeared nationally both on network television and on syndicated and cable television. *See* JX 2F ¶28. The television ads were 15-second commercials. JX 2E ¶25. Ingrid Nagy, Doan's Business Unit Manager

from 1988 to 1991 and its Marketing Director from 1994 to 1995, believed that 15-second ads were effective because of the fairly singular communication point of the ads. IDF 29; CX 499 at 135 [Nagy Dep.]. In addition, Ciba disseminated the television ads through a flighting strategy [6] during 26 weeks of the year. Based on estimates by Ciba's advertising agencies, from 1988 to 1996, television commercials for Doan's reached 80% to 90% of the Doan's target audience, on average, between 20 and 27 times per year. JX 2F ¶28. Finally, for short periods in 1991 and 1993, Ciba tested radio ads including Spanish radio ads in Houston. JX 2I ¶¶34, 35.

II. PROCEDURAL BACKGROUND

On June 21, 1996, the Federal Trade Commission (the "Commission") issued a complaint alleging that Ciba had violated Section 5 by making unsubstantiated claims in its advertisements (1) that Doan's analgesic products were more effective than other analgesics, including Bayer, Advil, Tylenol, Aleve, and Motrin, for relieving back pain; and (2) that Ciba possessed and relied upon a reasonable basis to substantiate such claims. During litigation, complaint counsel sought an order requiring that the following corrective notice appear on all advertising and packaging: "Although Doan's is an effective pain reliever, there is no evidence that Doan's is more effective than other pain relievers for back pain."[7] Complaint counsel sought to impose a performance standard for determining when the corrective notice was no longer needed. Specifically, the corrective notice would appear until Ciba (now Novartis) submitted consumer survey data to the Commission demonstrating that consumer beliefs had reached a specified level.[8]

After extensive discovery and an administrative trial, the ALJ issued his Initial Decision and Order on March 9, 1998. The ALJ found that a facial analysis of the challenged advertisements supports the conclusion that the advertisements conveyed a claim of superior

[6] In contrast to ads that are aired every week, flights are ads that air for several weeks and then are off the air for several weeks. Peabody Tr. 130.

[7] For TV, radio, or other broadcast advertisements, Novartis would have the option of substituting either of the following corrective notices: "There is no evidence that Doan's is more effective for back pain relief than other over-the-counter pain relievers;" or "There is no evidence that Doan's is more effective than other pain relievers for back pain."

[8] The performance standard was modeled after the 1996 NFO belief study relied upon by complaint counsel in this litigation.

efficacy for the treatment of back pain. The ALJ concluded that the Doan's superior efficacy claims were presumptively material because they relate to the central characteristics of the product and involve health claims. He also found that the claims cause consumers economic injury because the Doan's products are significantly more expensive than other OTC analgesics. He therefore held the superiority claims to be deceptive in violation of 15 U.S.C. 45 and 52. Further, the ALJ concluded that Ciba intended to make the challenged claims. ID at 63-66.

The ALJ's order prohibits Novartis from making superiority claims for any OTC analgesic drug with regard to the product's ability to relieve back pain or any other particular kind of pain without competent and reliable scientific evidence that includes at least two adequate and well-controlled, double-blinded clinical studies. (Part I) As fencing-in relief, the ALJ's order prohibits Novartis from making any representation regarding any OTC analgesic drug's efficacy, safety, benefits, or performance without competent and reliable scientific evidence to substantiate the claim. (Part II) Finally, the order contains a "safe harbor" for claims approved by the FDA under a tentative or final monograph, or pursuant to an approved new drug application. (Part III).

The ALJ concluded that the record did not support the imposition of a corrective advertising remedy. He noted that a belief study, relied upon by complaint counsel, showed that a superior efficacy belief lingered for six months after the last challenged ad was disseminated. Nevertheless, the ALJ compared the 51 years Warner Lambert ran deceptive Listerine ads to the eight-year Doan's campaign and concluded that there was insufficient evidence that consumer misbeliefs in Doan's superiority for the treatment of back pain would linger in the absence of the remedy. ID at 64. Finally, he rejected complaint counsel's claim that the need for corrective advertising could be inferred.

III. DECEPTION ANALYSIS

A. Legal Standard.

The first issue in this case is whether the challenged Doan's ads were deceptive. Section 5 of the Federal Trade Commission Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. 45. Section 12 of the Act declares

dissemination of false advertisements regarding certain categories of products, including drugs, to constitute an unfair or deceptive act or practice under Section 5. 15 U.S.C. 52.

As the Commission explained in its policy statement on deception, appended to *Cliffdale Assocs., Inc.* 103 FTC 110, 176-184 (1984) (the "Deception Statement"), a representation is deceptive if it "is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." *Id.* at 176. In practice, the Commission's deception analysis is applied as a three-part test asking whether (1) a claim was made; (2) the claim was likely to mislead a reasonable consumer; and (3) the claim was material. *E.g.*, *Cliffdale Assocs., Inc.* 103 FTC at 165. There is no requirement of intent. *Kraft, Inc.*, 114 FTC 40, 121 (1991) ("Evidence of intent to deceive is not required to find liability."), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993).

The factors and evidence the Commission weighs in assessing the three prongs of the deception analysis are often interrelated. While Novartis' sole question on appeal is whether the ALJ "err[ed] in concluding that the alleged implied superior efficacy claim was material to consumers,"[9] RAB 7, its claims arguably implicate the other two parts of the test. Therefore, to address fully Novartis' arguments on appeal, and to provide a context for our discussion of the materiality issue, we briefly discuss the first two elements before considering materiality.

B. The Challenged Ads Conveyed Superior Efficacy Claims.

We first consider whether the challenged ads communicated a superior efficacy claim for the treatment of back pain. In determining what claims may reasonably be ascribed to an ad, the Commission examines the entire ad and assesses the overall net impression it conveys. *Deception Statement*, 103 FTC at 176; *Kraft, Inc.*, 114 FTC at 122; *Thompson Med. Co.*, 104 FTC 648, 790 (1984), *aff'd* 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

[9] In its appeal brief, Novartis states that while it "disputes the [ALJ's] finding that the challenged Doan's advertisements conveyed an implied superior efficacy claim to the requisite number of consumers under applicable precedent, it does not challenge that finding for purposes of this appeal." RAB 6. Novartis repeats that its appeal "challenges only the ALJ's conclusion that complaint counsel established the materiality of the alleged superiority claim," in its reply brief. RRAB 2. In a footnote, Novartis states that it is not conceding that the claim was communicated. *Id.* 2 n.1. By failing to appeal the issue, however, Novartis *has* conceded the issue for purposes of this litigation.

Claims can either be express or implied. Here we are dealing with an implied claim. Implied claims range on a continuum. At one end are claims that are "virtually synonymous with an express claim" and use "language that literally says one thing but strongly suggests another." *Thompson Med. Co.*, 104 FTC at 789. At the other end of the spectrum are claims that use "language that relatively few consumers would interpret as making a particular representation." *Id.*

The Commission's assessment of whether an implied claim is made necessarily begins with the advertisement itself. A facial analysis alone will suffice if it permits the Commission to conclude with confidence that the ad makes the implied claim. *See Stouffer Foods Corp.* 118 FTC 746, 798 (1994); *Kraft, Inc.*, 114 FTC at 121; *Thompson Med. Co.*, 104 FTC at 789. In cases where the claim is not manifest from an examination of the ad, the Commission will look to extrinsic evidence. *Id.* at 799; *Kraft Inc.*, 114 FTC at 121; *Thompson Med. Co.*, 104 FTC at 789. Such evidence might include, for example, the testimony of expert witnesses, market research studies regarding consumer reactions to the use of certain common terms, or consumer surveys. *Kraft, Inc.*, 114 FTC at 121-22. The Commission will carefully assess the quality and reliability of any extrinsic evidence introduced by the parties. *Stouffer*, 118 FTC at 799; Deception Statement, 103 FTC at 176. While methodological perfection is not required, with regard to reliance on copy tests and other consumer surveys, flaws in methodology may affect the weight the Commission gives to such results. *Id.*

1. A Facial Analysis of the Ads Reveals That They Conveyed Superior Efficacy Claims.

Respondent ran the challenged ads over eight years.[10] JX 2E ¶25. The "Graph" ad was the first in the new campaign. It begins with a visual of the profile of a person in front of what appears to be graph paper. CX 13. The individual twice attempts to bend over; the second time (after he has implicitly ingested Doan's), he is able to bend farther. The audio portion of the ad states that "Doctors measure back

[10] Graph (CX 13) ran from May 1988 through June 1991; X-Ray (CX 14) ran from August 1989 through June 1991; Black & White (CX 15) ran from June 1991 through October 1992; Black & White Pan (CX 16) ran from December 1992 through June 1994; Ruin A Night's Sleep (CX 17) ran from January 1992 through August 1992; Ruin A Night's Sleep (CX 18) ran from August 1993 through June 1994; Activity Playtime (CX 20) ran from July 1994 through July 1995; Activity Pets (CX 22) ran from July 1994 through July 1995; and Muscles (CX 23) ran from August 1995 through June 1996. JX 2E ¶ 25.

pain by how far you can bend." The ad then depicts a package of Doan's on the left side of the screen while packages of three competing analgesic brands -- Advil, Tylenol and Bayer -- are displayed on the right. The audio portion concludes: "With an ingredient these pain relievers *don't* have." The spotlight on the other brands is then darkened leaving only a visual of the Doan's package on the screen.

The television ads respondent disseminated after "Graph" continued to emphasize that Doan's has an ingredient not found in competing analgesics while depicting competing products. The "X-Ray" ad introduces an audio and visual reference to Doan's as "the back specialist," and this tag line is also used in several subsequent Doan's ads. CX 14. Respondent began to use the terms "special" and "unique" to modify references to Doan's "ingredient" in "Black and White Back" and "Ruin a Night's Sleep" ads, respectively. CX 15; CX 17.

The superiority themes begun in "Graph" and "X-Ray" continued in subsequent ads such as "Activity Playtime" and "Activity Pets." CX 20; CX 22. As in earlier ads, both depict a package of Doan's alongside other analgesics while the voice-over states, "Doan's has an ingredient these pain relievers don't have." And once again, the ads conclude with the "back specialist" tag line. Respondent repeated similar themes in the challenged "Muscles" ad. CX 23.

The Free Standing Inserts -- color print advertisements included with newspapers -- closely tracked the claims in the television ads. One FSI that first ran in 1989 and again in 1990 and 1991, features a large Doan's package alongside smaller but clearly visible packages of Advil, Extra-Strength Tylenol, and Bayer. CX 32. Copy above the packages states: "Doan's. Made for back pain relief. With an Ingredient these other pain relievers don't have." *Id.* Other FSIs made similar claims and included depictions of competing brands. *See., e.g.*, CX 33-39.

Based upon a facial analysis of the challenged ads, we find that they clearly conveyed a claim that Doan's is superior to other analgesics, such as Bayer, Advil, Tylenol, Aleve and Motrin, for relieving back pain. The express claims that Doan's is made for back pain and contains a unique or special ingredient that the other featured brands do not have, coupled with the depiction of the other brands, combine to communicate that Doan's is superior to the

competing analgesics for back pain. This message is reinforced by the statement in some ads that Doan's is the "back specialist." The superior efficacy claim is implied, but on the continuum of implied claims, we find the claim so clear as to be nearly express.

2. Extrinsic Evidence Confirms That the Challenged Ads Conveyed Superior Efficacy Claims.

Substantial extrinsic evidence confirms our conclusion that the challenged ads make a superior efficacy claim. We affirm and adopt the ALJ's findings on this point (ID at 62-63), and highlight some of the more persuasive extrinsic evidence.

Several consumer surveys and copy tests show that consumers understood the ads to be making a superiority claim. For example, copy tests on mock-up versions of some of the challenged ads conducted by Bruno & Ridgeway, an independent consumer research company employed by Ciba, showed that approximately 30 to 45% of the consumers tested discerned a superiority message from the ads.[11] Likewise, a Mail Panel Communication Test conducted by Market Facts, a firm retained by Ciba to test the 1991 FSIs, revealed that between 47 to 59% of respondents strongly or somewhat agreed that the FSIs indicated that Doan's is better for back pain than other pain relievers. CX 238-z-71. In addition, complaint counsel commissioned U.S. Research ("USR") to conduct a mall intercept copy test to determine if the challenged ads communicated the superiority claim. Fifty-seven percent of the "Activity-Playtime" ad and 40% of the FSI respondents took the superior efficacy claim from the ads. IDF 179, 180; ID at 63.

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[11] Bruno & Ridgeway used a mall intercept methodology where qualified respondents were shown mock-ups of the ads and then asked questions. CX 224-d; Peabody Tr. 160. A mall intercept study is conducted in suburban shopping malls in different cities. Interviewers posted in the mall solicit passers-by to participate. Interviewers first determine whether a participant meets the demographic requirements of the study. If so, the participant is shown materials and asked questions. Peabody Tr. 358. Mall intercept studies are sometimes criticized as less demographically balanced than mail panel or telephone surveys because mall-goers are not necessarily representative of society at large. *See* Peabody Tr. 204. Tests of this nature are referred to as forced-exposure communication tests.

Thirty-eight percent of the consumers tested indicated that the "Graph" ad communicated, as a primary or secondary message, that Doan's was "superior to other products." CX 224-m. In response to open-ended questions, 44% of the consumers who saw the "Black and White" ad gave answers that were coded as "superiority over other products." CX 236-j. If responses to all of the open-ended questions are netted, 62% indicated that at least one ad conveyed a superiority claim. CX 236-m. Similarly, the results for "Ruin A Night's Sleep" ad reported that 23% of Doan's users and 38% of Doan's non-users gave answers that were coded "superiority over other products." CX 244-h,v.

Ciba prepared these tests in the regular course of business, which indicates that at the time Ciba was running the ads, it was well aware that consumers understood them as conveying a superior efficacy message. Mr. Edward Peabody, the Director of Marketing Research, testified that he became concerned about miscommunication at the 10 to 15% level. Peabody Tr. 150-51. Nevertheless, as noted above, Ciba ran ads from which percentages of 30 to 45% drew a superiority message. While a respondent need not intend to make a claim in order to be held liable, evidence of intent to make a claim may support a finding that the claims were indeed made.

Novartis counters its own commissioned Bruno & Ridgeway test results with results obtained in ASI and ARS copy tests[12] that show low percentages of consumers drawing a superiority message from the ads.[13] We find that the ARS and ASI test methods likely understate the communication results. These were tests of recall and persuasion administered either one or three days after exposure to the ad. The legal issue in the first prong of deception, however, is whether the claim was made and not whether it was memorable. Forced-exposure tests, like those conducted by Bruno & Ridgeway, where questions are asked when the ad is fresh in the consumer's mind, are more telling regarding whether a particular claim was made. The ARS and ASI tests also tend toward understatement because their questionnaires contain no close-ended questions, and the open-ended questions asked consumers about express claims in the tested ads rather than what the ad implied or suggested. Peabody Tr. 194-95.

In sum, the issue of whether the claim was made is not a close one. While technically an implied claim, respondent's superior efficacy message is plain from a facial analysis of the challenged ads

[12] ASI tests expose consumers to commercials during pilot shows on unused cable channels. The consumer watches one or two pilots with test commercials embedded for Doan's and other products. Twenty-four hours later, consumers are called and asked questions about the ads. Peabody Tr. 181-83. ARS testing is similar to ASI testing except it is done in a theater-like setting, often at a hotel. Three days after seeing the pilot, consumers are called and asked questions about the ads. Peabody Tr. 350-52.

[13] Specifically, Novartis argues that a 1990 ASI copy test of "Black and White Back" reported that only 3% of the respondents questioned twenty-four hours after exposure to the ad reported that it communicated "product superiority," and that only 1% reported that it was "more effective/works better" in comparison to other products. Peabody Tr. 389; RX 98-h. Novartis also relies on ARS copy test data from 1991, 1993, 1994 and 1995 to show low percentages of consumer recall for a "more effective" or "good product/better/best" message within one to three days after exposure to the ads. RX 89-z-20; RX 32-y; RX 33-z-4; CX 265-z-2,3.

alone. The extrinsic evidence introduced on this issue provides additional support for our finding that the superiority claims for back pain treatment were made.

C. The Challenged Ads Were Likely to Mislead Reasonable Consumers.

Having concluded that the claims were made, we proceed to consider whether those claims were likely to mislead reasonable consumers. Deception Statement, 103 FTC at 177. The applicable standard is whether a claim is *likely* to mislead; proof that particular consumers were actually deceived is not required. *Kraft, Inc.*, 114 FTC 133; *Cliffdale Assocs., Inc.*, 103 FTC at 165; Deception Statement, 103 FTC at 176. Further, "[t]he test is whether the consumer's interpretation or reaction is reasonable." *Id.* The interpretation need not be the only one to be reasonable. For example, a respondent can be held liable where multiple interpretations of a claim are possible, only one of which is deceptive. *Stouffer Foods Corp.*, 118 FTC at 799; *Kraft, Inc.*, 114 FTC at 120-21 n.8; *Thompson Med. Co.*, 104 FTC at 789 n.7. The reasonableness of an interpretation is not contingent upon its being shared by a majority of consumers. A claim would likely mislead a reasonable consumer if at least "a significant minority of consumers" would be deceived by it. Deception Statement, 103 FTC at 177 n.20. Importantly, the Deception Statement adds that an interpretation is presumed reasonable if it is one the respondents intended to convey. *Id.* at 178.

The misleading nature of the superior efficacy claims at issue here is plain. The claims are entirely unsubstantiated. Novartis concedes that no scientific studies demonstrate the therapeutic superiority of magnesium salicylate, the active ingredient in Doan's, over aspirin, acetaminophen, ibuprofen, or naproxen sodium for relief of back pain or any other indications contained in the Monograph issued by the FDA. JX 1D ¶ 9. As a general matter, the Commission considers claims regarding the efficacy of analgesics to be adequately substantiated when the claims are supported by the results of two well-controlled clinical studies. *Thompson Med. Co.*, 104 FTC at 825. Here, the claim that Doan's is superior to various other OTC analgesics for treating back pain is baseless and, consequently, likely to mislead reasonable consumers.

This conclusion is bolstered by the fact that Ciba intended to make the superiority claim. Ciba knew from its own copy testing data that consumers were taking a superiority message from the ads and that it had no substantiation for such a claim. Indeed, more than a significant minority -- 30 to 45% -- of consumers discerned this superiority message. Yet, Ciba continued to run the ads. This demonstrates that Ciba intended to, and in fact did, convey a superiority message. Therefore, consumers receiving such a message from the ads behaved reasonably in doing so. *See Thompson Med. Co.*, 104 FTC at 791.

Our finding of the reasonableness of the deceptive interpretation is further supported by the nature of the product. Analgesics are products the efficacy of which consumers cannot readily judge for themselves. Well-documented phenomena such as the "placebo effect" and the "usage effect"[14] make it difficult for consumers to judge accurately the degree of an analgesic's efficacy. Superiority vis-a-vis other types of analgesics is even more difficult to ascertain absent well-controlled clinical trials. Thus, consumers necessarily rely upon manufacturers' representations and behave reasonably when they take those representations to be substantiated and accurate.

D. The Claims Are Material.

Finally, the Commission must determine whether the superior efficacy claim is material. A "material" misrepresentation is one that involves information important to consumers and that is therefore likely to affect the consumer's choice of, or conduct regarding, a product. Deception Statement, 103 FTC at 182. Materiality is closely related to injury in that when a consumer's choice is affected by a misrepresentation, the consumer, as well as competition generally, is injured. *Id.* at 182-83. However, proof of actual consumer injury is not required. *Kraft, Inc.*, 114 FTC at 134.

The ALJ concluded that the challenged claims were presumptively material, ID at 63-64, and found that the misleading

[14] The "placebo effect" is the tendency of patients to respond favorably to a treatment regardless of the treatment's medical efficacy. *See Thompson Med. Co.* 104 FTC at 715 (Initial Decision.) The "usage effect" is the tendency of users of a product to rate it more highly than non-users of the product. Mazis Tr. 992, 1055-56. Users tend to use a product because they believe it works and thus tend to give it higher ratings than non-users. *Id.*; Jacoby Tr. 2987. This may be attributable, in part, to consumers' inability to evaluate effectively the efficacy of OTC analgesic products they use. *See American Home Prods. Corp.*, 98 FTC at 282 (Initial Decision).

claims were material based upon this presumption and the record evidence. IDF 227.

On appeal, Novartis argues that the ALJ misapplied the presumption, and improperly evaluated the evidence submitted by the parties. We conclude that the respondent's implied superior efficacy claim was material.

1. The Presumption of Materiality

a. Generally

Novartis and *amicus curiae* Grocery Manufacturers Association argue that the ALJ improperly elevated the presumption of materiality to a virtually irrebuttable conclusion of law. We disagree.

Certain categories of information are presumptively material, including, but not limited to, express claims, claims significantly involving health or safety, and claims pertaining to the central characteristic of the product. Deception Statement, 103 FTC at 182. Similarly, the Commission will infer materiality where the record shows that respondent intended to make an implied claim. *Id.* However, we "will always consider relevant and competent evidence to rebut presumptions of materiality." *Id.* at 182 n.47.

"To establish a 'presumption' is to say that a finding of the predicate fact," here, any of the factors listed above, "produces a required conclusion in the absence of explanation," here, materiality. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993) (internal quotation marks omitted). In order to rebut the presumption, respondent must come forward with sufficient evidence to support a finding that the claim at issue is not material. Respondent can present evidence that tends to disprove the predicate fact from which the presumption springs (*e.g.*, that the claim did *not* involve a health issue) or evidence directly contradicting the initial presumption of materiality. This is not a high hurdle. Unless the rebuttal evidence is so strong that the fact-finder could not reasonably find materiality, the fact finder next proceeds to weigh all of the evidence presented by the parties on the issue. *See id.* at 516 (noting that after the presumption drops out, "the inquiry . . . turns from the few generalized factors that establish [the presumption] to the specific proofs and rebuttals . . . the parties have introduced"). While the presumption itself is negated by sufficient rebuttal evidence, as previously noted, the predicate facts that gave rise to the presumption are not. These facts remain evidence

from which materiality can be inferred. *See Boise Cascade*, 113 FTC at 975 (1990). However, this evidence is simply part of the entire body of evidence considered. *See also* 21 *Charles Alan Wright and Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence* §§ 5122 *et seq.* (1977 and 1998 Supp.) (discussing the history and application of presumptions).

b. The Facts Underlying the Presumption

The ALJ applied a presumption of materiality because the challenged claim involves a health issue. He also concluded that the presumption was appropriate in light of evidence that the challenged superior efficacy claim relates to the central characteristic of the product, that is, Doan's ability to relieve back pain. *See, e.g., Sterling Drug*, 102 FTC at 753 (efficacy is "the most important feature of any analgesic"). Novartis admits that the presumption of materiality properly flows from these facts. RAB 46; RRAB 9.

We likewise conclude that these predicate facts -- that the claims go to health[15] and to a central characteristic of the product -- both support an initial presumption of materiality and constitute strong evidence that the claims were material. Common sense and experience, along with the Commission's expertise in advertising matters, counsel that respondent's representation that Doan's is more effective than other analgesics in the treatment of back pain was important to consumers considering a purchase and likely affected their decisions as to which product to buy. This requires no great leap.

Along with the "health claim" and "central characteristic" bases for the presumption of materiality, the ALJ found that Ciba's intent to make a superior efficacy claim was evidence that the claim was material and supplied an independent basis for the presumption. ID at 64. Novartis objects to this finding.

An advertiser's intent to make a claim generally implies that the advertiser believes that the claim is important to consumers. *See American Home Prods.*, 98 FTC 136, 368 (1981) ("The very fact that AHP sought to distinguish its products from aspirin strongly implies that knowledge of the true ingredients of those products would be material to consumers."), *aff'd*, 695 F.2d 681 (3d Cir. 1982). Thus, the Deception Statement includes intent as a predicate fact giving rise

[15] The record establishes that approximately 50% of adults in the United States suffer from back pain; thus, the treatment of that pain is an important health concern. CX 388-b.

to a presumption of materiality. 103 FTC at 182; *see also Thompson Med. Co.*, 104 FTC at 816. For express claims, the intent to make the representation is self-evident. In the context of implied claims, however, extrinsic evidence is required to establish an intent to make the claim.

Complaint counsel presents various documents showing that Ciba knew that the ads were conveying a superiority message. Novartis argues that the documents have been taken out of context and offers the testimony of employees who state that Ciba had no intent to make the claim. We find complaint counsel's evidence more credible and compelling and conclude that Ciba did indeed intend to communicate a superior efficacy message to consumers.

The record is replete with evidence demonstrating that Doan's ads were communicating a superiority claim and that Ciba management was aware of that communication. For example, the Bruno & Ridgeway communication study of the "Graph" ad categorized 38% of consumers exposed to the ad as answering that it communicated that Doan's was "superior to other products." CX 224-m. In a May 1988, memorandum to Ciba regarding the study, Bruno & Ridgeway recommended producing the ad, *inter alia*, because it "communicated *product superiority* and perceived efficacy." CX 225-d (emphasis added). This memorandum was directed to Ciba's Marketing Research Department and circulated to the Group Vice President of Marketing and other senior marketing executives at Ciba. In addition, the 1989 Doan's Marketing Plan prepared by Ciba reported the product superiority interpretation of the ad and described the "Graph" ad as a "strong execution which effectively communicates product superiority and perceived efficacy . . . ." CX 335-z-8.

Communication tests conducted for Ciba on its "Black & White Back," "Ruin A Night's Sleep," and "Activity Playtime" advertisements indicated that they communicated a product superiority claim as well. For example, the Bruno & Ridgeway copy test for "Black & White Back" reported that 46% of respondents recalled a message of superiority over other products. CX 236-j.

In May, 1994, Ciba's advertising agency, Jordan McGrath Case & Taylor, wrote to Ciba indicating that the networks were seeking substantiation for one of the implied superiority claims:

All three Networks are requiring substantiation for the claim "If nothing you take seems to help." The Networks believe that this language implies that Doan's

provides superior efficacy vis-a-vis the competitive products shown .... As such, to make this claim we will need substantiation that Doan's is more effective (due to its Magnesium Salicylate ingredient) at relieving back pain versus the competitors pictured.
Importantly, our Agency coun[sel] agrees with the networks.

IDF 111; CX 165-a. In response, Ciba deleted the words "you take" from the ad copy so that the ad stated "if nothing seems to help." CX 20.

Despite its knowledge that the ads were communicating an unsubstantiated efficacy claim, Ciba continued to disseminate some of the ads until May, 1996, just a month before the Commission's decision to issue a complaint in this matter and well after its investigation had begun.

Novartis argues that Ciba did not intend to make a superior efficacy claim, but rather to distinguish Doan's from other products. Novartis primarily relies on the testimony of former and current Ciba/Novartis managers who stated that Ciba did not intend to make any superiority claims. We are unpersuaded by these *post facto* denials. They ring hollow in the face of the contemporaneous documentary evidence revealing knowledge that a superiority claim was being communicated. *See, e.g., United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 506, 602 (1957).

In sum, we agree with the ALJ that Ciba intended to make the superiority claim and conclude that this intent, along with the predicate facts that the claim goes to health and to a central characteristic of the product, create a presumption, and provide strong evidence, of materiality.

2. Complaint Counsel's Additional Evidence of Materiality

Along with the evidence that gave rise to the initial presumption of materiality, discussed above, the record contains substantial additional evidence supporting a finding that the claim was material. This diverse body of evidence includes consumer survey results, expert testimony, and business records.

a. The Nature of the Claims

The record contains ample evidence showing that superior efficacy claims are important to consumers attempting to choose a back pain remedy. First, experts for both parties testified that a superior efficacy claim would be important to the back pain sufferer

when choosing an OTC analgesic. Mazis Tr. 1983 (testifying that superior efficacy is the primary reason why consumers choose one analgesic over another); Jacoby Tr. 3371 (testifying that superior efficacy claim would "motivate" back pain sufferers to purchase a product).

Second, the results of a study performed by Dr. Whitcup show the importance of efficacy claims. Dr. Whitcup asked consumers to rate the characteristics of pain relief products. Dr. Whitcup found that efficacy-related responses constituted three of the top four characteristics. RX 2-z-105. These results led Dr. Whitcup to conclude that analgesic products are generally chosen "on the basis of perceived efficacy," along with other factors. RX 2-z-3; Whitcup Tr. at 2815.

Third, several studies and copy tests Ciba commissioned in the ordinary course of business demonstrate the importance of efficacy claims to consumers of back-pain remedies. For example, a study delivered to Ciba management highlights a key finding: "[Doan's] is seen as particularly effective for back pain, and as having a special ingredient . . . . this specificity is what users are looking for . . . ." CX 256-c (Brand Equity Study, Exec. Summary). Similarly, Bruno & Ridgeway stated in its report on the copy test for the "Graph" ad that superiority "seems to be an important and persuasive idea." CX 224-l. Weiss Marketing Research Co. likewise concluded that the fact that the "Graph" ad created the impression that Doan's is better may persuade people to try Doan's. CX 227-z-3.

b. The Price Premium

Throughout the relevant period, Doan's was priced well above the general purpose analgesics depicted in the challenged ads, including Tylenol, Advil, and Bayer. In 1992, for example, a 24-count package of Doan's cost consumers 66% more than the same size package of Tylenol. IDF 15-16. The existence of this price premium constitutes further evidence of materiality. Deception Statement, 103 FTC at 183.

Respondent argues that these price premiums cannot be linked to the challenged claim because the premium is attributable to Doan's status as a niche brand. RAB 83. However, the challenged ads compared Doan's to general purpose, lower-priced analgesics and not to other similarly priced niche products. Thus, the ads used a misrepresentation in an effort to convince consumers to pay the additional amount for a product similar to general purpose analgesics.

3. Novartis' Evidence Against Materiality

Novartis offers several arguments to support its contention that the superior efficacy claim was not material. While we find that Novartis submitted a sufficient amount of relevant evidence to rebut the presumption of materiality, the totality of the evidence strongly compels a finding of materiality.

a. Effectiveness of the Ads

Novartis primarily argues that the ads were ineffective in communicating their message to consumers and therefore did not affect consumer purchase decisions (*i.e.*, they were not material). Respondent argues that Ciba ran ads that it knew were ineffective in order to appease retailers who demand manufacturer support for niche brands.[16] RAB 56-57. Respondent cites market data for the relevant period that reflect little or no growth in sales or market share and reasons that the superior efficacy claim, therefore, did not affect consumer purchase behavior.[17] RAB 71.

In the first place, this claim is irrelevant even if it were true. Materiality is not a test of the effectiveness of the communication in reaching large numbers of consumers. It is a test of the likely effect of the claim on the conduct of a consumer who *has* been reached and deceived. *See* Deception Statement at 182-83. The materiality inquiry builds upon the findings from the prior two factors in the deception analysis -- that the claim was made and that it was likely to mislead at least a significant minority of reasonable consumers exposed to the ad. Materiality turns upon whether those consumers who have drawn the claim from the advertisement and been misled by it are also likely to have their conduct affected by the misrepresentation.

In any event, respondent's argument that it ran an eight-year multimillion dollar campaign of ineffective ads is contradicted by the

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[16] Novartis also argues that the evidence shows that consumers did not find the challenged ads interesting or persuasive. RAB 57-59. Even if this were the case, in the context of the materiality inquiry, it is the challenged claim that is at issue and not the ad as a whole.

[17] Along with its market *performance* arguments, Novartis advances a market *positioning* argument. Novartis contends that any superior efficacy belief that caused consumers to purchase the product was not the result of the misleading claim contained in the advertising, but rather was the result of product usage and Doan's historical market positioning as specifically for treating back pain. RAB 75-76. We reject this argument. The materiality inquiry focuses on the claim and its effect, not on other conceivable sources of consumer beliefs. Respondent's argument -- that if an advertiser is able to point to other possible sources for the misbelief engendered by its misrepresentation, it should be free to continue making its misrepresentation -- is untenable.

evidence. Market data demonstrate that the campaign produced positive results. Contrary to Novartis' assertions, Doan's maintained its market share in an extremely competitive environment and enjoyed an 80% increase in dollar sales during the relevant period.[18] JX 2B ¶17. Because the number of consumers in the analgesics market in which Doan's competes is not growing appreciably (*i.e.*, the market is "mature"), a business must take customers from another brand in order to increase market share. Stewart Tr . 3467; CX 597. In such markets, maintenance of market share, and not increasing sales, is the primary criterion of success. *Id.* Indeed, Doan's ability to maintain its market share in the mature OTC analgesics market notwithstanding the fact that its advertising budget was much less than those of its competitors, JX 2E ¶24, reveals that the challenged advertising campaign was successful. The fallacy of Novartis' market performance arguments is also shown by Doan's survival and prosperity while other products were introduced and later withdrawn.

Even if Novartis' characterization of the market data were accurate, a history of static performance alone does not support its contention that the challenged ads were ineffective. Market performance is governed by a host of variables, and the materiality inquiry focuses upon a single claim.[19] Absent evidence, lacking here, that links market performance directly to the claim or controls for other variables influencing market performance, general market data is not particularly useful in assessing materiality.

b. Puffery

Novartis argues that the challenged claims were not material because they amounted to mere "puffing." RAB 61-64. Respondent posits that if consumers did not take the superiority

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[18] Novartis argues that unit sales, and not dollar sales, is the more appropriate measure. Novartis contends that the strength of the dollar sales is misleading because it is attributable to the introduction of premium priced line extensions, namely Extra Strength Doan's and Doan's PM. These line extensions, however, were supported by the same advertising as regular Doan's and to the extent that the advertising was successful in convincing consumers to buy these premium-priced items, the profits made on these products suggest that the ads were having their desired effect.

[19] For example, the existence and strength of competitors, the availability of substitute products, the maturity of the market, the state of domestic and foreign economies, general business cycles, distribution issues, and trends in consumer preferences, among other factors, can all affect market performance and do not relate to an unsubstantiated superior efficacy claim made in an advertising campaign.

claim seriously, the claim could not have misled them into buying the product. We reject this argument.[20]

The claim that Doan's is more effective than other analgesic products for treating back pain is not a subjective opinion, a matter of personal taste, or a hyperbolic statement that might be deemed "puffery." Rather, it is an objective claim that can be scientifically tested. The implied claim at issue here not only asserts superiority, but specifies in what respect (back pain relief), why (its unique ingredient) and compared to whom (named competitors). CCAB 93-94. This is the opposite of puffery, and the exact type of claim that a consumer would reasonably expect to be substantiated by adequate clinical studies. *See Pfizer*, 81 FTC 23, 64 (1982) (puffing does not include "affirmative product claims for which either the Commission or the consumer would expect documentation").

Respondent also argues that approximately half of all consumers harbor a general belief that no analgesic is any more effective than any other in treating back pain. RAB 65-66. Presumably, respondent's point is that these skeptics would never be swayed by false efficacy claims. Even assuming, for the sake of argument, the accuracy of the statistic and the validity of the claim that a consumer's general belief could not be overcome by specific misrepresentations, the argument still fails. An advertiser does not have to fool all of the people to be found liable; a "significant minority" of consumers is sufficient. Deception Statement, 103 FTC at 177 n. 20. Nor does the existence of some hardened cynics free advertisers to make deceptive claims.

c. Consumer Surveys

Novartis offers various consumer survey results as support for its contention that the claim was not material. For the most part, the results touted by respondent, even assuming flawless methodology, are only marginally probative on the issue of materiality. With respect to the one survey that tested materiality, methodological flaws render its results unreliable.

Respondent first points to the ARS tests, which indicate a low consumer recall of superiority messages between one and three days

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[20] In the first place, respondent's puffing argument goes to ad interpretation, an issue properly considered in connection with the second prong of the deception analysis, rather than to materiality. *See* Deception Statement, 103 FTC at 181 (puffing addressed as part of the discussion of the reasonable consumer's interpretation of the claim). As noted above, respondent has expressly waived any challenge to the second prong.

after seeing certain ads, as demonstrating that some of the challenged ads were not material. RAB 69-70. As discussed above, these tests asked only about express superiority claims, which were not made. Because the ARS tests did not even ask about implied claims (the only kind of claims at issue), they are hardly helpful. Moreover, materiality does not depend upon whether the claim is remembered by consumers days later. As discussed above, a claim does not have to be memorable to be material.

Novartis also claims that a study conducted by Dr. Jacob Jacoby in late 1996 shows that the superiority claim was not important to consumers and that the challenged ads were unlikely to cause consumers to purchase Doan's. RAB 76-79; RRAB 23-25. In Dr. Jacoby's study, consumers were shown one of six commercials[21] and then questioned. Three of the questions (numbers 5a, 5b, and 5c) pertained to materiality. Question 5a asked: "Did seeing this commercial influence whether or not you would buy the advertised product in the future?" RX 5-z-112. Only those who responded affirmatively proceeded to question 5b: "Did it make you more likely to buy this product, or less likely to buy this product?" *Id.* Finally, those who responded "more likely," were asked 5c: "What is it about what the commercial said, showed or suggested that makes you more likely to buy it in the future?" RX 5-z-113. Dr. Jacoby contends that "only a trivial number" of those questioned indicated that the commercials made them more likely to buy the advertised product based upon a claim of superiority or because it had a special ingredient. RX 5-z-120.

Dr. Jacoby's test for materiality was flawed in several ways. First, by asking question 5c only of those who answered questions 5a and 5b in certain ways, Dr. Jacoby's study understated the number of respondents to whom the misrepresentation was material. Questions 5a and 5b ask about the *commercial* rather than the *claim.* Whether a commercial as a whole influences a consumer is not the same issue as whether a claim contained in the commercial is likely to do so. Despite the materiality of a given claim, the commercial containing that claim might fail to influence a consumer for any number of reasons. Because the claim need only be an important factor in the purchase decision, the results for questions 5a and 5b tell us little about the materiality of the superior efficacy claim.

[21] Two of the six were challenged commercials, "Activity Playtime" and "Muscles." The remaining four were non-challenged controls. RX 5-z-101 n.1.

Moreover, once the pool of respondents had been inappropriately filtered through questions 5a and 5b, their number had been drastically reduced. Of the 142 people shown the challenged "Activity Playtime" ad, only 35 were asked question 5c. RX 6-z-39. Similarly, of the 129 people shown the challenged "Muscles" ad, only 36 were asked question 5c. RX 6-z-15. These numbers appear to be too small to be accorded significant evidentiary weight.

Dr. Jacoby's study also understated the number of respondents to whom the superiority claims were material by failing to ask directly whether the superiority claim was important to them. The open-ended nature of question 5c tended to yield a scattershot range of responses. *E.g.*, RX 6-z-40. For each of the two challenged ads, seven of the approximately 35 people asked question 5c (roughly 20%) gave responses that Dr. Jacoby interpreted as indicating materiality. RX 6-z-16; RX 6-z-40. These results are almost certainly understated because Dr. Jacoby failed to ask follow-up questions to determine *all* of the aspects of the commercial that made consumers more likely to buy Doan's in the future. As previously noted, in order to be material, a claim does not have to be the *only* factor or the *most* important factor likely to affect a consumer's purchase decision, it simply has to be *an* important factor. By seeking only one response to question 5c for each consumer tested, Dr. Jacoby ignored this fact and thereby undermined his results.

During the administrative trial, Dr. Jacoby sought to buttress his results by performing calculations cross-referencing several other questions included in the survey. While Dr. Jacoby did not explain his methodology in detail, he apparently matched the consumers he interpreted as drawing a superior efficacy claim from the ads (in response to questions 6a, 6b, and 8b)[22] with those who stated, in answer to question 5b, that the commercial made them "more likely" to buy the product. *See* RX 209-a. *See* Jacoby Tr. 3061, 3338-343. Based upon these calculations, Dr. Jacoby concluded that for the challenged commercials, the overlap was only 12.7 and 4.7%, respectively. *See* RX 209-a. He reduced these results further by subtracting the percentages obtained from the control ads. *Id.*

[22] Question 6a asked the main idea of the commercial, and 6b asked about the other ideas the commercial was trying to get across. RX 5-z-96. Question 8a asked whether the commercial said, showed, or suggested that the advertised brand was more effective than other brands, and question 8b asked what the commercial said, showed or suggested that conveyed a superior efficacy claim. *Id.*; RX 5-z-139; RX 5-z-141. The results from these questions reveal a substantial communication rate for the challenged ads -- depending on the question, in the 30 to 50% range. RX 5-z-120-129; 139-148.

This procedure did not salvage Dr. Jacoby's study. The results of Dr. Jacoby's cross-referencing exercise derive from the results obtained from question 5b. That question only tells us which consumers found the commercial persuasive and does not reveal anything about what aspects of the commercial made it persuasive. As explained above, a claim by itself can be material and yet, when viewed in the context of a commercial, fail to persuade a consumer to buy the product. Therefore, question 5b improperly excluded many relevant respondents. As it is, Dr. Jacoby's results show that of the 35 consumers who indicated that they found "Activity Playtime" persuasive, 20 (57%) also drew a superior efficacy claim from the ad. *See* RX 209-a. While one might logically infer that the superior efficacy claim played an important role in making the ad persuasive to many of these consumers, the flaws in Dr. Jacoby's methodology preclude a definitive and quantified linkage.

Finally, Dr. Jacoby conceded that if a person suffers from back pain and is offered a product that is superior for the relief of back pain compared to other analgesics products, then that person would be motivated to purchase the product. Jacoby Tr. 3371. Thus, even Dr. Jacoby agrees that a superior efficacy claim is likely to affect consumers' purchase decisions.

E. Conclusion

Thus, although we have concluded that the evidence adduced by Novartis requires us to look beyond a simple presumption of materiality, our review of that evidence shows that it ultimately adds little to respondent's side of the scales. Weighing *all* of the available evidence -- including the basic and irrefutable fact that the misleading claims of superiority relate to the central characteristic of the product and involve health; the evidence that the claims were intended to affect consumer decisions; and the range of other evidence adduced by both sides -- we have no hesitation in concluding that the claims were material. The extensive record amassed in this proceeding strongly confirms the common-sense proposition that efficacy is a pivotal consideration for consumers in selecting an analgesic, and that claims of superior efficacy are highly material to those consumer choices.

IV. CORRECTIVE ADVERTISING

A. Legal Framework For Imposing Corrective Advertising

Corrective advertising is an appropriate remedy if (1) the challenged ads have substantially created or reinforced a misbelief; and (2) the misbelief is likely to linger into the future. *See Warner-Lambert Co. v. F.T.C.*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978). In such cases, the lingering effects of a deceptive advertisement constitute a "clear and continuing injury to competition and to the consuming public" and justify the requirement of a corrective message. *Warner-Lambert Co.*, 86 FTC 1387 (1975).

It is well settled that, in analyzing each of these two prongs, we may consider indirect evidence as well as direct evidence. *See, e.g., National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *Warner-Lambert Co.*, 562 F.2d at 762; *American Home Prods.*, 98 FTC at 407; Statement in Regard to Corrective Advertising, Trade Reg. Rep. (CCH) ¶ 39,046 (1979) (stating "that the absence of consumer research will not preclude a corrective advertising order if other factors in the evidentiary record indicate that the challenged advertising campaign has created or reinforced consumer beliefs"). Therefore, we reject Novartis' argument that reliance on inferences would be a departure from a "settled understanding" expressed in the corrective advertising case law. RRAB 53.

We also reject the ALJ's holding that corrective advertising is inappropriate absent "certainty" that the misbeliefs will otherwise linger. The proper standard is whether, by a preponderance of the evidence, the misbelief is *likely* to linger. A requirement of certainty that a misbelief will linger would be impossible to satisfy, because certainty about the future is unattainable.[23] The ALJ's finding that the false beliefs are not *certain* to linger applies the wrong legal standard.

Finally, we reject respondent's argument that corrective advertising can only be ordered if it is shown that such a remedy is the *only* way to eliminate consumer misperceptions. RRAB 94 (citing *American Home Prods.*, 98 FTC at 411). Contrary to the ALJ's suggestion, corrective advertising is not a drastic remedy. ID at 65.

[23] *Warner-Lambert* was a remarkable case. "Comparable proof of deception-perception-memory influence would be virtually impossible in most advertising cases .... corrective advertising must apply to more than the one-in-a-million type of ad campaign present in *Warner-Lambert.*" R. Pitofsky, *Beyond Nader: Consumer Protection Regulation of Advertising.* 90 Harv. L. Rev. 661, 698 (1977) (footnote omitted).

Requiring the dissemination of a truthful message to counteract beliefs created or reinforced by a respondent's deceptive message is an appropriate method of restoring the *status quo ante* and denying a respondent the ability to continue to profit from its deception.

B. Methodology of Belief Studies

To support a corrective advertising remedy, complaint counsel relies on three consumer belief studies to demonstrate (1) that the challenged advertising campaign created or reinforced misbeliefs harbored by consumers about Doan's, and (2) that those misbeliefs are likely to linger. Complaint counsel claims: first, that the A&U Study demonstrated that Doan's had a weak image compared to the other leading brands of general purpose analgesics in 1987, before the challenged ads were aired; second, that a Brand Equity Study, conducted mid-way through the campaign in 1993, showed that Doan's was then viewed as particularly effective for back pain and as having a special ingredient -- two claims that were the focus of the new campaign; and third, that a 1996 NFO study, commissioned by complaint counsel for this litigation, showed that users of Doan's and non-users who were aware of Doan's continued to harbor misbeliefs about the superiority of Doan's for back pain six months after the campaign had ended and that the misbeliefs were disproportionately high compared to the beliefs held for other products. One of complaint counsel's experts, Dr. Michael Mazis, also compared the results of these three studies, concluding that Doan's ads created or reinforced a superiority belief.

To counter complaint counsel, Novartis relies on three separate belief studies conducted for this litigation by Mr. Robert Lavidge, Dr. Morris Whitcup, and Dr. Jacob Jacoby. Novartis contends that these studies show that consumers do not have misbeliefs about Doan's. In addition, Novartis contends that the ARS and ASI copy tests and an Aleve Tracking Study, conducted by Ciba when Aleve was introduced into the OTC analgesic market, demonstrate low levels of unaided recall for the Doan's products. Novartis argues that if consumers are unaware of Doan's, they cannot harbor misbeliefs of any kind, and, thus, corrective advertising would be an inappropriate remedy.

The methodology and results of each of these studies are described in Appendix I.[24] The Brand Equity, Jacoby, and Lavidge studies used a mall intercept method. The A&U, Aleve Tracking, and Whitcup studies were conducted by telephone. Dr. Whitcup testified that telephone surveys are the most appropriate way of assessing consumer attitudes because their samples are most representative of the total population.[25] Whitcup Tr. 2107. Finally, the NFO study used a mail panel method. Mail panel research involves mailing research instruments to individuals who previously have agreed to serve as survey participants. These individuals complete and return the research instrument. The mail panels used by NFO were designed to achieve demographic balance.[26] Clarke Tr. 11. NFO panels are especially useful in identifying hard-to-reach consumers because of the large sample size. *Id.*

We initially discuss two criteria that affect the evidentiary value of the parties' consumer belief studies. First, consumer beliefs should be measured without exposing survey participants to the challenged ads. This is because such exposure may elicit the participant's interpretation of the ad rather than his or her beliefs. Second, the universe of participants surveyed should be properly selected to eliminate usage bias and to compare relevant groups. In testing for credence claims about a product, where consumers may have difficulty objectively evaluating the product's performance, the survey should insert controls to counter bias stemming from the use of the product.

1. Exposure to Advertising

All of the studies but one asked participants questions about their beliefs without exposing them to ads. Only the Lavidge study showed consumers television ads for four OTC products prior to questioning. Both complaint counsel's expert, Dr. Mazis, and respondent's expert, Dr. Jacoby, testified that the appropriate way to measure beliefs is

[24] As the Commission stated in *Stouffer* "[p]erfection is not the prevailing standard for determining whether a copy test may be given any weight. The appropriate standard is whether the evidence is reliable and probative." 118 FTC at 807. While a given study may be flawed in some respects, it still can be probative, and any deficiencies simply will affect the weight given to the evidence. *Id.*

[25] Random digit dialing reaches both listed and unlisted numbers. Whitcup Tr. 2108.

[26] Mail panel participants may under-represent those with the lowest incomes (who may not have a permanent address or may be illiterate) and those with the highest incomes (who disproportionately decline to participate). Clarke Tr. 13.

without exposure to ads. Mazis Tr. 1276; Jacoby Tr. 2962, 2968, 3155. By exposing consumers to advertising before asking questions about their beliefs, it is difficult to determine whether the consumers' responses to questions designed to elicit their beliefs reflect their interpretation of the ad or, in fact, their beliefs. We find that the Lavidge study is not probative of consumer beliefs because, contrary to the first criterion, participants were exposed to advertising as part of the study.[27] By contrast, the A&U, Brand Equity, NFO, and Whitcup, studies as well as the relevant portions of the Jacoby study were conducted in keeping with this criterion.

2. The Proper Universe

The appropriate universe is crucial to determine the probative value of any consumer survey. An improper universe can render a survey useless. Experts for both parties agreed that in a survey of consumers' beliefs regarding Doan's superior efficacy, the universe should be limited to those who suffer from and treat back pain. Mazis Tr. 1120; Lavidge Tr. 770; Whitcup Tr. 2109. All of the belief studies, with the exception of the Aleve Tracking Study, limited the universe of participants to those who suffered from back pain and had used an OTC analgesic product within the previous year. Because the Aleve Tracking Study was not confined to backache sufferers, the results are not particularly useful.[28]

The experts part company on the question of whether the survey respondents should be aware of the product for which the beliefs are tested. Complaint counsel's expert, Dr. Mazis, concluded that the appropriate universe for testing consumer beliefs about Doan's would include both people who were users of Doan's and people who were aware of, but not users of, Doan's (aware non-users). With such a universe it would be possible to compare the beliefs of users of

[27] There are other flaws in the Lavidge study which may tend to understate the frequency of superior efficacy beliefs regarding Doan's. Dr. Mazis testified that it was difficult for consumers to answer the questions used in that study, because it required participants to sort through all the brands of which they were aware and then to make judgments about them. Mazis Tr. 1274-76. Moreover, Mr. Lavidge failed to control for usage bias; therefore, the fact that fewer of his participants used Doan's than used other products understated the superiority beliefs regarding Doan's. Mazis Tr. 1271. Mr. Lavidge even acknowledged that personal experience with a product is very important in shaping a consumer's beliefs about the product. Lavidge Tr. 750. The ALJ rejected the Lavidge study. IDF 310.

[28] Admittedly, the purpose of the Aleve Tracking Study was to track the introduction of Aleve on the OTC market generally, although it did develop some information about Doan's. Dr. Mazis testified that the respondents in the Aleve Tracking Study were not focusing on back pain, so a back pain-specific product would be much less likely to be recalled. Mazis Tr. 2016.

Doan's to users of other products. In order to control for usage bias, it is also necessary to compare the beliefs of people who were aware of the product, but not users, with the beliefs of users of the product. Mazis Tr. 1122-23. On the other hand, Novartis' experts contend that a survey limited to participants who are aware of Doan's would not be representative of the relevant population, and would tend to overstate ratings for Doan's relative to other OTC analgesics. Whitcup Tr. 2182. In their belief studies, Novartis' experts included consumers who were unaware of Doan's. Dr. Jacoby testified that this was an important group of consumers because they were prospective consumers and they were the people to whom the advertising is directed. Jacoby Tr. 2937.

On balance, we conclude that the most reliable studies are those that focus on persons who have used Doan's or are aware of the product. Because our inquiry is whether the Doan's ad campaign has created or reinforced misimpressions about the product's efficacy, it makes sense to direct our attention to those consumers who, in fact, have an opinion about Doan's -- which will necessarily be those who are aware of the product.[29]

The soundness of this approach is confirmed by consideration of the problem of user bias. Users of a product tend to rate it more highly than do non-users. Mazis Tr. 992.[30] This preference may be attributable, in part, to consumers' inability accurately to evaluate the efficacy of certain products -- such as analgesics -- relative to alternatives. *See American Home Prods. Corp.*, 98 FTC at 282 (Initial Decision). Although the Whitcup and Jacoby consumer studies included consumers who were Doan's users (8% in Whitcup universe and 21% in Jacoby) the studies failed to ascertain the number of remaining consumers who were aware of Doan's, making it impossible to compare the beliefs of consumers who use the product to those who are aware of the product, but are not users. Accordingly, the most reliable assessments of consumer beliefs will be based on comparisons of like groups -- *e.g.*, users of one brand to users of another brand; or aware non-users of one brand to aware non-users of another. Only the NFO belief study used such a methodology. The

[29] Indeed, when Ciba itself tested consumer beliefs in the regular course of business, it limited its samples to those who were aware of the product. The A&U Study and the Brand Equity Study were confined to consumers who were aware of Doan's.

[30] *See* infra n.13.

NFO demonstrated that 77% of Doan's users and 45% of aware non-users believed that Doan's is superior to other brands.[31]

C. The Evidence Supports the Imposition of Corrective Advertising.

Having found that the superior efficacy claim was deceptive, and that a relevant universe of consumers believe that Doan's is superior, we must determine whether (1) the ads created or reinforced that misbelief; and, if so, whether (2) that misbelief is likely to linger. We address each of these issues in turn.

1. The Challenged Ads Created or Reinforced Misbeliefs.

A number of factors influence consumer beliefs about and attitudes toward a product, including advertising, use of the product, recommendations by doctors or others, and packaging. Mazis Tr. 1606-09; Lavidge Tr. 750-52. As a general matter, advertising and usage are among the most important of these factors.[32] *American Home Prods.*, 98 FTC at 281. But product usage can be a primary source of a consumer's product image "only if the consumer has the ability to discriminate objectively between various similar products. . . . Thus, if a consumer is unable to evaluate objectively a product's actual efficacy, the role of advertising as a cause of the consumer image is enhanced." 98 FTC at 410. Because consumers cannot objectively evaluate OTC analgesics, including Doan's, advertising is an important factor in creating and reinforcing beliefs about such products. Mazis Tr. 1609. The Doan's eight-year advertising campaign created and/or reinforced beliefs and made them more salient, understandable, and resistant to change. Mazis Tr. 1205-06. Indeed, such a long campaign could do both, having initially created and later reinforced beliefs.

After the 1987 A&U study showed that Doan's had a weak image, CX 221-c,d, Ciba launched the challenged advertising campaign, claiming that Doan's was superior to other general purpose analgesics for back pain and that Doan's contained a special ingredient for that

[31] The Jacoby study, as far as it goes, actually corroborates the results of the NFO study. For example, in the Jacoby study, 38% of Doan's users reported Doan's as "more effective" in contrast to 23% of Advil and 17% of Tylenol users who reported their brands as "more effective." RX 5-z-105.

[32] Indeed, word-of-mouth recommendations largely depend upon prior exposure to advertising and product usage. *American Home Prods.*, 98 FTC at 281.

purpose. Consumer survey data, conducted before final production of the ads, showed that consumers were drawing a superiority claim for back pain from the advertising. *See* ID at 62-63. The challenged superiority claims were consistent and made throughout the campaign. In fact, the eight-year campaign presented a focused message of comparative superiority.

The Brand Equity Study, conducted midway through the campaign, provides strong evidence that the advertising had already influenced consumer beliefs. Dr. Mazis' summary of that study shows that users of Doan's put Doan's in the top category for back pain efficacy twice as often as users of Tylenol, Advil and Motrin gave such a rating to the products they used. CX 480-a. Non-users who were aware of the product also rated Doan's more highly than the other brands (though less dramatically so). CX 480-c. Thus, in five years, the Doan's brand developed from having a weak image to being viewed by users and those aware of the brand as particularly effective for back pain.[33]

Moreover, changes in consumer beliefs during that five-year period closely tracked the claims made in the challenged advertising. Mazis Tr. 1057. Dr. Mazis' summary sets out the percentage of users and non-users who were aware of Doan's who believed two attributes claimed in the challenged ads (superiority for back pain and use of a special ingredient) and a third that was not advertised (superiority for all kinds of pain). CX 480-c. Consumers tended to perceive Doan's as particularly effective for back pain and also as containing a unique ingredient.[34] Mazis Tr. 1058. The non-advertised attribute (effectiveness for all kinds of pain), however, was not believed by many consumers. CX 480. Accordingly, the Brand Equity Study supports the conclusion that the challenged ads played a substantial role in creating or reinforcing consumer misbeliefs about Doan's.

The results of the NFO belief study similarly show that in 1996, a disproportionately high percentage of Doan's users and aware non-users believed that Doan's was more effective than other OTC pain

[33] Respondent argues, and the ALJ found, that the attribute of "being particularly effective for back pain" does not necessarily imply that a product is "more effective than other OTC pain relievers for back pain relief," and thus that the Brand Equity Study is not probative of superiority beliefs. IDF 246. We disagree. A product that is no more effective than any other would not be "particularly" effective. The word "particularly" is inherently comparative. *See, e.g., Webster's New International Dictionary* 1783 (2d ed. 1938) (defining "particularly" as "[e]specially; unusually").

[34] Dr. Mazis testified that consumers would not infer that a product had a special ingredient for back pain simply from the fact it is only advertised and marketed for back pain. Mazis Tr. 1621.

relievers for back pain relief. CX 482. Dr. Mazis testified that the Doan's advertising played a significant role in creating or reinforcing the superiority belief. Mazis Tr. 1216-18.

Dr. Mazis also compared the results of the 1987 A&U Study with the 1996 NFO study. He testified that this analysis shows that "superior efficacy" beliefs for Doan's relative to Advil, Bayer, and Tylenol increased (between 0.5 and 1.25 scale points on a seven-point scale) between 1987 and 1996 relative to other brands, as did beliefs that Doan's has a "special ingredient" (between 0.75 and 1.875 points). At the same time, consumer beliefs that Doan's "is safe to use" -- a claim not made in its advertising campaign -- declined in rough proportion to the other products. CX 532-e, h, k; Mazis Tr. 1244-45. Dr. Mazis concluded that this striking pattern, in which changes in consumer beliefs mirrored advertising themes (or their absence), confirms that the ads created or reinforced the misbeliefs. Mazis Tr. 1246. The ALJ rejected Dr. Mazis' comparison of the studies because of the differences in their methodologies and questions asked. IDF 350. While we acknowledge the methodological differences between the studies, we believe that these data nonetheless corroborate the connection between the ads and the misbeliefs.[35] *See* IDF 351, 352.

We reject respondent's contention that the Aleve Tracking Study and the Whitcup Study demonstrate a low unaided recall of Doan's advertising, so consumers cannot harbor misbeliefs about Doan's. RRAB 61, 62. We have already noted that because the Aleve Tracking Study was not confined to back pain-sufferers, its results are not useful. It tends to understate those consumers who may have beliefs about Doan's and did not ask back pain-specific questions. And the results of the Whitcup study are undermined by the small number of Doan's users sampled (35) in contrast to the number of Tylenol users (190) and Advil users (121). RX 2-z-49. Indeed, Dr.

[35]Contemporaneous documents further indicate that Ciba's ad agency, Jordan McGrath, recognized that the challenged advertising was affecting superiority beliefs about Doan's among consumers. One such document from 1994 stated that:

> [t]he 1993 Brand Equity study showed that the specificity of Doan's positioning, as communicated by "The Back Specialist" campaign line has helped differentiate the Brand from other pain relievers. Clearly this unique positioning has contributed to this.

CX 387-y. (Doan's FY'95 Marketing Plan Key Issues, July 25, 1994.)

Similarly, Jordan McGrath's Vice President Account Supervisor who worked on the Doan's account noted the effectiveness of the challenged claims: "'The Back Specialist' we have kind of engraved that in the consumer's mind." CX 503 at 97 [Jackson Dep]. Other Ciba documents indicate the significant role that advertising played in driving Doan's sales. CX 404-a-b; CX 499-a.

Whitcup himself appended the letter "c" (designating "caution" due to a small base) to data regarding Doan's user responses.

As in its attack on materiality, respondent argues that the Whitcup, Lavidge, and Jacoby studies show that a majority of consumers do not believe that any OTC analgesic brand was more effective than others for relieving back pain, RRAB 63, 64, presumably rendering advertising ineffectual in creating or reinforcing any superior efficacy beliefs. Even if those studies show that a *majority* of consumers so believe, a *substantial number* of respondents remain who believe that one brand may be more effective than others. *See* RX 23-j; RX 2-t; RX 6-j. The results do not shed light on whether the challenged ads created or reinforced misbeliefs in the minds of these remaining consumers.

Novartis also recycles its argument that, even if consumers harbor misimpressions about Doan's, such beliefs are due to Doan's ninety-year positioning as a back-specific analgesic and not to the challenged ads. RRAB 75-77. In fact, however, there is no record evidence to support respondent's speculation. To the contrary, the A&U Study showed that Doan's historical positioning did not have a major impact on consumer beliefs, and that the product's image remained weak prior to the commencement of the ad campaign at issue here. CX 221-c. As the evidence discussed above shows, the ensuing multi-million dollar, eight-year campaign was successful in enhancing the product's image by persuading consumers, incorrectly, of Doan's superior efficacy. In any event, even if that misimpression existed to some degree prior to the ad campaign, the campaign at the very least had the effect of *reinforcing* such beliefs, which to supports a corrective advertising remedy. *See Warner-Lambert Co.*, 562 F.2d at 762. In fact, the campaign could have both created and reinforced misbeliefs in that beliefs may have been created and later reinforced.

We likewise reject respondent's argument that complaint counsel failed to establish a link between consumer beliefs and the challenged advertising. Respondent claims that the NFO study is flawed because Dr. Mazis did not ask survey participants whether they were aware of Doan's advertising. RRAB 79.[36] While a specific question asking whether participants recalled the challenged advertising might have

[36] Dr. Mazis testified that he did not ask whether people had seen advertising for Doan's because at the time of the NFO study, the ads had not run for six or seven months, and people might not reliably recall ads that they did, in fact, see. Mazis Tr. 1797. He also testified that beliefs from ads may linger even though recall of specific ad claims may not. Mazis Tr. 1798, 1800.

been useful, we find that the failure to include such a question was not a fatal flaw. The evidence of parallel changes in consumers' beliefs about Doan's that track the course of the eight-year campaign sufficiently establishes the link between the challenged ads and the resultant misbeliefs.

Respondent further claims that the ads did not create or reinforce misbeliefs because the campaign was ineffective in communicating its superiority message (again repeating a claim employed to attack materiality). Novartis argues that Doan's used a small advertising budget and relied on "worn out" ads. *See* e.g., RAB 16, 23; RRAB 1. Such a campaign, it claims, would be incapable of creating misbeliefs in the minds of consumers that would justify corrective advertising. This line of argument, however, is not only inconsistent with the evidence already discussed regarding the campaign's actual effects but is also belied by Ciba's actions during the campaign, which evince its reliance on the campaign.

Ciba continually refined its marketing plans in response to changing demographic information. Ciba conducted research to define precisely the target audience of backache sufferers and revised its media plans accordingly. For example, after learning that its target audience was disproportionately female and Southern, the yearly marketing plans considered these factors in developing media strategies and ad placement. CX 335-z-14; CX 343-z-64. Ciba's decision to test Spanish radio ads in Houston during short periods in 1991 and 1993 is another example of Ciba's responsiveness to changing demographics. Similarly, when competitors entered the market, Doan's responded through defensive advertising. When Nuprin Backache was introduced in the first half of 1993, Ciba increased Doan's television advertising budget by approximately $500,000. CX 357-b. When Bayer Select Backache was introduced, Ciba increased its spending to run more advertising during the new product's introductory period. CX 378-k. A Marketing Director wrote that Doan's used "a consistent strong advertising campaign to defend and even build share in the face of these new competitors." CX 399-b.

Finally, Novartis' resort to market share data and statistics wholly fails to show that the ads could not have created or reinforced consumer misbeliefs. Respondent claims that Doan's unit sales actually declined during the relevant period; that even when measured against OTC analgesics used to treat backache, Doan's market share stood at 5%; that Doan's was unable to increase its sales and market

share even after dropping its price,[37] and that any increases in factory or consumer dollar sales resulted from the introduction of the Extra Strength and PM lines. RAB 17-19. In fact, the sales volume fluctuated during these years rather than declining and Novartis' expert, Dr. Scheffman, relied upon incomplete data that did not extend beyond 1993. RX 189-a. Volume sales increased by 10% in 1995. CX 402-c; CX 408-h. Further, Doan's share of the total analgesic category grew from 0.8 to 0.9% between 1993 and August 1995, a 12.5% increase, and there was nearly an 80% increase in factory sales. JX 2B ¶17. Moreover, in a mature market, a key criterion for advertising success is maintenance of market share. Stewart Tr. 3467. And, a variety of marketing plans during the relevant period indicate that sales were responding well to ads. CX 360-z-43; CX 393-q; CX 408-i. Accordingly, we conclude that the challenged ad campaign was successful, and that the challenged ads created or reinforced misbeliefs among consumers regarding the superior efficacy of Doan's.

2. The Effects of the Challenged Ads Are Likely to Linger.

We next turn to the question whether the misimpressions caused or reinforced by the challenged advertisements are likely to linger in the absence of corrective advertising.

The NFO study, conducted six months after the ads ceased, demonstrates that 77% of Doan's users and 45% of those who were aware of but did not use Doan's believed that the product was superior to other brands for the treatment of back pain. These percentages are disproportionately high for both groups relative to other brands.[38] Thus, the NFO study shows that, for at least six

[37] Respondent also argues that the low share of usage, conversion rates, and advertising penetration data demonstrate that consumers do not believe that Doan's is more effective than other analgesics for the relief of back pain. RRAB 59-60. At best, these factors serve as an inexact proxy for consumer beliefs. The direct evidence shows that consumers believed that Doan's was superior to other OTC analgesic products.

[38] Respondent's arguments that the NFO study is flawed, RRAB 67-71, are without merit. As noted above, the NFO study used an appropriately restricted universe, and its protocol was proper and provided reliable results. Respondent argues that the absence of follow-up validation procedures renders the data unreliable. But all experts agreed that the purpose of validation is to deter and detect interviewer misconduct, Mazis Tr. 1128; Lavidge Tr. 788; Jacoby Tr. 2950-51. We therefore find that this mail panel study (which did not utilize an interviewer) did not require validation. Respondent's concern that the wrong household members may have completed the survey questionnaires, thereby rendering the results unreliable, is unwarranted. The study employed mechanisms to account for this possibility, Clark Tr. 40-41, and eliminated questionable responses.

months after the challenged ads stopped being aired, their effect continued to linger.

A Novartis expert, Dr. James Jaccard, re-analyzed the NFO data, attempting to measure the magnitude of the differences in brand attribute ratings, RX 132 f-o, and to demonstrate that there likely are not meaningful differences in brand efficacy beliefs held by those who use or are aware of Doan's and those who use or are aware of other OTC analgesics. Jaccard Tr. 1427. In fact, Dr. Jaccard's testimony does not undermine the conclusions of Dr. Mazis and the NFO study.

First, Dr. Jaccard has no expertise regarding the OTC analgesic market and does not know whether any of the differences in effectiveness beliefs in the NFO study were significant. Jaccard Tr. 1523. Second, he conceded that traditional null hypothesis testing, as used by Dr. Mazis, is the dominant analytic technique, Jaccard Tr. 1510, and that his own approach is not common. Jaccard Tr. 1444-45. Third, Dr. Jaccard acknowledged that the differences observed in the NFO study might be practically significant. Jaccard Tr. 1450-51.

A number of factors that support the results of the NFO study also support an inference that consumers' false beliefs are likely to endure. *See American Home Prods.*, 98 FTC at 411. Specifically, the challenged claims were (1) very salient to consumers (because superior efficacy is among the primary considerations for a consumer in selecting a back pain remedy), (2) clearly and consistently conveyed by the challenged ads, and (3) an integral part of an eight-year campaign. Respondent spent approximately $65,000,000 disseminating these claims, primarily in fifteen-second ads whose primary message was the false superiority claim. The ads reached between 80 and 90% of Doan's target audience approximately 20 to 27 times each year. JX 2F ¶ 28. A likelihood of lingering effects can also be inferred from copy tests, which demonstrated that consumers drew a superiority claim from the Doan's ads after just one or two exposures.[39] *See Warner Lambert*, 86 FTC at 1470.

Finally, Novartis questions the significance of the NFO study results. Dr. Mazis analyzed the different sets of ratings for joint users of Doan's and one of the other five brands and found that, on average, 25% more people rated Doan's as superior for back pain relief. IDF 263. The comparative analysis for non-users who were aware of several products revealed that, on average, 20% more people rated Doan's superior. IDF 265. This demonstrates a strong difference in beliefs among these groups. Mazis Tr. 1196-1199.

[39] Dr. Mazis testified that the beliefs are likely to linger in light of the length and effectiveness of the ads, the fact that they stressed the superiority claim repeatedly, and the recall evidence from the copy tests. Mazis Tr. 1255-56.

Novartis' expert, Dr. Scheffman, testified that any misimpression created by the Doan's ads is not likely to linger due to Doan's insignificant advertising spending and the placement, length, and frequency of the challenged advertising compared to the amount of advertising in the OTC analgesic marketplace. Scheffman Tr. 2612-13. We reject the argument that market share, total sales, or the relative size of the advertising budget determine whether a misbelief is likely to linger. All of these factors go primarily to the purported *magnitude* of the harm created by the deceptive ads and not to the likelihood that the misbelief will linger.[40] Moreover, niche marketers who engage in deceptive campaigns should not be immune from a corrective advertising requirement simply because of the relative size of their advertising budget or market shares.

Respondent also contrasts the evidence of lingering misbeliefs in *Warner-Lambert*, in which we ordered corrective advertising, to that in cases where we declined to order corrective advertising. RRAB 96. Novartis argues that we have rejected corrective advertising in three cases where challenged ads were disseminated for a longer period of time than those in this case, where the advertising budget for the challenged campaign was larger, and where there was higher consumer recall of the specific challenged claims. RRAB 47.

We disagree that such a comparison counsels against corrective advertising here. First, we have frequently noted that the amount of evidence in *Warner Lambert* was unusually strong and far exceeded the threshold needed to impose corrective advertising. "We emphasize that we do not believe corrective advertising may only be imposed where there is an evidentiary basis like that in *Warner-Lambert*." *American Home Prods.*, 98 FTC at 408 n.93 (citations omitted.).[41] Second, none of the three cases relied upon by respondent involved comparable evidence to support a corrective advertising remedy. In *Bristol-Myers Co.*, 102 FTC 21 (1983), complaint counsel introduced "no evidence" that misbeliefs would likely linger. *Id.* at 380. We declined to infer a likelihood of lingering solely from the face of the challenged ads. *Id.* Similarly, in *American Home Products*

[40] In any event, in a mature market, such as OTC analgesics, a central purpose of advertising is to retain current users and a key criterion for an ad campaign's success is whether it is succeeding in maintaining share, particularly in the face of a competitive onslaught. IDF 335; Stewart Tr. 3467. We find that Doan's was able to maintain and even increase its sales in light of the competitive pressures of new entrants in the back pain category and affirm the ALJ's finding on this point. IDF 336.

[41] *See, supra,* footnote 23.

Corp., we refused to infer a likelihood of lingering merely from the nature of the ads notwithstanding a total absence of evidence on that issue in the record.[42] 98 FTC at 409. In *Sterling Drug, Inc.*, 102 FTC 395 (1983), we found that the misrepresentations had not created or reinforced misbeliefs in light of studies conducted both before and after the challenged campaign revealing the same levels of consumer misbeliefs.[43] *Id.* at 798. These cases are easily distinguished from this one, where extensive evidence supports each prong of the corrective advertisement test.[44]

Respondent next contends that low unaided brand awareness, evinced by consumer survey testing, demonstrates that the ads did not convince consumers that Doan's is more effective than other brands,[45] RAB 39-40, 73-75; RRAB 59, and thus no misbeliefs can linger. The advertising penetration data are not probative. Apart from the serious methodological flaws with the belief studies noted above,[46] this low brand awareness -- even assuming it exists -- is relevant only to the magnitude of the harm that respondent's false ads caused, and not to the likelihood that such harm as was caused will linger.

The ALJ found that the ARS and ASI studies, revealing 2 to 8% recall of a "more effective" or a "good product/better/best" message after 24 and 72 hours, suggest that any misbelief may be transitory. ID at 64. We disagree. These were communication studies that asked what the ad said or showed, not what consumers believed about the product. The data from these tests thus do not establish the nonexistence of consumer misbeliefs. Consumers may hold beliefs about a product without recalling advertising that contributed to such

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[42] Some of the claims in that case were also secondary to the main message of the ads. 98 FTC at 408.

[43] Complaint Counsel in that case conceded that the frequency of misbeliefs was not altered by the challenged ad campaign, but argued that the misbeliefs "nonetheless became 'sharper'" as a result thereof. 102 FTC at 799.

[44] The dissent's emphasis upon the duration of the advertising campaign and dollars spent in these cases neglects the absence in those cases of sufficient evidence demonstrating a likelihood of lingering misbeliefs. This analysis cannot be reduced to a rigid algorithmic inquiry.

[45] The Aleve Tracking Study indicates that Doan's had a 2 to 3% unaided brand awareness in December 1994 and June 1995, respectively. RX 101-t. None of the 423 respondents in the Whitcup belief study reported "top-of-mind" awareness of Doan's advertising. RX 2-o.

[46] For example, the Aleve Tracking Study focused on general analgesics and was not confined to backache sufferers; thus, it is not surprising that consumers did not mention Doan's, which is not marketed as a general analgesic. Moreover, Novartis' own expert, Dr. Jacoby, conceded that penetration studies are of questionable value in measuring consumer beliefs about a product. People can form and retain beliefs based upon an ad without recalling it. Jacoby Tr. 3201.

beliefs. *See* Jacoby Tr. 3201. This is especially true with respect to a credence good, such as an OTC analgesic, for which consumers cannot easily evaluate the truth or falsity of claims. Moreover, the studies do not even purport to measure the duration of misbeliefs among those who were, in fact, misled, which is, after all, the relevant inquiry.

The record establishes that consumers held misbeliefs about Doan's superior efficacy, that such beliefs were created by or substantially reinforced by the challenged advertising campaign, and that those beliefs are likely to linger into the future. Therefore, we find that the elements for corrective advertising are satisfied, and that corrective advertising is appropriate and necessary.

Corrective advertising is appropriate for an additional reason. We previously discussed the factors which, separate from the NFO study, support an inference that misbeliefs about the superior claim are likely to linger. Another inference arises under these facts. We cannot turn a blind eye to the obvious relationship between an absolute efficacy claim ("this product works"), which Doan's has been running for ninety years, and a comparative efficacy claim ("this product works better than others"). Given that Novartis' advertising campaign fostered a symbiotic relationship between these two claims, simply to permit Novartis to return to its ninety-year old positioning of Doan's as a backache product makes it all the more likely the misbeliefs will linger -- absent some corrective action.

3. Content of the Corrective Message

Dr. Mazis testified that, as a general matter, proper corrective advertising accomplishes its intended effect of dissipating misbeliefs over time. IDF 358-59. Studies designed to track the impact of corrective advertising imposed in *RJR Foods, Inc.*, 83 FTC 7 (1973) and *Warner Lambert* support this conclusion. IDF 360.

The corrective message should (1) state that Doan's products are effective; (2) correct the lingering misbelief that Doan's products are superior to other products; and (3) permit respondent to continue to advertise Doan's specifically for back pain.[47] The following corrective message proposed by complaint counsel satisfies all of these requirements: "Although Doan's is an effective pain reliever,

[47] The FDA monograph allows pain-specific advertising, and Novartis is free to make claims specifically allowed by FDA.

there is no evidence that Doan's is more effective than other pain relievers for back pain." We find that this slightly longer version of the corrective message is more balanced than the suggested alternatives for shorter television or radio ads. We recognize the FDA monograph allows pain specific advertising and do not want to impede Novartis' ability to make claims specifically allowed by FDA. For all these reasons, the corrective message in the present matter is inevitably somewhat complex.

Both parties conducted studies to test the effectiveness of this corrective message. Dr. Mazis tested the message in FSIs in a telephone survey involving 370 consumers.[48] Dr. Mazis concluded that the corrective message was effectively communicated with a very low level of miscommunication of the unintended message that Doan's is less effective.[49] Dr. Jacoby criticized the study because he did not believe that a mail panel method was appropriate to test the corrective message as a general matter. He also criticized the use of FSIs to test the corrective message since FSIs were not a large part of the advertising campaign.

Dr. Whitcup conducted a study of the same corrective message using a mall intercept methodology with the corrective message placed on the product package. Dr. Whitcup concluded that the corrective message did not convey the intended message to consumers[50] -- of the 35% who saw the disclaimer, 10% got it wrong. Dr. Whitcup argued that number to be high given the small number who recalled the disclaimer at all. Accordingly, he concluded that the corrective message did not do a good job of communicating its message. Dr. Mazis criticized the Whitcup study, noting that the

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[48] Of the respondents, 145 were Doan's users and 225 were non-users who were aware of Doan's. CX 489.

[49] In response to the question, "What did the ad say or imply about Doan's?" 38% of the participants indicated that Doan's was the same as or was not proven to be better than other medicines. Only 3 to 4% indicated that it was better or worse. CX 489-p. In response to closed-ended questions regarding what the ad said or implied about Doan's effectiveness for back pain in comparison to other medicines, 69% replied that it was the same or not proven to be better. Between 5 and 8.8% reported that it was better or worse. CX 489-x. Finally, in response to closed-ended questions about what was implied or stated, 75% agreed that the ad implied that Doan's is about as effective for back pain as other OTC pain relievers. None said it was less effective and 17% said it was more effective. CX 489-z.

[50] In response to an opened-ended question asking what the package said, showed or implied about the product, 15% responded that they understood that Doan's was not more effective than other pain relievers. RX 110-q. In response to a closed-ended question as to whether the package compared effectiveness of the product to the effectiveness of other pain relievers, 35% said yes, but 6% said the product was better and 4% said it was worse and 24% said it was the same. RX 110-v.

corrective message appeared in a cluttered context. He found that the message was inconspicuous and difficult to read. Mazis Tr. 1353-56.

We find that the Mazis study is probative of the effectiveness of the corrective message. We also find that the Whitcup package study actually confirms the effectiveness of the corrective message. We believe that the different levels of communication between the Whitcup product package study and the Mazis FSI study result from their differences in the conspicuousness of the disclosure and the fact that packages contain a great deal more information than advertising.

Although we have no data to determine at what level the message would be communicated in a 15-second television or radio ad, we believe that the corrective message would be difficult to communicate in such a short ad without unduly restricting respondent's ability to also convey its advertising message. Accordingly, we require that the corrective message appear on all advertising except television and radio ads that are 15 seconds or less in duration. The corrective message must also appear on the product package. Including the corrective message on the product packaging is especially important because, as Dr. Whitcup testified, packaging is a particularly ubiquitous form of advertising in that people have to pick up the product in order to purchase it. Dr. Whitcup also noted that in deciding what product to buy, consumers may compare packages. *See* Whitcup Tr. 2286.

We reject complaint counsel's recommendation that the duration of the corrective message be determined by a performance standard. In *Egglands Best*, we required the corrective message to appear on the package for one year. 118 FTC 340, 357. In *Warner Lambert*, we required the corrective message to appear in all advertising until the respondent had expended a sum equal to the average annual Listerine advertising budget for a ten-year period. 86 FTC 1514-1515. The Court of Appeals affirmed, stating: "[T]he corrective advertising order in this case, by tying the quantity of correction required to the investment in deception, is tailored to serve the legitimate governmental interest in correcting public misimpressions as to the value of Listerine and no more." In a footnote, the court went on to say: "As a result, any imprecision in the order's scope would seem likely to inure to Warner-Lambert's benefit." 562 F.2d 771.

We believe that a hybrid approach -- advertising expenditures and specific length of time -- is the best method for determining when the

corrective message should terminate. If we were to require that the corrective message appear in advertising until Novartis has expended a specific amount of money on advertising, Novartis could choose to advertise for a short period of time in an expensive way. If we were to require the corrective message to appear only for a specific period of time, then Novartis could choose not to advertise for that period of time.[51] Accordingly, we order that the corrective message appear for one year on all packaging and advertising, except radio and television ads of 15 seconds or less in duration, and until Novartis has expended on Doan's advertising an amount equal to the average spent annually during the eight years of the challenged campaign.[52] In contrast to complaint counsel's proposed performance standard, as the Court of Appeals found in the *Warner Lambert* matter, any imprecision in the scope of the order is likely to inure to Novartis' benefit.[53]

Respondent argues that complaint counsel's proposed corrective advertising order violates the First Amendment. RRAB 106. Respondent argues that the corrective message does not convey the intended message and may be confusing. In addition, it argues that the corrective notice will be punitive because it will have a negative influence on consumers' beliefs about Doan's. RRAB 104. Further, it argues that the message would force it to abandon the 15-second ad format. RRAB 110. Finally, it argues that the corrective message "carries an unacceptable risk of forcing Doan's to abandon its back pain specific positioning and thus forcing Doan's off the market." RRAB 106. These arguments rely on respondent's assumption that the corrective message could be perpetual because of the performance standard suggested by complaint counsel.

We reject these arguments. First, the corrective remedy is of a finite duration. Second, it will not force respondent to abandon 15-second ads because it does not apply to such ads. Third, the corrective message was effectively communicated and is not unduly confusing or misleading. Finally, it is not punitive to require respondent to tell the truth.

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[51] Indeed, an internal Novartis document suggests that if we order corrective advertising, they could stop advertising for three years. *See* CX 110-c.

[52] Respondents spent $65.3 million on advertising between 1988 and 1996. JX 2d ¶ 21. The average annual expenditure on advertising is $8 million.

[53] Dr. Mazis' expert testimony was that the belief that Doan's is more effective than other OTC pain relievers fro back pain will likely linger for a long time after the claim is no longer disseminated. Mazis Tr. 1255-56. Dr. Mazis' expert opinion is supported by three empirical studies that evaluated the effects of Commission corrective advertising orders. IDF 359.

We now turn to the specific First Amendment arguments. Respondent asserts that complaint counsel's proposed corrective advertising provision would prevent it from truthful speech and require it to underwrite speech about the merits of other brands. RRAB 107-108. It relies on *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation,* 512 U.S. 136 (1994). That case involved a reprimand by the Florida Board of Accountancy ("Board") of a Florida attorney for including her Certified Public Accountant and Certified Financial Planner credentials in her advertising and other communication to the public. *Id.* at 139-41. The United States Supreme Court noted that the challenged statements were true and that the government had nothing more than speculation or conjecture to support its fear that the listing of her credentials would, in fact, mislead consumers, by implying compliance with the relevant state accountancy regulations. *Id.* at 143, 144-47. In the present matter, we are not dealing with an across-the-board ban on truthful speech as was the case in *Ibanez,* but with commercial speech which was subject to an adjudicative proceeding and was found to be deceptive.

While commercial speech is entitled to First Amendment protection, misleading speech is not protected and may be banned entirely. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 477 U.S. 557 (1980). Nonmisleading commercial speech may be regulated if the regulation meets a three-prong test: (1) the government's interest in regulating the speech must be substantial; (2) the regulation must materially and directly advance these interests; and (3) the regulation must be no more extensive than is necessary.[54] *Id.* at 566.

We apply the *Central Hudson* test to the facts of this case. First, the government has a substantial interest in protecting consumers from deception. *See Warner Lambert,* 562 F.2d at 771. Thus, the first prong of the test is satisfied.

With respect to the second prong, we find that the corrective advertising remedy directly and materially advances the aforementioned governmental interest. We have determined that the challenged advertising has created or substantially reinforced misbeliefs in the minds of consumers and that those beliefs are likely to linger into the future. As discussed above, the corrective

[54] Although decided before *Central Hudson, Warner-Lambert* addressed the First Amendment issue and concluded that the First Amendment did not bar a corrective advertising order. 562 F.2d 768-71 (supplemental opinion on petition for rehearing).

advertising remedy we order has been copy tested by both parties, and the results show that it effectively communicates the desired message. Accordingly, we conclude that the corrective advertising remedy advances the governmental interest in preventing future deception by correcting the lingering effects of Doan's past false advertising.

Finally, we conclude that the remedy is no more extensive than necessary. Our order is narrowly drafted to correct the misbelief at issue. We have balanced the need for correcting the lingering misbeliefs of consumers against Novartis' ability to advertise effectively. In doing so, we have been mindful of imposing less restrictive alternatives where appropriate. Therefore, we have specifically exempted television and radio ads whose duration is 15 seconds or less to achieve the proper balance. Accordingly, we find that the last prong of *Central Hudson* has been satisfied.

V. CONCLUSION

After a careful review of the entire record and after consideration of all the arguments made by the parties, we believe that Doan's advertising claims were material, the required elements of corrective advertising have been satisfied, and a corrective advertising remedy is appropriate.

APPENDIX

I. THE ATTITUDE & USAGE STUDY

After acquiring the Doan's brand, Ciba wanted to gain a better understanding of the backache category and engaged Arbor, Inc. to conduct an Attitude & Usage Study ("A&U"). CX 221. The specific goals of the 1987 A&U study were to determine awareness and use of Doan's user profiles, brand perception, and reactions to a new Doan's concept.[1] CX 221-h. A total of 390 telephone interviews were conducted.[2] Almost all respondents were aware of Doan's. CX 221-t. Despite Doan's high brand and advertising awareness, Doan's has been tried by less than one third of backache sufferers. CX 221-v.

[1] The new concept was an extra strength product.

[2] Respondents were qualified if they were 18 years or older, suffered from backaches in an average six month period, usually treat backaches with either prescription or non prescription products, and either purchase the products themselves or decide what product is to be bought. An additional 45 consumer who had used Doan's in the past six months were included in the study in order to have 75 users. CX 221-i.

In the portion of the study relating to brand perception, one question asked the respondents to rate the brands they were aware of on 14 different attributes. One of the attributes listed was: "Is the most effective pain reliever you can buy for backaches." CX 221-x. The results for this question show that on mean values, Doan's was at 4.4, which was third after Extra-Strength Tylenol, 5.1, and Advil, 4.8. Bayer was fourth at 4.2. CX 221-z-72.

A summary memorandum from the Ciba consumer research department regarding the A&U study to Hal Russo, a member of the marketing department, described the results of the study by saying:

> Overall, Doan's competes in a broad arena, dominated by general purpose analgesics. Doan's has a weak image in comparison to the leading brands of analgesics and would benefit from positioning itself as a more effective product that is strong enough for the types of backache sufferers usually get. Care must be taken in positioning the brand as efficacious so that Doan's is not perceived to be only for very bad back pain. Being seen as for only back pain appears to limit usage occasions and may cause the product to be seen as too strong for frequent use. (emphasis in the original) CX 221-c,d.
>
> The study also noted: STRONG ENOUGH FOR ME is the most important dimension tested and was almost twice as important as the next most important dimension GOOD VALUE. MAXIMUM STRENGTH AND SAFE are the next most important. If a brand is perceived as being for BAD PAIN ONLY, it loses on preferences. Being BACKACHE SPECIFIC is not important. (emphasis in the original) CX 221-z-7.

The study also revealed that Doan's users are more likely to claim to use Extra-Strength Tylenol more often than they are to use Doan's. CX 221-z-21.

The results of the A&U study were used to help create new Doan's advertising. The first new Doan's ad that was created and disseminated after this study was the "Graph" ad. Peabody Tr. 146.

II. BRAND EQUITY STUDY

Five years later, in 1993, Ciba conducted the Brand Equity Study. CX 256. The goal of the study was to establish the current equity and brand image of Doan's and its major competitors in the backache category, to explore how the Doan's position might be optimized versus the incumbent competition, and to establish if there were any other categories where there might be an opportunity for Doan's. CX 256-f. The study was conducted via mall intercept in 10 locations. A total of 336 interviews were conducted among males and females

who suffer from back pain and treat their back pain with OTC products in pill form. All of the respondents were aware of Doan's. CX 256-g.

One aspect of the Brand Equity study was to evaluate how Doan's was perceived on a set of attributes compared to other analgesics used to treat back pain. Specifically, one question listed 21 attributes and used a grid of six boxes adjacent to each of the attributes. CX 260-b. The left hand box was labeled "Unacceptable, brand couldn't be worse." The right hand box was labeled "Ideal, nothing could make brand better." In the middle, above the dividing line on the grid, was the label "Good." Respondents were asked to rate each of a group of analgesics products they were aware of for the treatment of back pain on each of the 21 attributes.

Dr. Mazis created a summary of some of the data obtained from this question because the report itself did not contain a detailed discussion of the results. The data for both users and aware non-users are presented both in terms of "top box" - the right hand box rated "ideal" -- and the "top two box" results -- the boxes to the left of "Ideal." For users of the products, about twice as many people put Doan's in the top box of being particularly effective for back pain as compared to the three all-purpose analgesics -- Tylenol, Advil, and Motrin. CX 480-a. For Doan's aware non-users, the results were also higher than for the other brands, albeit at a lower level. CX 480-c.[3]

An Executive Summary describing the study to Ciba management highlights one of the key findings as: "The brand is seen as particularly effective for back pain, and as having a special ingredient." CX 256-c.

The FY'95 Marketing Plan suggests continuing to build on Doan's heritage as "The Back Specialist." It noted that the '93 Brand Equity Study that showed the specificity of Doan's positioning as communicated by the "Back Specialist" has helped differentiate the brand from other pain relievers. It went on to note that: "Clearly this unique positioning has contributed to this as the Equity Study showed the top two attribute ratings for Doan's were ingredients especially for back pain (49%) and Effective for back pain (44%)" CX 387-y.

[3] Twenty percent of aware non-users rated Doan's top box for the attribute particularly effective for back pain, while 7.1% put Extra Strength Tylenol in the Top Box category, 5.3% did for Advil, 6.6% for Motrin IB.

III. NFO STUDY

Dr. Mazis conducted a belief study for this litigation using National Family Opinion, Inc. ("NFO") a marketing research company which provides mail panel research.[4] Mail panel research involves mailing research instruments to individuals who have previously agreed to serve as survey respondents. These individuals then complete and return the research instrument to NFO by mail. NFO sent a screener questionnaire to 40,000 households in October 1996 to identify back pain sufferers/treaters who were Doan's users or aware non-users. CX 420-h. In December 1996, NFO conducted a follow-up survey consisting of 400 Doan's users and 400 Doan's aware non-users selected on a random basis from the larger population of both groups identified on the multi-card screening survey. CX 421-h.

Dr. Mazis concluded that users and aware non-users constituted the appropriate universe for testing beliefs because those who had never heard of the product could not have beliefs about the product. Mazis Tr. 1122. The purpose of the study was to assess beliefs on a number of attributes, but in particular, the "more effective for back pain" attribute and to compare the beliefs of users of Doan's to users of other analgesics for back pain relief, and aware non-users of Doan's to aware non-users of other analgesics.[5] Mazis Tr. 1129-30. The purpose of comparing users and aware non-users was to take into account and control for usage effect.[6] Mazis Tr. 1199-1201.

A total of 549 households returned surveys. CX 421-h. The results of the NFO belief study summarized in CX 482 show that over three-

[4] The mail panel NFO maintains is a bank of over 500,000 households who have agreed, in advance, to participate in research projects. Clarke Tr. 9.

[5] The questionnaire presented ten attribute statements and asked respondents to rate each statement on a seven-point scale, ranging from strongly agree to strongly disagree. CX 421 z-12. The list of ten belief attributes was chosen to include the belief of primary interest in this case, "Is more effective than other OTC pain relievers for back pain relief," as well as two other belief statements that tracked claims made in Doan's advertising: "Has an ingredient especially for back pain" and "Is just for back pain." Mazis Tr. 1133. The other attributes were: (1) Is just for headaches, (2) Is safe to use, (3) Has an ingredient especially for headaches, (4) Is gentle on the stomach, (5) Is effective for all kinds of pain, (6) Is more effective than other OTC pain relievers for headache relief, and (7) Is safer to use than other OTC pain relievers. CX 421-z-12. In addition, each questionnaire also asked respondents to write in their age and sex in spaces provided at the end of the questionnaire as a control procedure to guard against the possibility that the wrong member of the household completed the questionnaire. When the questionnaires were returned, NFO cross-checked this age and sex information against their records. Clarke Tr. 40.

[6] The marketing phenomenon called "usage effect" is the tendency of users of a product to give the product a higher rating than non-users of the product. Mazis Tr. 992.

quarters (77%) of the Doan's users believe Doan's is superior. Between 41 and 62% of users of other brands reported superiority beliefs about their brands. Forty-five percent of Doan's aware non-users held a superiority belief about Doan's, whereas only 17 to 35% of aware non-users of the comparison brands believed those products to be superior to other analgesics. Dr. Mazis concluded that the data for both Doan's users and aware non-users compared to users or aware non-users of each of the five other OTC analgesic products[7] show that the level of superiority beliefs for Doan's is substantially higher than it is for any of the competing products. Mazis Tr. 1151.

Dr. Mazis also undertook an analysis of joint users and joint aware non-users of the various products in order to compare their beliefs about Doan's and their beliefs about other products. Mazis Tr. 1159. This analysis shows disproportionate percentages of both Doan's users and aware non-users believing that Doan's is more effective for back pain. For example, Dr. Mazis looked at individuals who used both Advil and Doan's and compared their beliefs about Advil to their beliefs about Doan's. On average, the proportion of joint users agreeing that Doan's is more effective for back pain than other OTC analgesics was 26% higher than those agreeing that the other brands were more effective. IDF 262, 263; Mazis Tr. 1171-74. This analysis was done for each set of products for aware non-users. On average the proportion of joint aware non-users agreeing that Doan's was more effective for back pain than other OTC analgesics is almost 20% higher than the proportion agreeing that the other brands were more effective. IDF 264, 265; Mazis Tr. 1175-76. Using a two-tailed test, Dr. Mazis calculated that all of the observed differences in the user-to-user comparison for the attribute "more effective for back pain" were statistically significant at the .05 level, as were four of the five[8] aware non-user to aware non-user comparisons for the same attribute. Mazis Tr. 1187-89. Dr. Mazis also analyzed the NFO data by applying the Bonferroni adjustment to correct for experiment-wise error. Even after making these adjustments, the results remained statistically significant. Mazis Tr. 1190-96.

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[7] Advil, Aleve, Bayer, Motrin, and Tylenol.

[8] The Motrin non-user non-user comparison was not statistically significant at the .05 level. Mazis Tr. 1189.

IV. ALEVE TRACKING STUDY

In 1994, Procter & Gamble introduced Aleve. Weeks after introduction, Aleve became the number 3 brand with a 6.5% share of the $2.6 billion general analgesic category. RX 101-c. The advertising compared Aleve to other brands directly by name. In 1995, Ciba conducted the Aleve Tracking Study with the objective of monitoring the first year's progress of Aleve's national introduction in order to determine the impact on the OTC analgesic category generally, on major brands, and on the backache segment in particular. RX 101-d. Telephone interviews were conducted in two waves among nationally-projectable samples of those 18 years of age or older who used an analgesic product in the past year.[9] RX 101-e.

In connection with the study, Ciba obtained information about Doan's. The results of this study indicate that Doan's had between a 2 and 3% unaided brand awareness among the respondents. RX 101-t. However, on an aided basis, the results were higher at between 71 and 75%. RX 101-u.

V. JACOBY STUDY

Dr. Jacoby's study, conducted in late 1996, for this litigation, sought to measure both the materiality of the challenged claim as well as the beliefs created or reinforced by the Doan's campaign. Specifically, he sought to determine whether consumers exposed to the challenged Doan's advertising extracted a "more effective" claim, the basis for such a claim, and whether any such "more effective" claim was material to consumers. In addition, Dr. Jacoby also sought to determine whether there were any lingering effects of the implied superiority claim RX 5-z-82, 83. The study tested consumer beliefs first, without exposure to the challenged ads.

Dr. Jacoby's universe included 684 men and women, at least 18 years old, who in the past year had purchased, or in the past six months had used, a non-prescription medicine to relieve backache or back pain.[10] RX 5-z-85, 87. Dr. Jacoby specifically included consumers who were not aware of Doan's as long as they satisfied the other criteria. Jacoby Tr. 2936. The study was conducted via mall

[9] Of the respondents, between 39 and 42% had used an OTC pain reliever in the past year to treat a backache. RX 101-z-33.

[10] Dr. Jacoby's universe included people who may not have suffered from back pain, but purchased the product. Dr. Jacoby reanalyzed the data after becoming aware of this fact and concluded that 95% of his survey respondents were themselves backache sufferers/treaters. Jacoby Tr. 3140.

intercept in sixteen geographically dispersed markets, in each U.S. Census Division. RX 5-z-89.

The first three questions asked the respondents which products they had used during the past year. By aggregating the answers to these questions, the data show that 21%, or 123 respondents had used Doan's; 71% had used Tylenol; 58% Advil; 31% Aleve; 28% Motrin; and 21% Bayer. RX 5-z-104. There is no information in the study as to what percent of the respondents were aware of Doan's. Next, respondents were asked whether certain brands were more effective. Seven percent of the 684 respondents rated Doan's as more effective, compared to 13% who reported Advil more effective, and 12% who reported that Tylenol is more effective. RX 5-z-105. When analyzing the data further, 38% of the Doan's users reported Doan's as "more effective" in contrast to 23% of Advil and 17% of Tylenol users who reported their brands as more effective. *Id.* The study also showed that many more respondents attributed their usage of Doan's to personal experience (42%) than to advertising (11%).[11] RX 5-z-108-09. Dr. Jacoby also asked whether the respondents recalled any advertising and what it is they recalled from the advertising. The results indicate that for Doan's users, 48% did not recall any ads and that of those who did recall advertising, 44% remember a visual about the ad, 36% mentioned relief of back pain, and 3% mentioned superiority.[12] RX 5-z-110.

VI. WHITCUP STUDY

Dr. Whitcup's belief study was conducted, for this litigation, between February and April 1996. RX 2. It attempted to measure consumer awareness of Doan's and of Doan's advertising. Specifically, Dr. Whitcup attempted to access consumer beliefs about Doan's concerning its effectiveness for relief of back pain that may be the results of prior advertising, product usage, word of mouth, and other factors, as well as to ascertain whether or not Doan's is perceived by relevant consumers as containing a special ingredient for back pain that other OTC analgesics do not contain. RX 2-c.

There were a total of 423 respondents who were men and women aged 18 or older, who have used an OTC analgesic in pill form in the

[11] Interestingly, only users of Doan's reported that advertising was the basis for their belief.

[12] The ALJ stated that it was agreed at trial that the fact that respondents played back a general recall of Doan's ads, does not establish that they did not form a superiority belief from their exposure to Doan's ads. IDF 288.

past year, taken an OTC pain reliever in the past year for back pain, and have no one in their household employed in an industry or with atypical knowledge of pain relievers. Interviewing was conducted by telephone using random digit dialing. RX 2-e. The study was administered under "double blind" conditions where neither respondents nor interviewers were aware of the identity of the sponsor nor the true purpose of the study. RX 2-g. Only 35 respondents had used Doan's RX 2-z-49. In contrast, 190 of the respondents had used Tylenol and 121 had used Advil. *Id.* As a result of the small number of Doan's users in this study, Dr. Whitcup added the letter "c" ("caution small base") whenever he presented data based on their responses. *See e.g.* RX 2-q, s.

After screening for qualifications, respondents were asked a series of questions designed to measure their awareness and use of OTC analgesic brands and their advertising. RX 2-e. Specifically, the first question asked what brand of OTC pain relievers first came to mind. In response to this question 1% of the 423 respondents reported awareness of Doan's in comparison to 51 and 18% of the 423 respondents who mentioned Tylenol and Advil. RX 2-n. Other questions asked respondents to recollect which OTC pain relievers they have seen or heard ads for. No respondents reported top-of-mind awareness of Doan's advertising, in comparison to 36% and 20% who reported top-of-mind awareness for Tylenol and Advil respectively. RX 2-o. Other questions asked what brands respondents used in the past year to treat back pain. Eight percent indicated that they used Doan's in comparison to 45% and 29% who indicated that they used Tylenol and Advil respectively. RX 2-p. Finally, in response to a question asking which brands were most effective, 8% believed Doan's was more effective. RX 2-u. Dr. Whitcup acknowledged that the 8% superior efficacy belief measured for Doan's is at about the same level as Tylenol and Advil. Whitcup Tr. 2816.

VII. THE LAVIDGE STUDY

The Lavidge Study was conducted from October 1996 through January 1997. RX 23-a. It was designed for this litigation with the purpose of determining both what claims the "muscles" ads conveyed and whether consumers held a belief that Doan's contains an ingredient the other products do not have. RX 23-e. The universe included people 18 - 34 years of age who had experienced back pain

within the past 2 months and had taken OTC pain relievers for back pain within the past year. RX 23-f. Seventy one percent of the sample were unaware of Doan's. RX 182.

The Lavidge study was divided into three tests with a total of 750 respondents. RX 23-b. This test was also conducted under double blind conditions using a mall intercept approach in ten cities throughout the U.S. RX 23-e. The respondents were shown TV ads for four OTC products marketed for the relief of back pain -- Advil, Bufferin, Doan's and Tylenol. The Doan's ad used in Tests 1 and 3 was the challenged Muscle's ad, and the Doan's ad used in Test 2 was an unchallenged Doan's ad. Immediately after viewing the ads in Test 1 and Test 2, consumers were asked questions to evaluate the impact of the advertising on their beliefs. The Test 3 participants were asked follow-up questions 11 days later.

The study asked respondents questions about their beliefs after exposure to a clutter tape of ads which included both challenged and unchallenged Doan's ads as well as three other 15 second ads for other analgesic products promoted for back pain relief. Immediately after viewing the ads, 57% of the 499 respondents in two of the tests indicated that they did not believe that any OTC analgesic was more effective than others for the relief of back pain RX 23-j; RX 181. After exposure to the challenged Muscles ad, 5.2% of 249 respondents indicated that they believed that Doan's was more effective for relieving back pain. RX 23-j. Six percent of 250 respondents who saw the unchallenged Muscles ad believed that Doan's was more effective. RX 23-j; RX 181. In comparison, 10.6 % of the 499 respondents believed that Tylenol was more effective and 9.6% believed that Advil was more effective. *Id.* Of those who saw the challenged Muscle's ad and were questioned eleven days later, 3.1% believed that Doan's was more effective. *Id.*

FINAL ORDER

For purposes of this Order:

1. "*Doan's*" shall mean any over-the-counter analgesic drug, as "drug" is defined in the Federal Trade Commission Act, bearing the Doan's brand name, including, but not limited to, Regular Strength Doan's analgesic, Extra Strength Doan's analgesic, and Extra Strength Doan's P.M. analgesic.

2. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

3. "*Advertisement*" shall mean any written, oral or electronic statement, illustration or depiction which is designed to create interest in the purchasing of, impart information about the attitudes of, publicize the availability of, or affect the sale or use of goods or services, whether it appears in a brochure, newspaper, magazine, free standing insert, marketing kit, leaflet, circular, mailer, book insert, letter, catalogue, poster, chart, billboard, public transit card, point-of-purchase display, package insert, package label, product instructions, electronic mail, website, homepage, film, slide, radio, television, cable television, program-length commercial or "infomercial," or in any other medium.

I.

It is ordered, That respondents Novartis Corporation, and Novartis Consumer Health, Inc., corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Doan's or any other over-the-counter analgesic drug, in or affecting commerce, as "drug" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that such product is more effective than other over-the-counter analgesic drugs for relieving back pain or any other particular kind of pain, unless, at the time of making such

representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of Part I of this Order, "competent and reliable scientific evidence" shall include at least two adequate and well-controlled, double-blinded clinical studies which conform to acceptable designs and protocols and are conducted by different persons, each of whom is qualified by training and experience to conduct such studies, independently of each other.

II.

It is further ordered, That respondents Novartis Corporation, and Novartis Consumer Health, Inc., corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sales or distribution of Doan's or any over-the-counter analgesic drugs in or affecting commerce, as "drug" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, regarding such product's efficacy, safety, benefits, or performance, unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

Nothing in this Order shall prohibit respondents from making any representation for any drug that is permitted in labeling for any such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

IV.

It is further ordered, That respondents Novartis Corporation, and Novartis Consumer Health, Inc., corporations, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or any device, do forthwith cease and desist from disseminating or causing the dissemination of any advertisement for Doan's in or affecting commerce, as "commerce" is defined in the Federal Trade

Commission Act, unless the advertising includes the following corrective notice, clearly and prominently, in the exact language that follows:

"Although Doan's is an effective pain reliever, there is no evidence that Doan's is more effective than other pain relievers for back pain."

Provided, that respondents' obligation to include the corrective notice shall not be required for any television or radio advertisement of 15 seconds or less in duration.

Provided further, that respondents' obligation to include the corrective notice in all advertising shall continue for one year and until respondent has expended on Doan's advertising a sum equal to the average spent annually during the eight years of the challenged campaign.

V.

It is further ordered, That for a period of five (5) years after the last date of dissemination of any representation covered by this Order, respondents or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

VI.

It is further ordered, That respondents shall:

A. Within thirty (30) days from the date this Order becomes effective, provide a copy of this Order to each of their current principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this Order; and

B. For a period of ten (10) years from the date this Order becomes effective, provide a copy of this Order to each of their future principals, officers, directors, and managers, and to all personnel,

agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this Order who are associated with them or any subsidiary, successor, or assign, within three (3) days after the person assumes his or her position.

VII.

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

VIII.

It is further ordered, That this Order will terminate twenty (20) years from the date this Order becomes effective, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the Order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this Order that terminates in less than twenty (20) years;

B. This Order's application to any respondent that is not named as a defendant in such complaint; and

C. This Order if such complaint is filed after the Order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondents did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this paragraph as though the complaint was never filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling, and the date such dismissal or ruling is upheld on appeal.

IX.

It is further ordered, That respondents shall, within sixty (60) days from the date this Order becomes effective, and at such other times as the Federal Trade 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.

STATEMENT OF COMMISSIONER ORSON SWINDLE
CONCURRING IN PART AND DISSENTING IN PART

Today, the Commission has decided to order corrective advertising based on a full adjudicative record for the first time in nearly 25 years. I agree with my colleagues that respondents Novartis and Novartis Consumer Health, Inc. (collectively "Novartis" or "respondents") made the unsubstantiated claim that their Doan's analgesic product is superior to other over-the-counter ("OTC") analgesics in treating back pain ("the superior efficacy claim"). I also agree that the traditional cease-and-desist provisions contained in Parts I and II of the Order, which would prohibit Novartis from making the same or similar deceptive claims in the future, are necessary and appropriate. Unlike my colleagues, however, I conclude that the evidence does not support the imposition of the corrective advertising remedy contained in Part IV of the Order.

Corrective advertising is intended to prevent the harm to consumers and competition that is caused when a false belief engendered by prior deceptive advertising lingers. Novartis made an implied superior efficacy claim for Doan's through short television advertisements that have not been disseminated since May 1996. The majority concludes that these advertisements caused a false superior efficacy belief that has lingered and is likely to continue to linger until the corrective advertising provision terminates in July 2000 or beyond. I disagree with this conclusion, because the evidence offered to prove lingering effect is extremely weak, consisting mainly of inconclusive extrinsic evidence, indefinite expert testimony and broad inferences. This evidence is certainly far weaker than the evidence that proved the existence of a lingering effect in *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 762 (D.C. Cir. 1977), *modifying and enforcing* 86 FTC 1398 (1975). I conclude that this weak evidence does not prove by a preponderance of the evidence that the false superior

efficacy belief is likely to linger until July 2000 or beyond. Therefore, the Commission cannot order corrective advertising in this case.

I also conclude that the corrective advertising requirement, which is a form of compelled speech, infringes on Novartis's right to engage in commercial speech under the First Amendment to the United States Constitution. The Commission may compel Novartis to engage in corrective advertising only if the remedy "directly advances a substantial governmental interest" and is "no more extensive than necessary to serve that interest." *Central Hudson Gas & Electric Corp. v. Public Serv. Comm. of N.Y.*, 447 U.S. 557, 566 (1980). Because it has not been proven that the false superior efficacy belief in this case is likely to linger, there is no false belief that needs to be corrected to prevent deception; therefore, corrective advertising cannot directly advance any substantial governmental interest. In addition, because the majority opinion has not given adequate consideration to alternatives to corrective advertising or to less restrictive alternatives to the all-media corrective advertising remedy imposed (such as a corrective statement on the product label or point-of-sale materials), the Commission has not shown that the prescribed corrective advertising requirement here is no more extensive than necessary to prevent deception.

Corrective advertising is an extraordinary remedy that can serve the salutary purpose of preventing harm to consumers and competition. I have supported the imposition of corrective advertising provisions in those rare instances where the legal standard for its imposition has been satisfied and the remedy was otherwise warranted. I will continue to support the use of corrective advertising remedies in appropriate cases. But I am not willing to support a corrective advertising remedy in this case because the adjudicated record does not prove that any false superior efficacy belief is likely to linger and because the imposition of the remedy would be unconstitutional.

I. DECEPTION AND TRADITIONAL RELIEF

Before I turn to the question of corrective advertising, let me make clear that I concur in the majority's conclusions that Novartis's superior efficacy claim was deceptive and that the traditional cease-and-desist relief imposed by the order is necessary and appropriate. Administrative Law Judge Lewis F. Parker ("the ALJ") concluded that Novartis had violated Sections 5 and 12 of the Federal Trade

Commission Act, 15 U.S.C. 45, 52, by making the unsubstantiated claim that Doan's was superior to other OTC analgesics in treating back pain. Initial Decision ("ID") at 63-64. In its appeal from the ALJ's conclusion that the superior efficacy claim was deceptive, Novartis argued only that the claim was not material to consumers. I agree with the majority's conclusion that the superior efficacy claim was material, Majority Op. at 11-20, although not with all of the reasoning that supports this conclusion.[1] Accordingly, I agree that Novartis engaged in deception in violation of Sections 5 and 12 of the FTC Act.

The Commission has wide discretion in choosing a remedy to prevent Novartis from engaging in the same or similar deception in the future. The Commission may include provisions in its cease-and-desist orders that go beyond prohibiting the repetition of the deception that has been found, so long as such "fencing-in" relief bears a "reasonable relation" to the unlawful practices found. *FTC v. National Lead Co.*, 352 U.S. 419, 429 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-13 (1946). In determining the appropriate extent of fencing-in relief to remedy a law violation, the Commission considers the seriousness and deliberateness of the violations; the ease with which the unlawful conduct could be transferred to other products; and the respondent's history of violations. *See, e.g.*, *Kraft, Inc.*, 114 FTC 40, 139-40 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992); *Thompson Medical Co.*, 104 FTC 648, 833 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).

The Order here includes both core relief prohibiting Novartis from repeating its deceptive superior efficacy claim for Doan's and traditional fencing-in relief preventing similar violations. Part I prohibits Novartis from making any unsubstantiated claim that Doan's or any other OTC analgesic is more efficacious than other OTC analgesics for relieving back pain or any other particular type of pain. Part II also bars Novartis from making any unsubstantiated claim regarding the efficacy, safety, benefits, or performance of Doan's or any other OTC analgesic. Given the seriousness of

[1] The evidence does not prove that Novartis intended to make the claim or that it was able to charge a premium because of the challenged advertisements, Majority Op. at 13-15, and therefore I do not join in the majority's conclusion as to materiality to the extent that it relies on these findings. I agree with the majority that the effectiveness of the deceptive advertising campaign is not relevant to the issue of materiality, *id.* at 16-17, but I do not join in the majority's additional determination that the campaign was effective.

deceptive health claims and the ease with which Novartis could make similar unsubstantiated claims for Doan's or other OTC analgesics, both the core relief and the fencing-in relief included in Parts I and II of the Order are necessary and appropriate.

II. CORRECTIVE ADVERTISING

The majority also would require Novartis to undertake corrective advertising. Part IV of the Order mandates that Novartis make a specified corrective statement in all of its "advertising"[2] (except television or radio advertisements of 15 seconds or less in duration) for "one year and until the respondents have expended on Doan's advertising a sum equal to the average amount spent annually during the eight years of the challenged campaign." The prescribed corrective statement is: "Although Doan's is an effective pain reliever, there is no evidence that Doan's is more effective than other pain relievers for back pain."

A. Legal Standard

Corrective advertising is a type of fencing-in relief for which the court in *Warner-Lambert* adopted a higher standard than the "reasonably related" standard applicable to traditional forms of fencing-in relief. *Warner-Lambert*, 562 F. 2d at 762.[3] In *Warner-Lambert*, the respondent spent "vast sums" on a 51-year advertising campaign making the false claim that Listerine mouthwash was effective in treating colds and sore throats. 86 FTC at 1468, 1502. In affirming the Commission's imposition of an approximately one-year corrective advertising requirement, the court held the Commission could impose a corrective advertising requirement if it concluded that "Listerine's advertisements play[ed] a substantial role in creating or reinforcing in the public's mind a false belief about the product" and "this belief [would] linger on after the false advertising ceases." 562 F. 2d at 762. The court relied on consumer surveys over many years

[2] "Advertising" is defined in the Order to include claims made in a brochure, newspaper, magazine, free standing insert, marketing kit, leaflet, circular, mailer, book insert, letter, catalog, poster, chart, billboard, public transit card, point-of-purchase display, package insert, package label, product instructions, electronic mail, website, homepage, film, slide, radio, television, cable television, program-length commercial or infomercial, or in any other medium.

[3] *See California SunCare, Inc.*, 123 FTC 332, 391 (1997) (Statement of Commissioner Roscoe B. Starek, III, concurring in part and dissenting in part) (*Warner-Lambert* imposes a "more demanding standard for corrective advertising" than traditional fencing-in relief, such as affirmative disclosure requirements.).

and expert testimony in concluding that there was substantial evidence in the record as a whole to support these two factual prerequisites. *Id*. at 762 n.65. The *Warner-Lambert* court also concluded that the approximately one-year time period for the corrective advertising requirement was not "an unreasonably long time in which to correct a hundred years of cold claims." *Id*. at 764.

Since it decided *Warner-Lambert*, the Commission has considered the imposition of corrective advertising in three adjudicated cases, all of them involving claims made for OTC analgesics. *Sterling Drug, Inc.*, 102 FTC 395 (1983), *aff'd*, 741 F.2d 1146 (9th Cir. 1984); *Bristol-Myers* Co., 102 FTC 21 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984); *American Home Products Corp.*, 98 FTC 136 (1981), *aff'd as modified*, 695 F.2d 681 (3d Cir. 1982). In none of these cases, however, did complaint counsel prove the factual prerequisites for ordering corrective advertising -- that the deceptive advertisements substantially created or reinforced a false belief and that the belief was likely to linger -- and thus the Commission declined in each case to order corrective advertising. Because *Warner-Lambert* is the only adjudicated case in more than two decades in which the Commission has ordered corrective advertising, it provides the benchmark[4] for determining whether the evidence proves[5] the factual prerequisites for corrective advertising. I do not think that the evidence here proves these prerequisites.

B. Lingering Effect

In my view, corrective advertising cannot be ordered in this case because the evidence does not prove that any false superior efficacy

[4] The majority states that the Commission "has frequently noted that the amount of evidence in *Warner-Lambert* was unusually strong and far exceeded the threshold needed to impose corrective advertising." Majority Op. at 30. As discussed below in the text, the Commission has simply recognized that inference, not direct evidence, may be used in appropriate cases. The availability of inference does not relieve complaint counsel of the burden of proving lingering effect by a preponderance of the evidence. Moreover, *Warner-Lambert* did set the standard for corrective advertising, and the evidence in that case is the only benchmark that we have for assessing the sufficiency of evidence supporting corrective advertising. *See* E. Levi, *An Introduction to Legal Reasoning* 2 (1949) (the extension of a rule of law to new facts "depends upon a determination of what facts will be considered similar to those present when the rule was first announced").

[5] Complaint counsel has the burden of proving facts in Commission adjudications by a preponderance of the evidence. *Carter Products, Inc. v. FTC*, 268 F.2d 461, 487 (9th Cir. 1959); ABA Antitrust Section, *Antitrust Law Developments* 617 (4th ed. 1997) ("The burden of proof in a Commission proceeding is on complaint counsel to establish its case by a preponderance of the evidence.") (footnotes omitted); *see* 5 U.S.C. 556(d) ("[e]xcept as otherwise provided by statute, the proponent of a[n] * * * order has the burden of proof.").

belief substantially caused by the deceptive advertising campaign is likely to linger.[6] The majority concludes that the false superior efficacy belief will linger, but fails to address or even identify how long the belief must be likely to linger to support the corrective advertising remedy in this case. A false superior efficacy belief will not support corrective advertising unless it is likely to linger throughout the period during which the corrective advertising provision will be in effect. Without a lingering false belief, there is no more reason to impose a corrective advertising remedy than there is for a doctor to prescribe a remedy for a patient who has already recovered. Specifically, the false superior efficacy belief must exist at the time that the Commission's order becomes final -- that is, the date on which the corrective advertising provision must commence -- and must continue, albeit presumably at a decreasing level due to the effects of the provision, at least until the corrective advertising requirement expires.[7] Hence, for the Commission to order corrective advertising in this case, the false superior efficacy belief would have to exist when the Order becomes final (in July 1999[8]) and would have to continue to exist until the corrective advertising requirement terminates (in July 2000 or beyond).[9]

The ALJ did not order corrective advertising because he was not persuaded that the evidence in the record proved that the false

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[6] I am assuming for the sake of argument that the majority is correct that the false superior efficacy belief was caused substantially by the deceptive advertising at issue, rather than by some other entirely plausible factor such as the introduction of new, extra strength Doan's products or the nine decades of positioning Doan's product as an effective remedy for back pain. *Compare Sterling Drug Co.*, 102 FTC at 798-99 (concluding that it was not clear that deceptive advertising campaign was a substantial cause of false efficacy belief because "the longer a brand has been in existence, the less its image stems from one particular advertising campaign," since "[f]or a brand like Bayer, which has been on the market for years, familiarity is the primary influence on brand image").

[7] *See* R. Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661, 697 (1977) (hereinafter "Pitofsky, *Beyond Nader*") (false belief must continue to "influence purchasing decisions up to the date of the entry of a final Commission order, and [be] likely to continue to be influential for a substantial segment of potential purchasers even if the false claims [are] no longer disseminated by the seller").

[8] Commission cease and desist orders, including their corrective advertising provisions, become final 60 days after service unless the Commission or a court has granted a stay. Section 5(g) of the FTC Act, 15 U.S.C. 45(g).

[9] The corrective advertising provision could last substantially longer than one year because it is required to continue for "one year **and** at least until the respondent has expended on Doan's advertising a sum equal to the average amount spent annually during the eight years of the challenged campaign" (emphasis added). For instance, although the corrective advertising provision in *Warner-Lambert* was similarly prescribed to last until the respondent had spent the same amount on advertising as its average recent annual advertising expenditure, the provision was in effect for at least 18 months. Mazis Tr. at 1798.

superior efficacy belief would linger. ID at 63-64. According to the ALJ, the evidence revealed that it is uncertain[10] that the false belief is likely to linger, given that the advertisements in *Warner-Lambert* ran for 51 years while the advertisements here ran for only 8 years. *Id.* at 64. The ALJ also found unpersuasive the testimony of Dr. Michael Mazis, complaint counsel's marketing expert, that the false superior efficacy belief would linger. *Id.* at 63. Finally, the ALJ not only rejected complaint counsel's argument that a lingering effect can be inferred from other facts, but also found "indications in the record that the belief in Doan's superiority may be transitory," *id.*, including evidence that the deceptive advertisements were not memorable and did not cause any increase in product sales. *Id.* at 64-65. A careful review of the evidence persuades me that the ALJ correctly concluded that the requisite lingering effect has not been proven.

1. Direct Evidence of Lingering Effect

The majority first relies on extrinsic evidence for its conclusion that the false superior efficacy belief will linger. In December 1996, National Family Opinion, Inc. ("NFO") conducted a mail panel research study of consumer beliefs (the "1996 NFO Study"). CX-421. The 1996 NFO Study tested the efficacy beliefs of users and aware non-users of six OTC analgesics -- Advil, Aleve, Bayer, Doan's, Motrin, and Tylenol. For each of these OTC analgesics, users and aware non-users were asked whether they strongly agreed, agreed, somewhat agreed, neither agreed nor disagreed, somewhat disagreed, disagreed, or strongly disagreed with the statement that the OTC analgesic was "more effective than other over-the-counter pain relievers for back pain." CX 421-V. For each of these six OTC analgesics, a significant proportion of the users and aware non-users had a false superior efficacy belief,[11] even though none of the OTC

[10] The majority takes the ALJ to task for purportedly requiring that the lingering effect must be proven with certainty. Majority Op. at 21. The ALJ stated that "there is no certainty that the belief at issue requires corrective advertising." ID at 64. While the ALJ's language could have been more precise, the more reasonable understanding of his statement is that the evidence presented as to lingering effect was too uncertain, not that complaint counsel have not accomplished the obviously impossible task of proving lingering effect with certainty.

[11] Among users, 62.3% of Advil users, 51.4% of Aleve users, 41.3% of Bayer users, 78.9% of Doan's users, 61.4% of Motrin users, and 43.8% of Tylenol users stated that their own brand was superior for back pain relief. CX-421-V. Among aware non-users, 31.2% of Advil aware non-users, 19.9% of Aleve aware non-users, 27.1% of Bayer aware non-users, 44.6% of Doan's aware non-users, 35% of Motrin aware non-users, and 22.4% of Tylenol aware non-users stated that the brand that they were aware of (but did not use) was superior for back pain relief. *Id.*

analgesics other than Doan's had been advertised specifically as a back pain medication. Even though many users and aware non-users held the false superior efficacy belief for all of the OTC analgesics, Dr. Mazis testified that, following statistical adjustments, on average 20 to 25% more users and aware non-users of Doan's had a false superior efficacy belief than did the users and aware non-users of the other OTC analgesics tested. Mazis Tr. at 1385. Given a statistical confidence level of approximately 5%, Dr. Mazis testified that when a 20% reduction (*i.e.*, only a reduction of one in five of the relevant consumers) occurred, there would no longer be a lingering false superior efficacy belief to be corrected. *Id*. at 1385, 1386-87.

While the 1996 NFO Study shows that 20% more Doan's users and aware non-users have the false superior efficacy belief than the users and aware non-users of other OTC analgesics, it does not prove that this level of beliefs about Doan's is the lingering effect of the deceptive advertising. Study participants were simply never asked whether they had ever seen any Doan's advertising, much less the particular deceptive advertisements at issue here. Mazis Tr. at 1642, 1644, 1786. It is not impossible that study participants saw the deceptive advertising before it was discontinued in May 1996 and formed the false superior efficacy belief as a result of exposure to this advertising, and that this belief lingered until December 1996. However, a variety of influences -- other than any particular advertising campaign -- create, reinforce, and change consumer beliefs about a product. Given that other, entirely plausible influences could well be responsible for the belief reported in the 1996 NFO Study (such as historic positioning and the introduction of new extra strength Doan's products), I am not willing to infer that the belief is the enduring effect of the discontinued deceptive advertising. Jacoby Tr. at 3005-06; Scheffman Tr. at 2618.

Even if the 1996 NFO Study had established that the false superior efficacy belief had lingered, it would prove only that the belief had lingered until December 1996 – not that it was likely to linger until July 2000 or beyond. Persuasive expert testimony is one possible method[12] of proving that the false superior efficacy belief

[12] Another possible method of proving lingering effect would be through a series of comparable consumer surveys conducted over the course of years demonstrating that the belief is durable. In *Warner-Lambert*, for example, the Commission concluded that a false cold and sore throat efficacy belief concerning Listerine would persist based on numerous, identical quarterly market research reports over an eight-year period demonstrating that consumers had consistent levels of the belief and that the belief did not diminish substantially during periodic cessations of the advertising during the summer

would continue to linger from December 1996 until July 2000 or beyond. Dr. Mazis, complaint counsel's expert, did testify that the heightened false superior efficacy belief is likely to linger, but his testimony on lingering effect is not persuasive. In support of his conclusion, Dr. Mazis briefly mentioned the length and effectiveness of the advertisements, the emphasis in the advertisements on the superior efficacy claim, and the results of copy tests. But he provided no analysis of the reasons that each of these factors demonstrates that a lingering effect is likely under the particular facts of this case. Mazis Tr. at 1255-56. In the absence of a thorough analysis as to why these considerations mean that the false superior efficacy belief is likely to linger, the unsupported conclusion of Dr. Mazis that the false belief will linger is no more persuasive than the conclusions of Novartis' experts that it will not. *See* Whitcup Tr. at 2336; Scheffman Tr. at 2536; Jacoby Tr. at 3201.[13]

Moreover, even assuming that Dr. Mazis had testified persuasively that the false superior efficacy belief generally is likely to linger, his testimony is flawed because it is extraordinarily indefinite as to how long the belief is likely to linger. Dr. Mazis variously phrased the length of the likely lingering effect as that it would "last for quite some time," it would "go on for years," it would "not go away quickly," it would linger for a "very, very long time," it would linger a "considerable length of time," and it would be "hard to know" how long it would linger, but "beliefs tend to dissipate slowly." Mazis Tr. at 1254, 1256, 1263, 1798, 1975. Dr. Mazis's testimony thus does

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months. 86 FTC at 1472-76, 1503-04. Other than the 1996 NFO Study, the only other extrinsic evidence that purports to show the false superior efficacy belief is the 1993 Brand Equity Study. Like the ALJ, I do not believe that the 1993 Brand Equity Study is probative because the question posed was unclear as to whether participants were being asked if Doan's was very effective in an absolute sense or if Doan's was more effective than other OTC analgesics. FF 246. Consequently, unlike *Warner-Lambert*, there is no series of comparable tests over the course of years in this case that proves the existence of a stable and enduring false superior efficacy belief.

[13] Dr. Mazis also relied on consumer research studies purportedly showing lingering false beliefs about Listerine mouthwash and Hawaiian Punch fruit drink in the 1970s. He provided no analysis of the reasons why the results of these studies are applicable to the specific facts of this case -- false superior efficacy beliefs about an OTC analgesic in the 1990s. Mazis Tr. at 1256-63. Consumers of OTC analgesics may well be subject to significantly different influences than consumers of mouthwash or fruit punch; for example, advertising for OTC analgesics is much more competitive than advertising for mouthwash or fruit punch. Scheffman Tr. at 2603-04, 2626, 2647. Consumers of products in the 1990s also may well be subject to significantly different influences than in the 1970s because of new media, such as cable television, electronic mail, and websites. Without a cogent analysis of why the results of these consumer research studies are applicable to current consumer beliefs about Doan's, I am not persuaded by Dr. Mazis's testimony that these studies prove lingering effect.

not address with any specificity how long the false superior efficacy belief is likely to linger.[14]

Dr. Mazis's expert testimony is far weaker than the expert testimony that has been offered in other Commission corrective advertising cases on the issue of how long the false belief will linger. For example, in *Warner-Lambert*, one marketing expert testified that the levels of false cold and sore throat efficacy beliefs for Listerine "would continue at the 1971 rate (59 percent) for about two years after colds advertising ceased and would remain high even *after* five years," while another marketing expert opined that "in the absence of colds advertising consumer beliefs would decline at *no greater* a rate than 5 percent a year." 86 FTC at 1503-04 (emphasis in original). Similarly, in *American Home Products*, experts testified that after deceptive advertising making a false superior efficacy claim about Anacin ceased, the false belief created would linger among non-users for "approximately one year" and among users for more than one year. 98 FTC at 283-84.

Some quantitative assessment is needed in this case if expert testimony is going to support the imposition of corrective advertising. After all, because the deceptive advertising here ceased three years ago, corrective advertising cannot be ordered as a matter of law if the false superior efficacy belief is likely to linger for three years or less, while it could be ordered if the belief is likely to linger for approximately four years or more. Expert testimony that the false superior efficacy belief is likely to linger for some indeterminate period of time is of little probative value when the Commission must decide whether the belief is likely to linger for a particular period of time. Given Dr. Mazis's lack of analysis in support of his opinion that the false belief is likely to linger and his inability to identify with any specificity how long the false belief will linger, I conclude, like the ALJ, that his testimony is not persuasive.

2. Inference of Lingering Effect

Absent a basis in the direct evidence, the majority turns to inference as an additional ground for its conclusion that the

[14] As an example of how indefinite are Dr. Mazis's testimony and the other evidence on the issue of the duration of the false superior efficacy belief, one need look no further than the disagreement between the majority and complaint counsel over the suitable length of the corrective advertising remedy: the majority has concluded that the evidence warrants a one-year period for corrective advertising, while complaint counsel have argued that (if a fixed period is imposed) the evidence warrants an eight-year period for corrective advertising. CCRB at 40 n. 55.

heightened level of false superior efficacy beliefs among Doan's users and aware non-users will linger. Majority Op. at 30-31. The majority infers a lingering effect from the fact that the deceptive superior efficacy claim was very salient to consumers. *Id*. at 30. The majority also draws such an inference from the fact that the deceptive superior efficacy claim was clearly and consistently conveyed to consumers, as revealed by copy tests. *Id*. at 30-31. Finally, the majority infers lingering effect from the fact that the deceptive advertising campaign was an integral part of an eight-year advertising campaign that cost $65 million. *Id*. at 30.

The Commission has said that inferences drawn from other facts may be used to prove the requisite lingering effect in some circumstances. "[A]bsent probative evidence one way or the other, [the Commission may] infer that a deceptive advertisement will leave a lingering deceptive impression in consumers' minds." *American Home Products Corp.*, 98 FTC at 408 n.93; *see Bristol-Myers*, 102 FTC at 380 n.102 ("survey evidence is only one factor to be considered in determining whether corrective advertising is appropriate in a particular case"); *Statement in Regard to Corrective Advertising*, 6 Trade Reg. Rep. (CCH) ¶ 39,046 at 41,705 (1979) ("In some cases, the [Commission] might conclude that corrective advertising is necessary without formal surveys to show that consumers have lasting wrong impressions about the product."). While an inference from other facts may be employed in appropriate cases, such an inference generally will have less probative value than direct evidence because inference is by nature an indirect and imprecise method of proof.[15] Indeed, it is important to emphasize that the only time that the Commission has ordered corrective advertising in an adjudicated case in more than two decades, it relied on direct evidence in the form of persuasive extrinsic evidence and expert testimony, not simply on inferences. *Warner-Lambert*, 86 FTC at 1501-04.

[15] It is extremely difficult to infer any particular duration of a lingering effect from other facts. For example, in this case, what are the differences in length of lingering effect among a material claim, a salient claim, and a very salient claim? What are the differences in length of lingering effect for an implied claim, a nearly express claim, a clear and consistent claim, and an express claim? What are the differences in length of lingering effect among a ten-year, $45 million advertising campaign; an eight-year, $65 million advertising campaign; and a five-year, $75 million advertising campaign? The indeterminate duration of any inferred lingering effect indicates that the case in which inference will support corrective advertising is likely to be the exception, not the rule.

While inference of lingering effect may be considered in this case, the particular inferences that the majority seeks to draw are not persuasive. The majority first infers a lingering effect from the purported powerful impact of the deceptive advertising on consumers, which, in turn, is based on the majority's conclusions that the superior efficacy claim was "very salient" and was made "clearly and consistently." Consumers may have taken away the implied claim immediately after seeing the deceptive advertisements, but only a minimal proportion (between 1% and 8%) of test participants recalled the claim 24 hours or 72 hours after viewing the advertisements along with programming and other advertisements.[16] Similarly, only a minimal proportion (0% top-of-the-mind and 2% total unaided) of consumers recalled any advertising for Doan's, including the deceptive advertisements. RX 2-O. Although consumers could conceivably form a belief about a product based on a deceptive advertisement without being able to recall the claim shortly thereafter or without being able to recall any advertising for the product, the far more plausible conclusion is that the extremely low recall of the deceptive claim and of Doan's advertising means that the deceptive advertisements had no real lasting impact because they were not memorable. Whitcup Tr. at 2123. Indeed, the conclusion that the deceptive advertisements did not have a powerful impact on consumer beliefs is corroborated by the fact that unit sales of Doan's declined during 1988 to 1993, the first five years in which the deceptive advertisements were being disseminated. RX-189-A; Scheffman Tr. at 2550-51; Stewart Tr. at 3487. I am not persuaded that an inference can be drawn that this ineffective advertising campaign caused a false belief that is likely to linger until July 2000 or beyond, more than four years after Novartis ceased disseminating the deceptive advertisements.

The majority, emphasizing that the campaign lasted eight years, cost $65 million, and reached 80 to 90% of the target audience 20 to 27 times per year, also would infer a lingering effect from the purported extensiveness of the advertising campaign. Majority Op. at 30-31. But reaching 80 to 90% of one's target audience 20 to 27 times per year pales in comparison to the level of advertising by Novartis's

[16] FF 141, 148, 153, 157, 164. While these studies may understate the level of advertising claim communication because they are designed primarily to test the memorability of advertisements, not claims in advertisements, *see Kraft, Inc.*, 114 FTC at 126 n.13, they nevertheless raise serious doubt as to whether the deceptive advertisements had the claimed powerful impact on consumer beliefs.

competitors, who reach 98 to 99% of their target audience between 32.5 and 121.2 times per year. JX 2-H, ¶ 32; RX 36-M, Z-27. Moreover, Novartis was primarily using short television advertisements (15 seconds in duration), while its competitors generally were using much longer advertisements (30 seconds and 45 seconds in duration). IDF 318; Peabody Tr. at 465. Given that Novartis competes with other OTC analgesic advertisers for the limited attention of OTC analgesic customers, I am not persuaded that the relatively infrequent and short advertisements here captured the limited attention that consumers devote to considering information about OTC analgesics so as to have caused strong beliefs that are likely to linger for years.[17]

A comparison to prior Commission cases in which corrective advertising has been considered and rejected also persuades me that a lingering effect cannot be inferred from the fact that Novartis clearly and consistently made a very salient superior efficacy claim for Doan's during an eight-year, $65 million advertising campaign. The deceptive advertising campaign here pales in comparison with other deceptive advertising campaigns (especially when advertising expenditures are measured in constant dollars) that have not resulted in the Commission imposing corrective advertising. *See* Appendix A.[18] For example, in *American Home Products*, the respondent had made, expressly and by clear implication, a false superior efficacy claim for Anacin during a more than 12-year, $204 million advertising campaign. 98 FTC at 151. The Commission did not order a statement to correct any resulting false superior efficacy establishment belief because there was "little likelihood that a false or unsubstantiated image of proven superiority [would] survive" in

[17] In determining whether the deceptive advertisements were so extensive that an inference of lingering false belief can be drawn, the majority rejects any consideration of the extent of advertising by other competitors in the marketplace. Majority Op. at 31. However, in assessing the effects of a deceptive advertising campaign, the Commission should not treat deceptive advertising, especially comparative deceptive advertising, as if it takes place in a vacuum. For instance, assume that Company A spent $20 million over five years on advertisements making the deceptive claim that Product A is better than Product B, while Company B spent $500 million over the same five years on advertisements making the claim that Product B is better than Product A. In determining if it can be inferred that Company A's campaign is likely to create the lingering false belief that Product A is superior, the Commission should consider the nature and extent of the advertising campaigns of both Company A and Company B.

[18] The majority states that I am emphasizing "the duration of the advertising campaign and the dollars spent in these cases." Majority Op. at 32 n.44. I have addressed the length of deceptive advertising campaigns and the amounts spent during these campaigns simply because they are some of the facts from which the majority is drawing an inference of lingering effect.

light of the traditional relief contained in the Commission's cease-and-desist order. *Id*. at 411.

Similarly, in *Bristol-Myers*, the respondent had made, expressly and by clear implication, false superior efficacy claims for Bufferin and Excedrin that were important to consumers. These claims were made during a 13-year, $171 million advertising campaign for Bufferin, and a 13-year, $98 million advertising campaign for Excedrin. 102 FTC at 21, 104-06, 254, 260. The Commission did not order a statement to correct any resulting false superior efficacy establishment claims for either Bufferin or Excedrin. The Commission concluded that such a remedy was not warranted because there was "no evidence that consumers will retain an image that this superiority has been established," *id*. at 380, and in the absence of such evidence the Commission was unwilling to infer the existence of such an enduring image from the superior efficacy belief held and the extent and nature of the deceptive advertising campaign. *Id*. at 380 n.102. Accordingly, *Bristol-Myers* and *American Home Products*[19] provide no support for the inference that the majority draws in this case.

In contrast, it might be instructive to consider a recent case in which I drew an inference of lingering effect. *R.J. Reynolds Tobacco Co*, FTC File No. 992-3025 (Mar. 1, 1999). In August 1997, R.J. Reynolds ("Reynolds") commenced a massive [20] national advertising campaign running innovative print, billboard, and point-of-sale advertisements for Winston cigarettes that made an express "No Additives" representation. The advertising campaign was so successful that by the end of 1997, Reynolds had already increased its volume of Winston sales by 9%. *1997 RJR Nabisco Annual Report* 24 (1997). In March 1999, when the advertising campaign was ongoing, the Commission accepted for public comment a consent

[19] In *Sterling Drug*, the Commission did not order corrective advertising because "it ha[d] not been shown that [the deceptive] advertising created or reinforced the public's image of Bayer," 102 FTC at 799, and, therefore, the Commission did not reach the issue of lingering effect.

[20] *1997 Annual Report: R.J. Reynolds Tobacco Co.* (1997) ("Winston's comprehensive marketing program includes eye-catching billboards and print ads that speak straight to adults with a twist of humor. Point-of-sale displays cut through the marketplace clutter, and new packaging - with distinctive wraparound graphics - reflects the "No Bull" attitude."); American Lung Association, *American Lung Association News*, "Winston Campaign Attacked by Health Groups" (Aug. 25, 1997) (R.J. Reynolds launched a "massive national advertising campaign to reposition Winston. Ads * * * appeared in such widely circulated publications as People, Glamour, and Inside Sports magazines. Billboards, bus shelters, and other outdoor advertising proclaim Winston as the new cigarette with nothing but tobacco.").

agreement with Reynolds accompanied by a complaint alleging that the "No Additives" representation made the implied claim that Winston cigarettes are safer to smoke because they contain no additives. The proposed order would require that Reynolds make a corrective statement in its advertising for one year. I was willing to infer that the false belief would linger in the minds of consumers for one year "[b]ased on the extent and magnitude of the ongoing ad campaign and the demonstrated strength of the implied health claim." Inferring a one-year lingering effect from the ongoing, massive, and innovative advertising campaign in *R.J. Reynolds* for purposes of accepting a consent agreement for public comment, however, is a far cry from the present case, in which a more than four-year lingering effect is being inferred from a long-discontinued, limited, and uncreative advertising campaign.[21]

In my view, complaint counsel have not met their burden of proving that the false superior efficacy belief concerning Doan's is likely to linger. The direct evidence in the record on the issue of lingering effect -- the 1996 NFO Study and Dr. Mazis's testimony -- is far weaker than the direct evidence of lingering effect that justified corrective advertising in *Warner-Lambert*, and it does not persuade me that the false superior efficacy belief is likely to linger. The inference as to lingering effect that the majority seeks to draw is not persuasive, and the Commission did not draw such an inference from even stronger facts in *American Home Products* and *Bristol-Myers*. Complaint counsel's failure to meet their burden of proof on the issue of lingering effect should not be surprising, given how rarely complaint counsel will be able to prove this effect. *See* R. Pitofsky, *Beyond Nader*, 90 Harv. L. Rev. at 697 (if the burden of proving lingering effect remains with complaint counsel -- so that complaint counsel is not simply entitled to a presumption on this issue -- then corrective advertising will be "imposed rarely"). Without stronger evidence of lingering effect, the Commission cannot order corrective advertising.

[21] Resort to inference is more likely in the context of consent agreements than in adjudicated cases. Extrinsic evidence and expert testimony often are not available to the Commission when it considers a consent agreement, which makes the use of inference more probable. *See Eggland's Best*, 118 FTC 340, 365 n.3 (1994) (Statement of Commissioner Roscoe B. Starek, III, concurring) ("It is certainly unrealistic to think that we will have [extrinsic evidence of lingering effect] when the respondents enter into a consent agreement before a complaint is filed."). Moreover, because the Commission applies a "reason to believe" standard to consent agreements and a "preponderance of the evidence" standard to adjudicated cases, inference is more likely to suffice in connection with consent agreements than adjudicated cases.

III. CONSTITUTIONALITY OF CORRECTIVE ADVERTISING REQUIREMENT

I also believe that the corrective advertising provision is a form of compelled speech that infringes Novartis's constitutional right to engage in commercial speech. The Supreme Court has recognized that advertising is a form of commercial speech entitled to protection under the First Amendment to the United States Constitution. The free flow of commercial information through advertising is "indispensable to the proper allocation of resources in a free enterprise system" because it informs the numerous private decisions that drive the system. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). Advertising is critical to consumers because a "particular consumer's interest in the free flow of commercial information ... may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id*. at 763. Corrective advertising requirements disrupt the free flow of information from advertisers to consumers because they compel advertisers to make statements that they would not otherwise make, sometimes having adverse incidental consequences for those advertisers. *See Sterling Drug, Inc.*, 102 FTC at 723 (Initial Decision); *see also* R. Pitofsky, *Beyond Nader*, 90 Harv. L. Rev. at 698 ("The purchase of advertising space or time for the corrective message is expensive, and the remedy is unusually embarrassing to the false advertiser."); Note, *Corrective Advertising -- The New Response to Consumer Deception*, 72 Colum. L. Rev. 415, 429, 431 (1972) (remedy is "severe" and "dramatic").

Notwithstanding the fact that corrective advertising remedies disrupt the free flow of information from advertisers to consumers and may otherwise harm advertisers, the burdens associated with such compelled speech pass constitutional muster if they meet the test first enunciated in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm. of N.Y.*, 447 U.S. 557 (1980). *Central Hudson* set out a framework for determining whether a regulation of commercial speech (or compelled speech in the commercial speech context[22]) survives First Amendment scrutiny:

[22] The corrective advertising remedy mandates that Novartis make a statement that it finds objectionable in part because its competitors in the highly competitive OTC analgesic market do not have to make such statements. Therefore, the corrective advertising remedy here is a form of compelled speech that is to be analyzed under the *Central Hudson* test. *See Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130, 2139 (1997) (*Central Hudson* test applies to compelled commercial speech that requires advertisers to "repeat an objectional [sic] message out of their own mouths").

For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

I agree with my colleagues that the initial portions of the *Central Hudson* test have been satisfied, *see Warner-Lambert*, 562 F. 2d at 771 (corrective advertising is intended to serve the substantial governmental interest of protecting citizens against deception), but I disagree that the corrective advertising provision here "directly advances the governmental interest asserted" and is "not more extensive than is necessary to serve that interest."

A. Direct Advancement of Substantial Governmental Interest

Central Hudson requires that the restriction on commercial speech "directly advance [ ] the governmental interest asserted." 477 U.S. at 566.[23] This "is not satisfied by mere speculation or conjecture; rather [the government] must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71; *see also 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1509 (1996) ("some impact" in redressing harm is not enough; ban on alcohol price advertising must "*significantly* reduce alcohol consumption") (emphasis in original). A restriction thus will not be sustained if "it provides only ineffective or remote support for the government's purpose." *Edenfield*, 507 U.S. at 770, *quoting Central Hudson*, 447 U.S. at 564; *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

Corrective advertising is intended to prevent deception by curing the lingering false beliefs of consumers that were caused by deceptive advertising. The record before us does not demonstrate that the false superior efficacy belief here is likely to linger through the time that the corrective advertising provision will be in effect. As explained above, the only evidence that a heightened level of false superior efficacy beliefs is likely to linger until July 2000 or beyond is the

[23] The government has the burden of proving that a corrective advertising requirement meets the *Central Hudson* standard because "[i]t is well-established that '[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.'" *Edenfield v. Fane*, 507 U.S. 761, 770 (1993), *quoting Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n. 20 (1983); *see also Ibanez v. Fla. Dept. of Bus. & Pro. Regulation*, 512 U.S. 136, 142 n.7 (1994).

inconclusive 1996 NFO Study, the unsupported and indefinite testimony of Dr. Mazis, and the unwarranted broad inferences that the majority draws. This weak evidence of lingering effect does not satisfy the Commission's burden of showing direct advancement of a substantial governmental interest, because a corrective advertising provision cannot prevent deception arising from false superior efficacy beliefs in the absence of proof that such lingering beliefs are likely to exist. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995) ("anecdotal evidence" and "educated guesses" are not sufficient); *Edenfield*, 507 U.S. at 771 (conclusory testimony is not sufficient).[24]

B. No More Extensive Than Necessary

The corrective advertising requirement also violates the last prong of *Central Hudson*, 477 U.S. at 566, which requires that the governmental restriction be no more extensive than necessary to serve the asserted governmental interest. *See also Warner-Lambert*, 562 F.2d at 758 (Commission has a "special responsibility to . . . order corrective advertising only if the restriction inherent in its order is no greater than necessary to serve the interest involved"). This means that there must be a "reasonable fit" between the restriction imposed and the government interest sought to be advanced. *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). "[I]f there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati*, 507 U.S. at 417 n.13; *see also Rubin*, 514 U.S. at 490-91 (no reasonable fit between restriction and governmental interest existed because less restrictive options were available). In analyzing the fit between the restriction and the governmental interest, the government must carefully calculate the costs and benefits associated with the restriction. *City of Cincinnati*, 507 U.S. at 417-18; *Fox*, 492 U.S. at 480.

The majority addresses in one short paragraph whether the corrective advertising provision here is a reasonable fit with the

[24] Similarly, it is unclear that the corrective advertising provision will in fact correct any remaining false superior efficacy beliefs (and thereby prevent deception) to any material degree in the approximately one year that it will be in effect. While testifying that the remedy will correct beliefs much more quickly than if it were not imposed, Dr. Mazis also acknowledged that "[w]e don't know how much faster" and no one "can measure with any precision how long a corrective notice for this particular case should be run." Mazis Tr. at 1975, 1382.

asserted governmental interest in preventing deception. The paragraph states that the Commission has balanced the need for correcting lingering false beliefs against Novartis's ability to broadcast effectively, the upshot of which is to exempt short television and radio advertisements from the corrective advertising requirement. Majority Op. at 37. Thus, except for not applying the corrective advertising requirement to short television and radio advertisements, the majority does not consider any less restrictive alternatives. This minimal analysis is not the careful calculation of the costs and benefits associated with alternatives that *Central Hudson* requires.

First, the majority does not analyze whether there are any narrower alternatives to imposing corrective advertising, including considering whether traditional cease-and-desist order provisions (such as those contained in Parts I and II of the Order, or triggered disclosure requirements) could be adequate to address future deception.[25] Second, assuming that some corrective advertising provision is warranted, the majority does not address in any detail whether there are narrower alternatives to this particular corrective advertising provision. The corrective advertising requirement in this case apparently is intended to closely track the requirement imposed in *Warner-Lambert*. The respondent in *Warner-Lambert* was required to make a corrective statement in all advertising until it had "expended on Listerine advertising a sum equal to the average annual Listerine advertising budget for the period of April 1962 to March 1972." 86 FTC at 1515.[26] Here, Novartis is required to make a corrective statement in all of its "advertising" (except short television and radio advertisements) for "one year and until the respondents have expended on Doan's advertising a sum equal to the average amount spent annually during the eight years of the challenged campaign." The Order defines an "advertisement" broadly to include any intended inducement to sale that appears in:

[25] In other cases, the Commission analyzed whether other cease-and-desist provisions would substantially prevent deception before concluding that corrective advertising was the "least restrictive means of achieving a substantial and important governmental objective." *Warner-Lambert*, 562 F. 2d at 770-71; *see also American Home Products Corp*., 98 FTC at 411 (corrective advertising was not needed in part because a triggered efficacy disclosure would be sufficient to prevent deception).

[26] When it issued its decision in 1975, the Commission concluded that the false belief about Listerine would linger "well into the 1980's," 86 FTC at 1504, that is, at least five years after the Commission's order became final. The Commission imposed an approximately one-year corrective advertising requirement to address this lingering effect. This demonstrates an effort to carefully craft a remedy that was not overbroad.

a brochure, newspaper, magazine, free standing insert, marketing kit, leaflet, circular, mailer, book insert, letter, catalog, poster, chart, billboard, public transit card, point-of-purchase display, package insert, package label, product instructions, electronic mail, website, homepage, film, slide, radio, television, cable television, program-length commercial or infomercial, or in any other medium.

Part IV thus imposes a corrective advertising requirement that is nearly identical to the one-year, all-media requirement that the Commission imposed in *Warner-Lambert*.

While applying the corrective requirement to all media may have been a reasonable fit with the objective of correcting false beliefs in *Warner-Lambert*, it is not a reasonable fit in this case. In *Warner-Lambert*, the Commission was trying to correct false beliefs among the *general public* concerning Listerine mouthwash, and so an all-media corrective advertising provision was consistent with that objective. *See Warner-Lambert*, 86 FTC at 1501, 1503 (false beliefs exist among "Listerine users as well as nonusers"; "long after Listerine cold efficacy advertising ceased, a substantial portion of the *public* would continue to believe") (emphasis added). In contrast, the Commission here is trying to correct false superior efficacy beliefs among *Doan's users and aware non-users*. Mazis Tr. at 1385, 1805 (back pain sufferers who are neither Doan's users nor aware non-users have no need to receive the corrective statement). Therefore, the media chosen for the dissemination of the corrective message here must be targeted to Doan's users and aware non-users if the Commission's remedy is to achieve the reasonable fit that is constitutionally required. *See 44 Liquormart, Inc.*, 517 U.S. 484, 529 (1996) (O'Connor, J., concurring in judgment) ("The scope of the restriction on speech must be *reasonably*, though it need not be perfectly, *targeted* to address the harm intended to be regulated.") (emphasis added). Significantly, the difference between the general public as a target audience and Doan's users and aware non-users as a target audience is quite substantial, given that 31% of back pain sufferers (itself a subset of the general public) are neither Doan's users nor aware non-users. Mazis Tr. at 1793.

The corrective advertising requirement here is in no way limited to media that are likely to target Doan's users and aware non-users. One narrower alternative that would more accurately target Doan's users and aware non-users is to require the corrective statement only on product labeling and in packaging. Product labeling and packaging are sources of critical safety and efficacy information for users and

potential users of Doan's, such as indications for use, directions, warnings, drug interactions, active ingredients, and inactive ingredients. *See* Mazis Tr. at 1607-08 (product package can affect beliefs; consumers look at the product package immediately at the point of purchase). Another narrower alternative is brochures with corrective information that would be made available to Doan's users and aware non-users through prominent displays on the drug store shelves and other locations at which Doan's and other OTC analgesics are sold. Indeed, the Commission has used similar media to target a particular group of consumers who have false beliefs to be corrected.[27] Although dissemination of a corrective statement through product packaging and point-of-sale displays, either separately or combined, is a less restrictive alternative that may well be adequate to correct the false belief among Doan's users and aware non-users, the majority does not consider the imposition of such alternatives -- much less conduct a careful calculation of their costs and benefits. Therefore, the corrective advertising requirement imposed here has not been demonstrated to be no more extensive than necessary, as *Central Hudson* requires.

IV. CONCLUSION

Because the evidence in the record does not prove that the false superior efficacy belief will linger for the requisite period of time for imposing corrective advertising under the standard set forth in *Warner-Lambert*, and also because the corrective advertising provision is an unconstitutional infringement on Novartis's right to engage in commercial speech under the First Amendment, I dissent from Part IV of the Order.

[27] *See, e.g., Eggland's Best*, 118 FTC at 366 (Statement of Commissioner Roscoe B. Starek, III, concurring) (corrective statement on egg cartons was "careful[ly] craft[ed]" to "reach consumers likely to have been misled by Eggland's ads (those who are preparing to purchase the product), rather than the population at large"); *Unocal Corp.*, 117 FTC 500, 511 (1994) (corrective brochure required to be mailed to customers who had company credit cards and who lived in one of five specified states in which deceptive claims were disseminated).

APPENDIX A

IN THE MATTER OF

MONIER LIFETILE LLC, 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 9290. Complaint, Sept. 22, 1998--Decision, May 19, 1999

This consent order, among other things, requires the respondents, producers of concrete roofing tile, who have established a joint venture, to divest certain tile manufacturing assets and to provide written notification to the Commission prior to acquiring any stock, share capital or equity in any concern engaged in the manufacturing of concrete roofing tile in Southern California, Arizona, Nevada or Florida.

Participants

For the Commission: *Nicholas Koberstein, Alissa Hecht, Ann Malester, Eric Rohlck, Daniel Ducore, William Baer, Charissa Wellford, William Layher, Charles Pidano,* and *Randi Boorstein.*

For the respondents: *Tom Smith, Jones, Day, Reavis & Pogue,* Washington, D.C. and *Randall Allen, Alston & Bird,* Atlanta, GA.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Boral Ltd., a corporation subject to the jurisdiction of the Commission, and Redland PLC, a wholly-owned subsidiary of Lafarge S.A., a corporation subject to the jurisdiction of the Commission, acquired shares in and contributed assets to a joint venture limited liability corporation, Monier Lifetile LLC, a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Monier Lifetile LLC is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its principal place of business located at One

Park Place, Suite 900, Irvine, California. Monier Lifetile LLC is owned by Lafarge S.A. and Boral Ltd.

2. Respondent Boral Ltd. is a corporation organized, existing, and doing business under and by virtue of the laws of the Country of Australia, with its principal place of business located at 50 Bridge Street, Sydney, NSW, Australia 2000. Boral Ltd., which had total sales of approximately $3.6 billion in 1996, manufactures a diversified group of construction products. Prior to the formation of Monier Lifetile LLC, Boral Ltd. manufactured and sold concrete roofing tile in the United States through its wholly-owned subsidiary, Boral Lifetile, Inc. Prior to the formation of Monier Lifetile LLC, Boral Lifetile was the second largest producer of concrete roofing tile in the United States.

3. Respondent Lafarge S.A. is a corporation organized, existing, and doing business under and by virtue of the laws of the Country of France, with its office and principal place of business located at 61 Rue des Belles Feuilles, Paris, France. Lafarge S.A., which had total sales of approximately $7 billion in 1997, produces cement and construction materials. Following the formation of Monier Lifetile LLC, Lafarge S.A. acquired Redland PLC. Prior to the formation of Monier Lifetile LLC, Redland PLC manufactured and sold concrete roofing tile in the United States through its wholly-owned subsidiary, Monier, Inc. Prior to the formation of Monier Lifetile LLC, Monier, Inc. was the largest producer of concrete roofing tile in the United States.

II. THE JOINT VENTURE

4. On or about August 15, 1997, Boral Ltd. and Redland PLC acquired stock in and contributed the assets of their respective United States concrete roofing tile operations to a joint venture limited liability corporation, named Monier Lifetile LLC. Monier Lifetile LLC was formed as a limited liability company under Delaware state law.

III. JURISDICTION

5. Monier Lifetile LLC, Boral Ltd. and Lafarge S.A. are, 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 are corporations whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. THE RELEVANT MARKETS

6. The relevant line of commerce in which to analyze the effects of the formation of Monier Lifetile LLC is the market for standard-weight concrete roofing tile. Standard-weight concrete roofing tile is used predominately in new home construction.

7. The relevant geographic markets in which to analyze the effects of the formation of Monier Lifetile LLC are the Southwestern United States (consisting of California, Arizona and Nevada) and Florida and/or narrower areas within the Southwestern United States and Florida including, but not limited to: Southern California (all of the state of California south of, and including, Bakersfield); Nevada; Arizona; and Southern Florida (all of the state of Florida south of Lake Okeechobee).

V. STRUCTURE OF THE MARKETS

8. Prior to the formation of Monier Lifetile LLC, Boral Lifetile, Inc. and Monier, Inc. were the two largest producers of concrete roofing tile in the United States. Only one other manufacturer, Pioneer Roofing Tile, Inc., operates in both the Southwestern United States and Florida. In California and Nevada, the only other significant competitor in concrete roofing tile is Burlingame Industries. In Arizona, Monier Lifetile LLC and Pioneer Roofing Tile, Inc. are the only significant competitors in concrete roofing tile. In Florida, the only other significant producer of concrete roofing tile is Entegra Roof Tile Corp.

9. Each of the relevant markets is highly concentrated whether measured by the Herfindahl-Hirschman Index or the two-firm and four-firm concentration ratios. The formation of Monier Lifetile LLC has greatly increased concentration in each of the already concentrated markets.

VI. ENTRY CONDITIONS

10. The threat of entry has not deterred Boral Lifetile, Inc.'s and Monier, Inc.'s attempts to raise prices for concrete roofing tile in the past. The threat of entry has not deterred anticompetitive effects resulting from the formation of Monier Lifetile LLC. It is unlikely the threat of entry will deter additional anticompetitive effects likely to result from the formation of Monier Lifetile LLC.

11. It is unlikely that an entrant would achieve a significant market impact within two years and deter or counteract the anticompetitive effects likely to result from the formation of Monier Lifetile LLC.

12. Because the cost of entering and producing concrete roofing tile is relatively high compared to the potential sales revenues available to an entrant, new entry into the relevant markets is not likely to be profitable. Consequently, entry into the production of concrete roofing tile is not likely to occur in a timely manner to deter or counteract the anticompetitive effects likely to result from the formation of Monier Lifetile LLC.

VII. EFFECTS OF THE ACQUISITION

13. The formation of Monier Lifetile LLC has substantially lessened, or may substantially lessen, competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others, by:

a. Eliminating Boral Ltd. and Redland PLC as independent competitors with significant capacity in the relevant markets;

b. Eliminating actual, direct, and substantial competition between Boral Ltd. and Redland PLC, both of which had the ability and incentive to compete on price, in the relevant markets;

c. Increasing the likelihood of coordinated interaction in the relevant markets;

d. Increasing the likelihood of unilateral anticompetitive effects in the relevant markets;

e. Having led, or leading, to a reduction in likely price decreases or an increase in prices in the relevant markets;

f. Having led, or leading, to a reduction in service in the relevant markets; and/or

g. Having led, or leading, to a reduction in quality in the relevant markets.

VIII. VIOLATIONS CHARGED

14. The formation of Monier Lifetile LLC described in paragraph four constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

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

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

1. Respondent Monier Lifetile LLC is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Park Plaza, Suite 900, Irvine, California.

2. Respondent Boral Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of Australia, with its office and principal place of business located at 50 Bridge Street, Sydney, NSW 2000, Australia.

3. Respondent Lafarge S.A. is a corporation organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 61 rue des Belles Feuilles, Paris, France.

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

ORDER

I.

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

A. "*Monier Lifetile*" means Monier Lifetile LLC, its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Monier Lifetile, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*Boral*" means Boral Ltd., its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Boral, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "*Lafarge*" means Lafarge S.A., its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Lafarge, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "*Respondents*" means Monier Lifetile, Boral and Lafarge, individually and collectively.

E. "*CRH*" means CRH PLC, a corporation organized, existing and doing business under and by virtue of the laws of Ireland, with its office and principal place of business located at Belgard Castle, Clondalkin, Dublin 22, Ireland; and its subsidiaries, divisions, groups and affiliates controlled by CRH, including Oldcastle, Inc.

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

G. "*Joint Venture*" means the formation of the limited liability company, Monier Lifetile, on or about August 15, 1997, through the issuance of membership interest and contribution of assets of the respective United States concrete roofing tile operations of Boral and Redland PLC, now a wholly-owned subsidiary of Lafarge.

H. "*Acquirer*" means CRH or the entity/entities to whom respondents divest the Tile Manufacturing Assets To Be Divested.

I. "*Concrete Roofing Tile*" means concrete tile designed primarily to cover the roofs of residential and commercial structures.

J. "*Field Tile*" means Concrete Roofing Tile that is used to cover the face of a roof.

K. "*Field Tile Line*" means a delivered, assembled, installed, and functioning production line that produces Field Tile.

L. "*Trim Tile*" means Concrete Roofing Tile that is used to cover the crest and soffit of a roof.

M. "*Trim Line*" means a delivered, assembled, installed, and functioning production line that has the capacity to produce Trim Tile at a level of at least ten (10) per cent of the overall Field Tile production capacity of the tile manufacturing facility in which the Trim Line is located.

N. "*Divestiture Agreement*" means the Acquisition Agreement between Monier Lifetile and Oldcastle, Inc., dated January 21, 1999, and all exhibits thereof, incorporated by reference into this order and made a part hereof as a Confidential Appendix, regardless of whether the purchase and sale of assets contemplated by such agreement is consummated.

O. "*Tile Manufacturing Assets To Be Divested*" means the following:

1. The Corona tile manufacturing facility, located at 1745 Sampson Avenue, Corona, California, including: two (2) Field Tile Lines and one (1) Trim Line, with a minimum annual production capacity of 600,000 squares of Concrete Roofing Tile; and all assets related to the production of Concrete Roofing Tile at the Corona tile manufacturing facility included in the Divestiture Agreement.

2. The Casa Grande tile manufacturing facility, located at 1742 South Rooftile Road, Casa Grande, Arizona, including: two (2) Field Tile Lines and one (1) Trim Line, with a minimum annual production capacity of 700,000 squares of Concrete Roofing Tile; and all assets related to the production of Concrete Roofing Tile at the Casa Grande tile manufacturing facility included in the Divestiture Agreement.

3. The Ft. Lauderdale tile manufacturing facility, located at 1900 N.W. 21st Avenue, Ft. Lauderdale, Florida, as a functioning facility producing Concrete Roofing Tile, including: one (1) Field Tile Line and one Trim Line, with a minimum annual production capacity of 300,000 squares of Concrete Roofing Tile; and all assets related to the production of Concrete Roofing Tile at the

Ft. Lauderdale tile manufacturing facility included in the Divestiture Agreement.

4. All covenants; undertakings; representations; warranties; guarantees; indemnifications; marketing information; product development information; research materials; technical information; inventions; trade secrets; technology; know-how; intellectual property rights; patents; patent applications; formulas; copyrights; licenses; trademarks; trade names; and rights, expressed or implied, included in the Divestiture Agreement.

P. "*Cost*" means direct cash cost of labor.

Q. "*Non-Public Acquirer Information*" means any information not in the public domain obtained by respondents directly or indirectly from the Acquirer prior to the effective date, or during the term, of the provision of assistance to the Acquirer as required by paragraph II.C. of this order. Non-Public Acquirer Information shall not include information that subsequently falls within the public domain through no violation of this order by respondents.

R. "*Southern California*" means all of the state of California south of, and including, Bakersfield.

II.

It is further ordered, That:

A. Respondents shall divest absolutely and in good faith the Tile Manufacturing Assets To Be Divested to CRH in accordance with the Divestiture Agreement within five (5) days of the date the Commission serves its final decision containing the order herein on respondents' counsel, in disposition of this matter.

B. The purpose of the divestiture of the Tile Manufacturing Assets To Be Divested is to ensure that the Tile Manufacturing Assets To Be Divested are used to produce and sell Concrete Roofing Tile of commercial quality similar to that currently produced by Monier Lifetile and to remedy the lessening of competition resulting from the Joint Venture as alleged in the Commission's complaint.

C. Respondents shall commit to provide at Cost upon reasonable notice and request by the Acquirer, for a period not to exceed six (6) months from the date each divestiture is completed: (a) such assistance, personnel and training as are reasonably necessary to enable the Acquirer to manufacture Concrete Roofing Tile in

substantially the same manner and quality employed or achieved by Monier Lifetile; and (b) such assistance, personnel and training as are reasonably necessary to enable the Acquirer to obtain any necessary governmental approvals to manufacture Concrete Roofing Tile at the current location of the tile manufacturing facility acquired by the Acquirer and to sell Concrete Roofing Tile in each of the counties in which Monier Lifetile currently sells Concrete Roofing Tile in the state where the tile manufacturing facility acquired by the Acquirer is located.

D. Respondents shall not provide, disclose or otherwise make available to any of their employees not involved in providing assistance any Non-Public Acquirer Information, nor shall respondents use any Non-Public Acquirer Information obtained or derived by respondents in their capacity as providers of assistance pursuant to paragraph II.C., except for the sole purpose of providing assistance pursuant to paragraph II.C.

E. Pending divestiture of the Tile Manufacturing Assets To Be Divested, respondents shall take such actions as are necessary to maintain the viability, marketability and competitiveness of the Tile Manufacturing Assets To Be Divested, and to prevent the destruction, removal, wasting, deterioration or impairment of any of the Tile Manufacturing Assets To Be Divested except for ordinary wear and tear.

F. Respondents shall comply with the terms of the Divestiture Agreement and such agreement is incorporated by reference into this order and made a part hereof as a Confidential Appendix. Any failure by respondents to comply with the terms of the Divestiture Agreement shall constitute a failure to comply with this order.

G. Respondents shall take all steps necessary to restore the Ft. Lauderdale tile manufacturing facility, located at 1900 N.W. 21st Avenue, Ft. Lauderdale, Florida, as a functioning facility, capable of producing at least 300,000 squares annually of Concrete Roofing Tile of commercial quality similar to that currently produced by Monier Lifetile, and respondents shall complete all restoration work, including addition of the Trim Line, by April 30, 1999, or within two (2) months of the date respondents signed the agreement containing consent order in this matter, whichever is later.

III.

It is further ordered, That:

A. If respondents fail to divest absolutely and in good faith all of the Tile Manufacturing Assets To Be Divested pursuant to paragraph II.A. of this order, the Commission may appoint a trustee to divest the Tile Manufacturing Assets To Be Divested. In the event that 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, respondents 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 respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority and responsibilities:

1. The Commission 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. If Monier Lifetile has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Monier Lifetile of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to accomplish the divestitures described in paragraph III.A. of the order.

3. Within ten (10) days after appointment of the trustee, respondents shall execute a trust agreement that, subject to the prior approval of the Commission, and in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3. to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan for the divestitures required by this order or believes that the divestitures required by this order can be achieved within a reasonable time, then the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend the period for the divestitures only two (2) times.

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

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestitures shall be made in a manner consistent with the terms of this order; provided, however, if the trustee receives bona fide offers for a Tile Manufacturing Facility from more than one acquiring entity, 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 respondents from among those approved by the Commission; provided further, however, that respondents shall select such entity within five (5) days of receiving notification of the Commission's approval.

7. 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 the authority to employ, at the cost and expense of

respondents, and at reasonable fees, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers and other representatives and assistants as are 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 the 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's accomplishing the divestitures required by paragraph III.A. of this order.

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims or expenses result from misfeasance, gross negligence, willful or wanton acts or bad faith by the trustee.

9. 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 paragraph.

10. 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 reasonably necessary or appropriate to accomplish the divestitures required by this order.

11. The trustee may divest such additional ancillary assets related to the Tile Manufacturing Assets To Be Divested and effect such ancillary arrangements as are necessary to satisfy the requirements or purposes of this order.

12. The trustee shall have no obligation or authority to operate or maintain the Tile Manufacturing Assets To Be Divested.

13. The trustee shall report in writing to respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestitures required by this order.

IV.

It is further ordered, That within thirty (30) days after the date this order becomes final, and every sixty (60) days thereafter until respondents have fully complied with the provisions of paragraphs II. and III. of this order, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the requirements of this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II. and III. of the order. Respondents shall include in their compliance reports copies of all written communications to and from any Acquirer, all internal documents (except privileged documents), and all reports and recommendations, concerning the divestitures.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, joint ventures, or otherwise:

A. Acquire any stock, share capital, equity, partnership, membership or other interest in, any concern, corporate or non-corporate, engaged in, at the time of such acquisition or within the year preceding such acquisition, the manufacture of Concrete Roofing Tile in Southern California, Arizona, Nevada or Florida; or

B. Acquire any assets used at the time of such acquisition or within the year preceding such acquisition in the manufacture of Concrete Roofing Tile in Southern California, Arizona, Nevada or Florida.

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"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification. The Notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondents and not of any other party to the transaction.

Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 CFR 803.20), respondents shall not consummate the transaction until twenty (20) days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

VI.

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

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondents shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access 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 any matters contained in this order; and

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

[CONFIDENTIAL APPENDIX REDACTED]

IN THE MATTER OF

R.J. REYNOLDS TOBACCO COMPANY

Docket 9285. Interlocutory Order, May 26, 1999

ORDER WITH RESPECT TO PROTECTIVE ORDER

On March 29, 1999, the R.J. Reynolds Tobacco Company ("Reynolds") filed a motion requesting that the Commission either clarify or modify the Protective Order Governing Confidential Material (dated July 18, 1997), which was entered in Docket No. 9285. Reynolds filed the motion in an effort to establish a right to retain confidential materials it obtained in discovery from Dr. John Pierce ("Pierce") and from the Robert Wood Johnson Foundation ("Foundation"), and to retain work product created by Reynolds' experts incorporating information contained in those materials. Pierce and the Foundation opposed the motion and asked that the Commission impose sanctions against Reynolds.

For the reasons set forth below, we deny Reynolds' request and order that it comply in full with Paragraph 14 of the Protective Order within 15 days of the issuance of this Order.[1] We also deny the Pierce and Foundation requests for sanctions.

I. BACKGROUND

On May 28, 1997, the Commission voted to issue an administrative complaint alleging that Reynolds' Joe Camel advertising campaign violated Section 5 of the FTC Act, 15 U.S.C. 45. During the discovery phase of the administrative proceeding, complaint counsel and counsel for Reynolds jointly moved that the administrative law judge enter a Protective Order Governing Confidential Material ("Protective Order"). The purpose of this order was to control the use and disposition of confidential materials submitted during the course of the proceeding. The Protective Order defined "confidential material" to include, *inter alia*, "documents

[1] Reynolds directed its motion to Administrative Law Judge ("ALJ") James P. Timony, who presided over the adjudicative proceeding in Docket No. 9285. However, because that proceeding has been concluded, *see infra*, the Commission resolves this motion. *See, e.g., General Motors Corp.*, 103 FTC 105 (1984).

provided in compliance with informal discovery or discovery requests pursuant to the Commission's Rules of Practice that are designated [by either party or the submitter] 'confidential material' * * *." Protective Order at ¶ 1.

The Protective Order restricted the disclosure of confidential material to eight categories of individuals, including complaint counsel, Reynolds' counsel, and experts retained by either party to assist at, or in preparing for, trial. Protective Order at ¶ 10. Paragraph 11 further restricted disclosure by stating that confidential material could be disclosed to individuals listed in Paragraph 10 "only for the purposes of the preparation, hearing, and any appeal of this proceeding and any subsequent administrative proceeding and for no other purpose whatsoever." Paragraph 11 also provided that before any expert could receive confidential material, the expert would have to sign the Agreement to Maintain Confidentiality ("Paragraph 11 Agreement") that was attached to the Protective Order. Signers of the Paragraph 11 Agreement pledged not to disclose confidential material to anyone not entitled to receive it, and "that upon the termination of my participation in this proceeding I will promptly return all copies of documents, or portions thereof, containing confidential material, and all notes, memoranda, or other papers containing confidential material, to complaint counsel or respondent's counsel."

Paragraph 14 of the Protective Order specifically governs the ultimate disposition of confidential materials received by any counsel, or expert, for Reynolds. It states that:

> [When any such person] ceases to participate in this proceeding, all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information, *shall be returned by such person to counsel for respondent, who in turn shall, at the conclusion of this proceeding, (a) return all original confidential material in his or her possession, custody, or control, to the submitter; and (b) destroy all remaining non-original confidential material.* (emphasis added)

On May 5, 1998, during the course of administrative discovery, Reynolds served Pierce with a subpoena seeking materials related to his article entitled "Tobacco Industry Promotion of Cigarettes and Adolescent Smoking." The article appeared in the February 1998 issue of the Journal of the American Medical Association and reported the results of a study conducted by *Pierce et al.* On July 1, 1998, Pierce complied with the subpoena. Included among the

responsive material were unpublished background data from Pierce's study, which Pierce designated as confidential.

Pierce's study was funded by the Robert Wood Johnson Foundation, and on May 8, 1998, Reynolds served the Foundation with a subpoena seeking all documents in its possession regarding the study. On May 21, 1998, the Foundation complied with the subpoena. Among the documents submitted by the Foundation were 20 pages of peer review materials. Although Reynolds was obligated under Paragraph 5 of the Protective Order to provide the Foundation a copy of the Protective Order, it failed to do so. As a result, counsel for the Foundation did not learn of the Protective Order until November 1998, and at that time, it designated the peer review materials as confidential.

Trial against Reynolds began on November 9, 1998. However, on November 23, 1998, before the trial concluded, Reynolds (and other cigarette manufacturers) entered into an agreement with the attorneys general of 46 states and five other jurisdictions. Pursuant to this settlement, Reynolds agreed, *inter alia*, to cease using all cartoon characters (including Joe Camel) in advertising, and to help fund a public education campaign designed to discourage underage usage of tobacco. The following day, complaint counsel filed a motion to dismiss the Commission's administrative litigation on the grounds that the relief it was seeking had been achieved as a result of the multi-state settlement. Reynolds agreed that the case should be dismissed but urged that it be dismissed with prejudice.

The ALJ thereafter certified complaint counsel's motion to dismiss to the Commission, and on January 26, 1999, the Commission granted the motion ("Dismissal Order"). In the Dismissal Order, we concluded that the public interest warranted dismissal of the complaint because the multi-state settlement achieved the most important elements of the relief that the Commission sought. However, we denied Reynolds' request that the dismissal be with prejudice, noting that we have "consistently refrained from dismissing a complaint with prejudice absent a substantive ruling. Without such a ruling by the ALJ or the Commission, it is not appropriate to foreclose the possibility of further litigation where unanticipated problems might develop with one or more of the relevant remedies." Dismissal Order at 4.

In addition to complaint counsel's motion to dismiss, the Commission had before it Reynolds' request that certain materials

received from Pierce and the Foundation be placed on the public record, and the Foundation's request that the materials it had submitted be accorded in camera treatment. We denied both motions and noted that Paragraph 11 of the Protective Order "prohibits respondent from disclosing the documents outside of this litigation and Paragraph 14 requires respondent to return the documents upon dismissal of the proceeding." Dismissal Order at 6.

On January 27, 1999, counsel for both Pierce and the Foundation sent letters to Reynolds' counsel requesting that, pursuant to the terms of the Protective Order and the Dismissal Order, Reynolds return all original confidential materials to the submitters and retrieve and destroy all copies, notes, memoranda or other papers containing confidential material. On March 5, 1999, Reynolds separately responded to Pierce and the Foundation with identically worded letters. Reynolds stated that it did not believe it was yet required by the Protective Order to retrieve, destroy and return confidential materials. Reynolds further stated that it:

> may seek review of the Commission's action in this litigation and may retain the materials pending the review period. Additionally, the Commission's order leaves open the possibility of a subsequent administrative proceeding.

On March 29, 1999, Reynolds filed a Motion for Clarification or Modification of the Protective Order ("Reynolds' Motion"), seeking a right under the Protective Order to retain confidential material subpoenaed from Pierce and the Foundation. This motion is before the Commission now. The motion argues that Reynolds is entitled to retain the material for two reasons. First, Reynolds contends that the Protective Order permits it to retain materials until the expiration of the review period for the proceeding, Reynolds' Motion at 17-20, and argues that this period is six years – the time within which it could challenge the dismissal pursuant to Section 2401 of the Administrative Procedure Act, 28 U.S.C. 2401. Accordingly, Reynolds argues that it should not be required to return any materials at least until January 2005.

Reynolds' second argument is based on Paragraph 11 of the Protective Order. Reynolds' Motion at 20-21, which states that confidential materials may be disclosed to the eight categories of individuals listed in Paragraph 10 "*for the purposes of the preparation, hearing, and any appeal of this proceeding and <u>any subsequent administrative proceeding</u>* * * *." Reynolds claims that,

because it is entitled to disclose the materials to counsel and experts for the purpose of defending itself in "any subsequent administrative proceeding," and because the Commission dismissed the complaint without prejudice, it should not be required to return documents "until there no longer exists the threat of a 'subsequent administrative proceeding' concerning the issues litigated this past November." Reynolds does not indicate when it believes such a threat would no longer exist. These arguments, according to Reynolds, are also supported by notions of equity, fairness, and due process. Finally, Reynolds requests that "[i]f it is deemed necessary," the Protective Order be modified consistent with its arguments. Reynolds' Motion at 21-24.

Both Pierce and the Foundation filed oppositions to Reynolds' motion. Pierce claims that he disclosed confidential material relying on the Protective Order, that the Protective Order clearly requires Reynolds to return confidential materials immediately, and that no modification of its provisions is appropriate. He also asks that the Commission sanction Reynolds and its counsel for their failure to comply with the Protective Order. The Foundation argues that the Protective Order requires the immediate return of the confidential material, that no order modification is appropriate, and that Reynolds and its counsel should be sanctioned.

II. DISCUSSION

After reviewing the submissions of Reynolds, Pierce, and the Foundation, we find that the Protective Order needs no clarification, nor should it be modified. Accordingly, we order that Reynolds and its counsel comply in full with Paragraph 14 of the Protective Order within 15 days of the issuance of this Order. We also reject the requests made by both Pierce and the Foundation that Reynolds and its counsel be sanctioned.

A. Reynolds' Motion for Clarification of Protective Order

The confidentiality obligations of the parties are clearly set forth in Paragraph 14 of the Protective Order which not only governs confidential information from the parties, but also their counsel,

experts, and others retained to assist in the litigation.[2] As previously noted, Paragraph 14 requires that when any such person "ceases to participate in this proceeding," that person shall return all confidential documents (or portions thereof) and "all notes, memoranda or other papers containing confidential information" to Reynolds' counsel. The paragraph further requires that "at the conclusion of this proceeding," Reynolds' counsel shall return all original confidential materials to the submitter, and shall destroy all other documents containing confidential material. The relevant issue here is whether "this proceeding" has been "concluded."

This proceeding commenced on May 28, 1997, when the Commission issued its complaint challenging Reynolds' Joe Camel advertising campaign,[3] and continued until January 26, 1999, when the Commission dismissed its complaint against Reynolds. Just as issuance of the complaint marked the commencement of the "proceeding," dismissal of that complaint marked its conclusion. After dismissal, Reynolds had only one avenue for extending the proceeding -- a petition for reconsideration filed within 14 days pursuant to Commission Rule 3.55, 16 CFR 3.55. Reynolds filed no such petition. Therefore, "this proceeding" concluded on January 26, 1999 and Reynolds is required to return original confidential material to submitters and to destroy all copies.

Reynolds claims that the Protective Order entitles it to retain confidential material at least until the expiration of its right to seek judicial review of the Dismissal Order. It further contends that it has six years within which to seek review -- the time within which it claims it could challenge the Dismissal Order under the Administrative Procedure Act ("APA"). Reynolds' Motion at 19-20. But, the Protective Order creates no such entitlement. The relevant obligations of Paragraph 14 are triggered when the "proceeding" concludes, and, as explained, this proceeding concluded when the complaint was dismissed. While it is possible to argue that *if* the complaint had not been dismissed *and if* the Commission had issued

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[2] Reynolds does not dispute that the documents requested by Pierce and the Foundation are "confidential material," as defined in Paragraph 1 of the Protective Order. Nor does Reynolds dispute that its obligations regarding those documents are governed by the Protective Order.

[3] *See* Commission Rule 3.11(a), 16 CFR 3.11(a) ("an adjudicative proceeding is commenced when an affirmative vote is taken by the Commission to issue a complaint.").

a final cease and desist order,[4] *and then* the "proceeding" would have continued until the expiration of Reynolds' right to petition for review of such an by a court of appeals, as set forth in Section 5(c) of the FTC Act, 15 U.S.C. 45(c), these hypothetical conditions do not exist here. In this case, the possibility of further proceedings pursuant to the May 28, 1997 complaint was extinguished once the complaint was dismissed and Reynolds failed to petition for reconsideration under Rule 3.55.[5]

Moreover, even if, as Reynolds contends, it could still challenge the Commission's decision to dismiss the complaint under the APA, the challenge would become a new action, not a continuation, appeal, or recommencement, of this proceeding, since Reynolds would have to argue that the Commission's order of dismissal constituted final action, not otherwise directly reviewable. *See* 5 U.S.C. 704. In doing so, Reynolds would be conceding that the action before the Commission had concluded, thereby compelling it to comply with Paragraph 14 of the Protective Order.[6]

The second argument advanced by Reynolds in support of its "right" to retain confidential material is that Reynolds could be subject to some future hypothetical legal action because the complaint was dismissed without prejudice.[7] Reynolds' Motion at 21-24. Although the Commission could, at least theoretically, bring such an

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[4] In that situation, the complaint would retain its vitality throughout the review period, and the matter could be remanded to the Commission for further administrative litigation pursuant to the complaint.

[5] Although Reynolds contends that Pierce and the Foundation have conceded that it could have extended the proceeding by filing a petition for review within 60 days pursuant to Section 5(c) of the FTC Act, this is incorrect. Section 5(c) provides for petitions for review only when the Commission issues a cease and desist order. Here, the Commission issued no such order and Section 5(c) does not apply.

[6] Significantly, Reynolds does not argue that it can seek direct review of the Commission's January 26 order, only that APA review is still available to it. Because such review is not direct review but is dependent upon the conclusion of the proceeding before the Commission, Reynolds' right to seek APA review does not affect its obligation under Paragraph 14.

[7] Reynolds claims that *Richards v. Firestone Tire & Rubber Co.*, 928 F.2d 241 (7th Cir. 1991) holds that a case dismissed without prejudice is not concluded on the merits. Reynolds' Opposition to John Pierce's and the Robert Wood Johnson Foundation's Cross-Motions for Enforcement of the Protective Order ("Reynolds' Opposition") at 4. However, the court in *Richards* reached no such sweeping conclusion. The court held instead that Richards' case against Firestone had not concluded because the plaintiff had sought dismissal without prejudice merely as a ruse to avoid an unfavorable discovery order from the trial court. It was clear that the plaintiff intended to refile the case once it was dismissed. By contrast, in this case, complaint counsel sought dismissal because it believed that the relief it was seeking was already achieved in another forum.

action, the Protective Order does not permit Reynolds to retain confidential material pending such a possibility.[8]

Reynolds further claims that it may retain the materials at issue because Paragraph 11 of the Protective Order provides that confidential materials may be given to certain individuals specified in Paragraph 10 "for the purposes of the preparation, hearing, and any appeal of this proceeding and any subsequent administrative proceeding ..." and that the possibility of a "subsequent administrative proceeding" has not dissipated. Reynolds' Motion at 21.

We reject this interpretation of the Protective Order because, in our view, it would make the Order internally inconsistent; more specifically, the plain wording of Paragraph 14 would clash with that of Paragraph 11. It is well established that courts should interpret the provisions of an order consistently, giving full application to each provision as written, *See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 233-241 (1975). We reject an interpretation that creates an inconsistency and interprets one provision at the expense of another.

Instead, we believe that the terms of Paragraph 11 must be read as a logical progression. "Any subsequent administrative proceeding" immediately follows "any appeal of this proceeding." That is, Reynolds may retain and disclose confidential materials not just in preparation for the administrative trial, but also in preparation for a petition for review of the trial *and for any subsequent administrative proceeding that might result from appellate disposition of such a petition*. Thus, the "subsequent administrative proceeding" referred to in Paragraph 11 allows for the possibility of an administrative proceeding that stems from a remand after appeal, a situation that has not occurred here. Paragraph 11 was not intended to provide an open-ended grant of authority for Reynolds to retain confidential material from this proceeding for later use in some entirely separate, subsequent administrative proceeding.

In sum, Paragraph 11 of the Protective Order assures Reynolds that it may retain and disclose confidential material to its experts during all phases of the proceeding, including any possible

[8] Reynolds also claims that if the Commission, in the future, again challenges its Joe Camel campaign, it needs the confidential material not only to defend itself but also to challenge the Commission's issuance of a complaint. Reynolds' Opposition at 5. However, as Reynolds learned in challenging the Commission's 1997 complaint, there is no subject matter jurisdiction for such an action. *R.J Reynolds Tobacco Co. v. FTC*, 14 F. Supp. 2d 757 (M.D.N.C. 1998).

subsequent administrative proceeding that may result from a remand on appeal of a Commission order to cease and desist (if there were such an order). However, nothing in Paragraph 11 describes Reynolds' obligation to return confidential material. That obligation is set forth exclusively in Paragraph 14 of the Protective Order which makes clear that Reynolds' possession of the confidential material must end when the proceeding ends. Based on the plain reading of Paragraph 14, and as described in our Dismissal Order, we reject Reynolds' contention that the Protective Order permits it to retain confidential material.

B. Reynolds' Motion for Modification of Protective Order

As an alternative means of retaining confidential discovery materials, Reynolds seeks modification of the Protective Order. But, like Reynolds' request for clarification, its alternative request is also deficient. Hence, we conclude that there is insufficient basis for modifying the Order.

Reynolds asks the Commission to exercise its discretion to modify the Protective Order to permit it to retain confidential material "in order to defend itself against the plaintiff (the Commission) in a future action, an action clearly contemplated by the Commission when it dismissed the Joe Camel complaint without prejudice." Reynolds' Motion at 23. Reynolds contends that it "should not be required to fight the same costly discovery battles again, and incur the same significant costs in retaining experts to duplicate work that has already been accomplished. Requiring Reynolds to return these materials and destroy the fruits of its experts' labor at this juncture would be highly prejudicial." Reynolds' Motion at 22. Accordingly, Reynolds' request raises the question of whether the circumstances presented here form an appropriate basis for the exercise of Commission discretion.

A protective order may be modified only where the party seeking modification shows good cause for the modification. *See Lee Shuknecht & Sons, Inc. v. P. Vigneri & Sons, Inc.*, 927 F. Supp. 610, 614-16 (W.D.N.Y. 1996). To determine whether good cause has been shown, courts consider such factors as the nature of the protective order and the modification that is sought, the foreseeability at the time the order was entered of the modification that is now requested, and

the extent to which a party or a third party will be prejudiced by the modification or by the retention of the *status quo. Id.*

Here, the Protective Order was not imposed on the parties, it was instead sought jointly by complaint counsel and by counsel for Reynolds.[9] Moreover, the modification sought by Reynolds, the authority to retain confidential material beyond the conclusion of the proceeding, goes to the heart of the scheme contemplated by the Protective Order. Because Reynolds sought issuance of the Protective Order, and because the provision Reynolds seeks to modify is a central one, Reynolds bears a heavy burden in seeking this modification.

First, Reynolds has not made a sufficient showing that its present situation was not foreseeable at the time it agreed to entry of the Protective Order. It was foreseeable that, at the conclusion of the Commission's proceeding, Reynolds would be in possession of confidential material that it might want to retain.

Nor has Reynolds made the sort of showing of prejudice that justifies the modification it seeks. Reynolds claims that if the Commission initiates another case against its Joe Camel advertising campaign, it will be required "to fight the same costly discovery battles again, and incur the same significant costs in retaining experts to duplicate work that has already been accomplished." Motion at 22. Although Reynolds claims that "the Commission contemplates a proceeding covering the same issues litigated this past November," Motion at 20, this is pure speculation on Reynolds' part. When the Commission dismissed the complaint without prejudice, it did so because it did not resolve the merits of the matter, not because it contemplated any further proceeding against Reynolds' Joe Camel campaign. Indeed, the multi-state settlement provides adequate relief regarding the campaign, and the Commission has no reason to believe that Reynolds will fail to comply with that settlement. Since Reynolds' claim of prejudice is based solely upon a hypothetical future Commission action, Reynolds has failed to make a sufficient showing that it will be prejudiced by the absence of the modification it seeks.

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[9] " Where a protective order is agreed to by the parties before its presentation to the court, there is a higher burden on the movant to justify the modification of the order." *AT&T v. Grady*, 594 F.2d 597 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979). *See also Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393 (W.D. Va. 1987).

Moreover, Pierce and the Foundation credibly claim that they will be prejudiced if the Protective Order is modified. They assert that if Reynolds retains the confidential material, the material may be improperly disclosed to unauthorized persons and that Reynolds may seek to use the material to discredit Pierce's study. They further argue that, given the length of time Reynolds seeks to retain the material, they will be unable to monitor or restrict further dissemination of the material. The Foundation argues that additional disclosure of the peer review material it has provided may damage the Foundation's peer review process. As explained in the Agreement to Maintain Confidentiality (which is attached to the Protective Order), Pierce and the Foundation are intended beneficiaries of the Protective Order. We agree that if Reynolds is permitted to retain the confidential material for at least six years beyond the conclusion of the Commission's proceeding, there is an increased risk that the material will be disclosed to others not originally contemplated by the Protective Order. This may result from inadvertent disclosure, or as the result of compulsory process issued to Reynolds. Given the nature of the material, we believe that both Pierce and the Foundation are more likely to be prejudiced by the modification than Reynolds is prejudiced by the *status quo*.

For these reasons, we do not find good cause for the modification Reynolds seeks and we decline to exercise our discretion to grant its motion.[10]

C. Pierce and Foundation Requests for Sanctions Against Reynolds

As previously discussed, both Pierce and the Foundation opposed Reynolds' motion and requested sanctions against Reynolds and its

[10] Reynolds' position is not similar to that of the third party seeking modification of the protective order in *Wilk v. American Medical Ass'n*, 635 F.2d 1295 (7th Cir. 1980); *see* Reynolds' Motion at 23. In that case, a third party (the State of New York) sought modification of a protective order so that it could discover AMA documents that were in Wilk's possession. New York was already engaged in litigation with the AMA and the court concluded that it would be wasteful to force New York to duplicate discovery already made during the AMA's litigation with Wilk. 635 F.2d at 1299. Although Reynolds believes that the Commission "clearly contemplate[s]" another challenge to the Joe Camel campaign, *see* Reynolds' Motion at 23, there is no basis for this belief and no reasonable likelihood that Reynolds will have to engage in any duplication of discovery.

Nor does Reynolds have any right to retain confidential material. *Kern v. TXO Production Corp.*, 738 F.2d 968 (8th Cir. 1984), and the other cases cited by Reynolds in its Opposition at 8, merely state that a defendant may use material discovered from the plaintiff in subsequent litigation brought by the same plaintiff. Those cases are all irrelevant to Reynolds' motion because in none of those cases was there either a protective order or any agreement by the parties to return or destroy confidential material at the conclusion of litigation.

counsel for failing to comply with Paragraph 14 of the Protective Order. Although we are sympathetic to the arguments advanced by Pierce and the Foundation, we decline at this time to impose any sanctions. However, we note with serious concern that Reynolds and its counsel have thus far failed to comply with their obligations regarding confidential materials -- obligations that were clearly set forth in the Protective Order and repeated in our Dismissal Order ("Paragraph 14 requires Respondent to return the documents upon dismissal of the proceeding.").

We do not support Reynolds' resort to self-help in order to implement a two month delay in complying with the Protective Order. Any objection that Reynolds had to the terms of the Protective Order or the Dismissal Order could and should have been raised during the period for reconsideration of the Dismissal Order. *See* Commission Rule 3.55, 16 CFR 3.55. Instead, Reynolds failed to raise any issue until March 29, 1999, more than two months following the issuance of the Dismissal Order. Furthermore, for the reasons discussed above, we find no merit whatsoever to the arguments Reynolds has advanced to excuse or delay its counsel's compliance.[11]

Notwithstanding these concerns, we seek to give Reynolds one final opportunity to comply with its Order obligations,[12] and fully expect Reynolds' counsel to meet their present obligation under this and prior orders regarding the confidential materials at issue.

Accordingly, *It is ordered*, That Reynolds' Motion for Clarification or Modification of the Protective Order is denied. *It is further ordered*, That within 15 days of the date this Order is issued, Reynolds' counsel of record in Docket No. 9285 shall comply in full with the Provisions of Paragraph 14 of the July 18, 1997, Protective Order entered in Docket No. 9285. Upon completion of that compliance, Reynolds' counsel of record shall file with the Secretary of the Commission a Certification detailing that compliance.

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[11] We believe it is also appropriate to note that Reynolds' failure to return or destroy confidential discovery material may not be the only case where it violated the Protective Order.

[12] We also note that counsel appearing before the Commission have a solemn duty to comport themselves in accordance with professional standards, and to comply with orders of the Commission. *See generally* 16 CFR 4.1(e).

IN THE MATTER OF

WAL-MART STORES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF TEXTILE FIBER PRODUCTS IDENTIFICATION ACT, WOOL PRODUCTS LABELING ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3870. Complaint, June 2, 1999--Decision, June 2, 1999

This consent order, among other things, prohibits Wal-Mart Stores, Inc., an Arkansas-based retailer, from advertising any textile fiber product or any wool product in any mail order catalog or mail order promotional material without disclosing clearly and conspicuously that the product was either made in the U.S.A., imported, or both.

Participants

For the Commission: *Carol Jennings* and *Elaine Kolish.*

For the respondent: *Irving Scher, Weil, Gotschal & Manges,* New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Wal-Mart Stores, Inc. ("respondent") has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.* (FTC Act), the Textile Fiber Products Identification Act, 15 U.S.C. 70 (Textile Act), and the Wool Products Labeling Act, 15 U.S.C. 68 (Wool Act), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Delaware corporation with its principal office or place of business at 702 S.W. 8th Street, Bentonville, Arkansas.

2. Respondent is a retail seller that has advertised, offered for sale, sold, and distributed to the public various products, including textile products subject to the requirements of the Textile Act and wool products subject to the requirements of the Wool Act.

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

4. Respondent has offered for sale and sold, by means of an online shopping service or catalog on the Internet, various products, including products subject to the requirements of the Textile Act and the Wool Act.

5. Since March 16, 1998, respondent has offered for sale and sold, by means of an online shopping service or catalog on the Internet, textile products subject to the requirements of the Textile Act and wool products subject to the requirements of the Wool Act, without disclosing in its product descriptions whether such products were made in the U.S.A., imported, or both, thus violating 15 U.S.C. 70b(i), and implementing regulations in 16 CFR 303.34 (as amended 63 Fed. Reg. 7508, 7518 (Feb. 13, 1998)), and 15 U.S.C. 68b(e), and implementing regulations in 16 CFR 300.25a (as amended 63 Fed. Reg. 7508, 7516, 7517 (Feb. 13, 1998)).

6. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

Commissioner Anthony recused.

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 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 violations of the Federal Trade Commission Act, the Textile Fiber Products Identification Act, and the Wool Products Labeling Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondent of all the jurisdictional facts set forth in the draft 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 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, 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 Wal-Mart Stores, Inc. is a Delaware corporation with its principal office or place of business at 702 S.W. 8th Street, Bentonville, Arkansas.

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

ORDER

I.

It is ordered, That respondent Wal-Mart Stores, Inc., its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, shall not advertise any textile fiber product or any wool product in any *mail order catalog* or *mail order promotional material*, as those terms are defined in 16 CFR 303.1(u) and 300.1(h), respectively, or as they may hereafter be amended, without disclosing clearly and conspicuously that the product was either made in the U.S.A., imported, or both.

II.

It is further ordered, That respondent Wal-Mart Stores, Inc., and its successors and assigns, for five (5) years after the date of issuance of this order, shall maintain, and upon request make available to the Federal Trade Commission, business records demonstrating compliance with the terms and provisions of this order, including but not limited to:

A. Copies of all mail order catalogs and mail order promotional materials, as defined in 16 CFR 303.1(u) and 16 CFR 300.1(h), that offer textile and/or wool products for direct sale to consumers. If such mail order catalogs and mail order promotional materials are disseminated to consumers in electronic form, copies may also be maintained in an electronic format, provided that it is accessible or printable.

B. All complaints and other communications with consumers, or with governmental or consumer protection organizations, that pertain to country of origin disclosures for textile and/or wool products.

III.

It is further ordered, That respondent Wal-Mart Stores, Inc., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

It is further ordered, That respondent Wal-Mart Stores, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent Wal-Mart Stores, Inc., and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

VI.

This order will terminate on June 2, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Commissioner Anthony recused.

IN THE MATTER OF

BUGLE BOY INDUSTRIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF TEXTILE FIBER PRODUCTS IDENTIFICATION ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3871. Complaint, June 2, 1999--Decision, June 2, 1999

This consent order, among other things, prohibits Bugle Boy Industries, Inc., a California-based clothing retailer, from violating any provision of the Textile Fiber Products Identification Act in the advertising, promotion and sale of clothing for men and boys.

Participants

For the Commission: *Carol Jennings* and *Elaine Kolish.*

For the respondent: *Linda Subias*, in-house counsel, Simi Valley, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Bugle Boy Industries, Inc. ("respondent") has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.* (FTC Act) and the Textile Fiber Products Identification Act, 15 U.S.C. 70 (Textile Act), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a California corporation with its principal office or place of business at 2900 North Madera Road, Simi Valley, California.

2. Respondent is a manufacturer and retail seller of clothing for men and boys. Respondent has advertised, offered for sale, sold, and distributed to the public textile products subject to the requirements of the Textile Act.

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

4. Respondent has offered for sale and sold, by means of an online shopping service or catalog on the Internet, textile products subject to the requirements of the Textile Act.

5. Since March 16, 1998, respondent has offered for sale and sold,

by means of an online shopping service or catalog on the Internet, textile products subject to the requirements of the Textile Act, without disclosing in its product descriptions whether such products were made in the U.S.A., imported, or both, thus violating 15 U.S.C. 70b(i), and implementing regulations in 16 CFR 303.34 (as amended 63 Fed. Reg. 7508, 7518 (Feb. 13, 1998)).

6. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

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 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 violations of the Federal Trade Commission Act and the Textile Fiber Products Identification Act.

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondent of all the jurisdictional facts set forth in the draft 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 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, 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 is a California corporation with its principal office or place of business at 2900 North Madera Road, Simi Valley, California.

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

ORDER

I.

It is ordered, That respondent Bugle Boy Industries, Inc., its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, shall not violate any provision of the Textile Fiber Products Identification Act, 15 U.S.C. 70, and any of the Rules promulgated pursuant to the Act, 16 CFR Part 303, or as they may hereafter be amended.

II.

It is further ordered, That respondent Bugle Boy Industries, Inc., and its successors and assigns, for five (5) years after the date of issuance of this order, shall maintain, and upon request make available to the Federal Trade Commission, business records demonstrating compliance with the terms and provisions of this order, including but not limited to:

A. Copies of all mail order catalogs and mail order promotional materials, as defined in 16 CFR 303.1(u), that offer textile products for direct sale to consumers. If such mail order catalogs and mail order promotional materials are disseminated to consumers in electronic form, copies may also be maintained in an electronic format, provided that it is accessible or printable.

B. All complaints and other communications with consumers, or with governmental or consumer protection organizations, that pertain to country of origin disclosures for textile products.

III.

It is further ordered, That respondent Bugle Boy Industries, Inc., and its successors and assigns, for five (5) years after the date of issuance of this order, shall deliver a copy of this order to all current

and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the publication or dissemination of mail order catalogs and mail order promotional materials, as defined in 16 CFR 303.1(u), and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

It is further ordered, That respondent Bugle Boy Industries, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent Bugle Boy Industries, Inc., and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

VI.

This order will terminate on June 2, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

BURLINGTON COAT FACTORY WAREHOUSE CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF TEXTILE FIBER PRODUCTS IDENTIFICATION ACT, WOOL PRODUCTS LABELING ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3872. Complaint, June 2, 1999--Decision, June 2, 1999

This consent order, among other things, prohibits Burlington Coat Factory Warehouse Corporation, a New Jersey-based retailer, from advertising any textile fiber product or any wool product in any mail order catalog or mail order promotional material without disclosing clearly and conspicuously that the product was either made in the U.S.A., imported, or both.

Participants

For the Commission: *Eleanor Durham, Charles Harwood, Carol Jennings,* and *Elaine Kolish.*

For the respondent: *Ron Bloch, McDermott, Will & Emery,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Burlington Coat Factory Warehouse Corporation ("respondent") has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.* (FTC Act), the Textile Fiber Products Identification Act, 15 U.S.C. 70 (Textile Act), and the Wool Products Labeling Act, 15 U.S.C. 68 (Wool Act), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a New Jersey corporation with its principal office or place of business at 1830 Route 130 N., Burlington, New Jersey.

2. Respondent is a retail seller that has advertised, offered for sale, sold, and distributed to the public various products, including textile products subject to the requirements of the Textile Act, and wool products subject to the requirements of the Wool Act.

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

4. Respondent has offered for sale and sold, by means of an online shopping service or catalog on the Internet, various products, including products subject to the requirements of the Textile Act and the Wool Act.

5. Since April 1, 1998, respondent has offered for sale and sold, by means of an online shopping service or catalog on the Internet, textile products subject to the requirements of the Textile Act and wool products subject to the requirements of the Wool Act, without disclosing in its product descriptions whether such products were made in the U.S.A., imported, or both, thus violating 15 U.S.C. 70b(i), and implementing regulations in 16 CFR 303.34 (as amended 63 Fed. Reg. 7508, 7518 (Feb. 13, 1998)), and 15 U.S.C. 68b(e), and implementing regulations in 16 CFR 300.25a (as amended 63 Fed. Reg. 7508, 7516, 7517 (Feb. 13, 1998)).

6. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

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 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 violations of the Federal Trade Commission Act, the Textile Fiber Products Identification Act, and the Wool Products Labeling Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondent of all the jurisdictional facts set forth in the draft 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 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, 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 Burlington Coat Factory Warehouse Corporation is a New Jersey corporation with its principal office or place of business at 1830 Route 130 N., Burlington, New Jersey.

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

ORDER

I.

It is ordered, That respondent Burlington Coat Factory Warehouse Corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, shall not advertise any textile fiber product or any wool product in any *mail order catalog* or *mail order promotional material*, as those terms are defined in 16 CFR 303.1(u) and 300.1(h), respectively, or as they may hereafter be amended, without disclosing clearly and conspicuously that the product was either made in the U.S.A., imported, or both.

II.

It is further ordered, That respondent Burlington Coat Factory Warehouse Corporation, and its successors and assigns, for five (5) years after the date of issuance of this order, shall maintain, and upon request make available to the Federal Trade Commission, business records demonstrating compliance with the terms and provisions of this order, including but not limited to:

A. Copies of all mail order catalogs and mail order promotional materials, as defined in 16 CFR 303.1(u) and 16 CFR 300.1(h), that offer textile and/or wool products for direct sale to consumers. If such mail order catalogs and mail order promotional materials are disseminated to consumers in electronic form, copies may also be maintained in an electronic format.

B. All complaints and other communications with consumers, or with governmental or consumer protection organizations, that pertain to country of origin disclosures for textile and/or wool products.

III.

It is further ordered, That respondent Burlington Coat Factory Warehouse Corporation, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

It is further ordered, That respondent Burlington Coat Factory Warehouse Corporation, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent Burlington Coat Factory Warehouse Corporation, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

VI.

This order will terminate on June 2, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

WOOLRICH, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF TEXTILE FIBER PRODUCTS IDENTIFICATION ACT, WOOL PRODUCTS LABELING ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3873. Complaint, June 2, 1999--Decision, June 2, 1999

This consent order, among other things, prohibits Woolrich, Inc., a Pennsylvania-based retailer, from violating any provision of the Textile Fiber Products Identification Act or the Wool Products Labeling Act.

Participants

For the Commission: *Eleanor Durham, Charles Harwood, Carol Jennings,* and *Elaine Kolish.*

For the respondent: *Howell Mette, Mette, Evans & Woodside,* Harrisburg, PA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Woolrich, Inc., ("respondent") has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.* (FTC Act), the Textile Fiber Products Identification Act, 15 U.S.C. 70 (Textile Act), and the Wool Products Labeling Act, 15 U.S.C. 68 (Wool Act), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Pennsylvania corporation with its principal office or place of business at Woolrich, Pennsylvania.

2. Respondent is a retail seller that has advertised, offered for sale, sold, and distributed to the public various products, including textile products subject to the requirements of the Textile Act, and wool products subject to the requirements of the Wool Act.

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

4. Respondent has offered for sale and sold, by means of an online shopping service or catalog on the Internet, various products, including products subject to the requirements of the Textile Act and the Wool Act.

5. Since September 22, 1998, respondent has offered for sale and sold, by means of an online shopping service or catalog on the

Internet, textile products subject to the requirements of the Textile Act and wool products subject to the requirements of the Wool Act, without disclosing in its product descriptions whether such products were made in the U.S.A., imported, or both, thus violating 15 U.S.C. 70b(i), and implementing regulations in 16 CFR 303.34 (as amended 63 Fed. Reg. 7508, 7518 (Feb. 13, 1998)), and 15 U.S.C. 68b(e), and implementing regulations in 16 CFR 300.25a (as amended 63 Fed. Reg. 7508, 7516, 7517 (Feb. 13, 1998)).

6. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

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 complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act, the Textile Fiber Products Identification Act, and the Wool Products Labeling Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondent of all the jurisdictional facts set forth in the draft 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 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, 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 Woolrich, Inc. is a Pennsylvania corporation with its principal office or place of business at Woolrich, 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.

It is ordered, That respondent Woolrich, Inc., its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, shall not violate any provision of the Textile Fiber Products Identification Act, 15 U.S.C. 70, and any of the Rules promulgated pursuant to the Act, 16 CFR Part 303, or as they may hereafter be amended, or the Wool Products Labeling Act, 15 U.S.C. 68, and any of the Rules promulgated pursuant to the Act, 16 CFR Part 300, or as they may hereafter be amended.

II.

It is further ordered, That respondent Woolrich, Inc., and its successors and assigns, for five (5) years after the date of issuance of this order, shall maintain, and upon request make available to the Federal Trade Commission, business records demonstrating compliance with the terms and provisions of this order, including but not limited to:

A. Copies of all mail order catalogs and mail order promotional materials, as defined in 16 CFR 303.1(u) and 16 CFR 300.1(h), that offer textile and/or wool products for direct sale to consumers. If such mail order catalogs and mail order promotional materials are disseminated to consumers in electronic form, copies may also be maintained in an electronic format.

B. All complaints and other communications with consumers, or with governmental or consumer protection organizations, that pertain to country of origin disclosures for textile and/or wool products.

III.

It is further ordered, That respondent Woolrich, Inc., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all

current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

It is further ordered, That respondent Woolrich, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent Woolrich, Inc., and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

VI.

This order will terminate on June 2, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order,

whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

ABERCROMBIE & FITCH, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF TEXTILE FIBER PRODUCTS IDENTIFICATION ACT, WOOL PRODUCTS LABELING ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3874. Complaint, June 2, 1999--Decision, June 2, 1999

This consent order, among other things, prohibits Abercrombie & Fitch, Inc., an Ohio-based clothing retailer, from violating any provision of the Textile Fiber Products Identification Act or the Wool Products Labeling Act in the advertising, promotion and sale of clothing for men and women.

Participants

For the Commission: *Carol Jennings* and *Elaine Kolish.*

For the respondent: *James Wilson, Vorys, Sater, Seymour and Pease,* Columbus, OH.

COMPLAINT

The Federal Trade Commission, having reason to believe that Abercrombie & Fitch, Inc. ("respondent") has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.* (FTC Act), the Textile Fiber Products Identification Act, 15 U.S.C. 70 *et seq.* (Textile Act), and the Wool Products Labeling Act, 15 U.S.C. 68 *et seq.* (Wool Act), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Delaware corporation with its principal office or place of business at 4 Limited Parkway East, Reynoldsburg, Ohio.

2. Respondent is a retail seller of clothing for men and women. Respondent has advertised, offered for sale, sold, and distributed to the public textile products subject to the requirements of the Textile Act and wool products subject to the requirements of the Wool Act.

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

4. Respondent has offered for sale and sold, by means of a print catalog, textile products subject to the requirements of the Textile Act and wool products subject to the requirements of the Wool Act.

5. Respondent has offered for sale and sold, by means of a print catalog, textile products subject to the requirements of the Textile Act

and wool products subject to the requirements of the Wool Act, without disclosing in its product descriptions whether such products were made in the U.S.A., imported, or both, thus violating 15 U.S.C. 70b(i), and implementing regulations in 16 CFR 303.34 (as amended 63 Fed. Reg. 7508, 7518 (Feb. 13, 1998)), and 15 U.S.C. 68b(e), and implementing regulations in 16 CFR 300.25a (as amended 63 Fed. Reg. 7508, 7516, 7517 (Feb. 13, 1998)).

6. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

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 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 violations of the Federal Trade Commission Act, the Textile Fiber Products Identification Act, and the Wool Products Labeling Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondent of all the jurisdictional facts set forth in the draft 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 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, 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 Abercrombie & Fitch, Inc. is a Delaware corporation with its principal office or place of business at 4 Limited Parkway East, Reynoldsburg, Ohio.

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

ORDER

I.

It is ordered, That respondent Abercrombie & Fitch, Inc., its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, shall not violate any provision of the Textile Fiber Products Identification Act, 15 U.S.C. 70 *et seq.*, and any of the Rules promulgated pursuant to the Act, 16 CFR Part 303, or as they may hereafter be amended, or the Wool Products Labeling Act, 15 U.S.C. 68 *et seq.*, and any of the Rules promulgated pursuant to the Act, 16 CFR Part 300, or as they may hereafter be amended.

II.

It is further ordered, That respondent Abercrombie & Fitch, Inc., and its successors and assigns, for five (5) years after the date of issuance of this order, shall maintain, and upon request make available to the Federal Trade Commission, business records demonstrating compliance with the terms and provisions of this order, including but not limited to:

A. Copies of all mail order catalogs and mail order promotional materials, as defined in 16 CFR 303.1(u) and 16 CFR 300.1(h), that offer textile and/or wool products for direct sale to consumers. If such mail order catalogs and mail order promotional materials are disseminated to consumers in electronic form, copies may also be maintained in an electronic format, provided that it is accessible or printable.

B. All complaints and other communications with consumers, or with governmental or consumer protection organizations, that pertain to country of origin disclosures for textile and/or wool products.

III.

It is further ordered, That respondent Abercrombie & Fitch, Inc., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, and directors, and to all current and future employees, agents, and representatives having responsibilities for preparation of the content of any mail order catalog or mail order promotional material, as defined in 16 CFR 303.1(u) and 16 CFR 300.1(h), and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

It is further ordered, That respondent Abercrombie & Fitch, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the filing of a plan of reorganization or dissolution pursuant to a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent Abercrombie & Fitch, Inc., and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

VI.

This order will terminate on June 2, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

DELIA'S INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF TEXTILE FIBER PRODUCTS IDENTIFICATION ACT, WOOL PRODUCTS LABELING ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3875. Complaint, June 2, 1999--Decision, June 2, 1999

This consent order, among other things, prohibits Delia's, Inc., a New York-based clothing retailer, from violating any provision of the Textile Fiber Products Identification Act or the Wool Products Labeling Act in the advertising, promotion and sale of clothing for girls and women.

Participants

For the Commission: *Carol Jennings* and *Elaine Kolish.*

For the respondent: *Alexander Navarro,* in-house counsel, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Delia's Inc. ("respondent") has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.* (FTC Act), the Textile Fiber Products Identification Act, 15 U.S.C. 70 *et seq.* (Textile Act), and the Wool Products Labeling Act, 15 U.S.C. 68 *et seq.* (Wool Act), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Delaware corporation with its principal office or place of business at 435 Hudson Street, New York, New York.

2. Respondent is a retail seller of clothing for women and girls. Respondent has advertised, offered for sale, sold, and distributed to the public textile products subject to the requirements of the Textile Act and wool products subject to the requirements of the Wool Act.

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

4. Respondent has offered for sale and sold, by means of both a print catalog and an online shopping service or Internet catalog, textile products subject to the requirements of the Textile Act and wool products subject to the requirements of the Wool Act.

5. Respondent has offered for sale and sold, by means of both a print catalog and an online shopping service or Internet catalog, textile products subject to the requirements of the Textile Act and wool products subject to the requirements of the Wool Act, without disclosing in its product descriptions whether such products were made in the U.S.A., imported, or both, thus violating 15 U.S.C. 70b(i), and implementing regulations in 16 CFR 303.34 (as amended 63 Fed. Reg. 7508, 7518 (Feb. 13, 1998)), and 15 U.S.C. 68b(e), and implementing regulations in 16 CFR 300.25a (as amended 63 Fed. Reg. 7508, 7516, 7517 (Feb. 13, 1998)).

6. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

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 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 violations of the Federal Trade Commission Act, the Textile Fiber Products Identification Act, and the Wool Products Labeling Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondent of all the jurisdictional facts set forth in the draft 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 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, 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 Delia's Inc. is a Delaware corporation with its principal office or place of business at 435 Hudson Street, New York, 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.

It is ordered, That respondent Delia's Inc., its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, shall not violate any provision of the Textile Fiber Products Identification Act, 15 U.S.C. 70 *et seq.*, and any of the Rules promulgated pursuant to the Act, 16 CFR Part 303, or as they may hereafter be amended, or the Wool Products Labeling Act, 15 U.S.C. 68 *et seq.*, and any of the Rules promulgated pursuant to the Act, 16 CFR Part 300, or as they may hereafter be amended.

II.

It is further ordered, That respondent Delia's Inc., and its successors and assigns, for five (5) years after the date of issuance of this order, shall maintain, and upon request make available to the Federal Trade Commission, business records demonstrating compliance with the terms and provisions of this order, including but not limited to:

A. Copies of all mail order catalogs and mail order promotional materials, as defined in 16 CFR 303.1(u) and 16 CFR 300.1(h), that offer textile and/or wool products for direct sale to consumers. If such mail order catalogs and mail order promotional materials are disseminated to consumers in electronic form, copies may also be maintained in an electronic format, provided that it is accessible or printable.

B. All complaints and other communications with consumers, or with governmental or consumer protection organizations, that pertain to country of origin disclosures for textile and/or wool products.

III.

It is further ordered That respondent Delia's Inc., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

It is further ordered, That respondent Delia's Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent Delia's Inc., and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

VI.

This order will terminate on June 2, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

THE STANLEY WORKS

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

Docket C-3876. Complaint, June 2, 1999--Decision, June 2, 1999

This consent order, among other things, prohibits The Stanley Works, a Connecticut-based manufacturer and distributor of mechanics tools, from misrepresenting the extent to which any mechanics tool is made in the United States.

Participants

For the Commission: *Kent Howerton, Laura Koss,* and *Elaine Kolish.*

For the respondent: *John Harkrider, Axinn, Veltrop & Harkrider*, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Stanley Works ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent The Stanley Works is a Connecticut corporation with its principal office or place of business at 1000 Stanley Drive, New Britain, Connecticut.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including mechanics tools.

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

HUSKY MECHANICS TOOLS

4. Respondent has disseminated or has caused to be disseminated advertisements, catalogs, packaging, labeling, in-store displays, and other promotional materials for certain of its Husky combination wrenches and sockets, including but not necessarily limited to the attached Exhibits A through J. These advertisements, catalogs, packaging, labeling, in-store displays, and other promotional materials contain the following statements or depictions:

A. **Television Advertisement, Exhibit A:**
Shows mechanics at work using Husky combination wrenches and standard sockets. Voice-over states: "We told these mechanics that Husky tools were American made and guaranteed forever."

B. **Print Advertisement, Exhibit B:**
A photograph of a man holding a combination wrench while working on his car. The words "Made in U.S.A." appear on the combination wrench.

C. **Catalog, Exhibit C:**
"The Husky name was first registered back in 1924 for use on quality US made Mechanics Tools .... Husky tools are made to exact standards in state of the art manufacturing plants in Dallas, Texas"; and
A logo consisting of an American flag with the phrases "Made in U.S.A." and "Guaranteed Forever" ("U.S. flag logo").

D. **Catalog, Exhibit D:**
"American Made to Meet or Exceed ANSI Specifications"; and
"Made in the USA."

E. **Catalog, Exhibit E:**
"Made in the USA"; and U.S. flag logo.

F. **Catalog, Exhibit F:**
U.S. flag logo.

G. **Packaging and Labeling, Exhibit G:**
"Made in U.S.A." in black and white; and U.S. flag logo.

H. **Packaging and Labeling, Exhibit H:**
"Made in U.S.A." in red, white, and blue; and
"Made in U.S.A." in black and white.

I. **In-store Display, Exhibit I:**
"All Husky Tools Made in USA"; and U.S. flag logo.

J. **Product Registration Card, Exhibit J:**
A depiction of a U.S. flag.

5. Respondent has distributed or has caused to be distributed certain of its Husky combination wrenches and sockets marked with the following statements: "U.S.A."; or "Made in U.S.A."

PROTO MECHANICS TOOLS

6. Respondent has disseminated or has caused to be disseminated advertisements, catalogs, packaging, labeling, and other promotional materials for certain of its Proto combination wrenches and teardrop ratchets, including but not necessarily limited to Exhibits K through L, that contain the following statements or depictions:

A. **Catalog, Exhibit K:**
Logo consisting of the words "Made in U.S.A.," appearing next to a silhouette of the continental United States that is covered by the U.S. flag.

B. **Stanley Catalog, Exhibit L:**
"Proto was the first hand tool manufacturer to produce and market the combination wrench in the United States"; and
Photographs of combination wrenches marked "U.S.A."

C. **Packaging and labeling:**
"Made in the U.S.A."

7. Respondent has distributed or has caused to be distributed certain of its Proto combination wrenches and teardrop ratchets marked with the following statements: "U.S.A."; or "Mfg. U.S.A."

BLACKHAWK MECHANICS TOOLS

8. Respondent has disseminated or has caused to be disseminated promotional materials for certain of its Blackhawk combination wrenches, open end wrenches, box end wrenches, flare nut wrenches, sockets, ratchets, flex handles, wrench sets, and socket sets that contain the following statements or depictions:

"America's Best";
Photographs of certain tools marked "U.S.A.";
"Made in America"; or "American-Made."

9. Respondent has distributed or caused to be distributed certain of its Blackhawk combination wrenches, sockets, flex handles, box end wrenches, flare nut wrenches, and open end wrenches marked with the following statement: "U.S.A."

CHALLENGER MECHANICS TOOLS

10. Respondent has disseminated or has caused to be disseminated promotional materials for certain of its Challenger combination wrenches, sockets, combination wrench sets, box end wrench sets, open end wrench sets, and cold chisel sets that contain the following statements or depictions:

Photographs of a combination wrench marked "U.S.A.";
Photographs of sockets marked "Proto U.S.A.";
Photographs of cold chisels marked "U.S.A."; or
Photographs of combination wrench sets, box end wrench sets, an open end wrench set, and a cold chisel set in roll-up pouches that state "Made in U.S.A."

11. Respondent has distributed or caused to be distributed certain of its Challenger sockets, combination wrenches, open end wrenches,

box end wrenches, flare nut wrenches, and cold chisels marked with the following statement: "U.S.A."

MASTER MECHANIC MECHANICS TOOLS

12. Respondent has disseminated or has caused to be disseminated certain of its Master Mechanic combination wrenches, sockets, and socket sets with labeling or other promotional materials that contain the following statement: "Made in U.S.A."

13. Respondent has disseminated or has caused to be disseminated certain of its Master Mechanic combination wrench sets and socket sets with packaging, labeling, or other promotional materials that contain the following statement and depiction:

"Made in U.S.A." next to an American flag.

14. Respondent has distributed or caused to be distributed certain of its Master Mechanic combination wrenches, flex handles, and sockets marked with the following statement: "U.S.A."

STANLEY MECHANICS TOOLS

15. Respondent has distributed or caused to be distributed packaging, labeling, or other promotional materials for certain of its Stanley combination wrenches, box end wrenches, open end wrenches, ratchets, combination wrench sets, and socket sets that contain the following statements or depictions:

"Made in U.S.A."; "U.S.A.";
"Tools made in U.S.A. Case made in Taiwan.";
A logo consisting of an eagle head on an American flag and the words "Made in U.S.A.";
Photographs of combination wrench sets and an open end wrench set with "Made in U.S.A." on their packaging; or
A silhouette of the United States showing Stanley plant locations.

16. Respondent has distributed or caused to be distributed certain of its Stanley combination wrenches, open end wrenches, and box end wrenches marked with the following statement: "U.S.A."

CATERPILLAR MECHANICS TOOLS

17. Respondent has distributed or caused to be distributed certain combination wrenches and cold chisels that it manufactures for Caterpillar marked with the following statement: "U.S.A."

JOHN DEERE MECHANICS TOOLS

18. Respondent has distributed or caused to be distributed certain combination wrenches and sockets that it manufactures for John Deere marked with the following statement: "U.S.A."

MARTIN MECHANICS TOOLS

19. Respondent has distributed or caused to be distributed certain ratchets, flex handles, and sockets that it manufactures for Martin marked with the following statement: "U.S.A."

WILDE MECHANICS TOOLS

20. Respondent has distributed or caused to be distributed certain sockets that it manufactures for Wilde marked with the following statement: "U.S.A."

21. Through the means described in paragraphs 4 through 20, respondent has represented, expressly or by implication, that certain of its mechanics tools are made in the United States, *i.e.*, that all, or virtually all, of the component parts of such mechanics tools are made in the United States, and that all, or virtually all, of the labor in manufacturing such mechanics tools is performed in the United States.

22. In truth and in fact, a significant portion of the components of certain of respondent's mechanics tools is, or has been, of foreign origin. Therefore, the representation set forth in paragraph 21 was, and is, false or misleading.

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

EXHIBIT A

Exhibit A consists of a video tape of a television advertisement. It has been placed on the public record of this proceeding.

EXHIBIT B

EXHIBIT C

EXHIBIT D

EXHIBIT E

EXHIBIT F

EXHIBIT G

EXHIBIT G

EXHIBIT H

EXHIBIT H

EXHIBIT I

EXHIBIT J

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 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 violations 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, and admission by the respondent of all the jurisdictional facts set forth in the draft 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 violated the said Act, 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 comments received from interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The Stanley Works is a Connecticut corporation with its principal office or place of business at 1000 Stanley Drive, New Britain, Connecticut.

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

ORDER

I.

It is ordered, That respondent, The Stanley Works, 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 manufacturing, marking, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of any mechanics tool in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, shall not misrepresent, in any manner, directly or by implication, the extent to which any such mechanics tool is made in the United States. For purposes of this order, mechanics tools means professional grade hand tools (other than carpentry tools) used by consumers or professionals in the assembly, repair, or maintenance of machinery or vehicles, or for other purposes. Such tools include, but are not limited to, wrenches, ratchets, sockets, and chisels.

Provided, however, that a representation that any mechanics tool is made in the United States will not be in violation of this order so long as all, or virtually all, of the component parts of the mechanics tool are made in the United States and all, or virtually all, of the labor in manufacturing the mechanics tool is performed in the United States.

Provided, further, that this order shall not apply to the marking of mechanics tools or components of mechanics tools forged, machined, or cast before the date that the complaint and order became final.

II.

It is further ordered, That respondent The Stanley Works and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All labeling, packaging, advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

III.

It is further ordered, That respondent The Stanley Works, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

It is further ordered, That respondent The Stanley Works, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent The Stanley Works, and its successors and assigns, shall, within sixty (60) days after the date of

service of this order, and at such other times as the Federal Trade 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.

VI.

This order will terminate on June 2, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of this order if such complaint is filed after the order has terminated pursuant to this Part. Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

CMS ENERGY 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-3877. Complaint, June 2, 1999--Decision, June 2, 1999

This consent order, among other things, permits CMS Energy Corporation's acquisition of natural gas pipelines from Pan Energy Corp. and Texas Eastern Corp., subsidiaries of Duke Energy Company, prohibits CMS from restricting or eliminating interconnection capacity available to the pipelines that compete with Panhandle and Trunkline, and requires CMS to post information regarding the capacity, shipments and throughput of the system on an electronic bulletin board.

Participants

For the Commission: *Frank Lipson, Mark Menna, Constance Salemi, Stephen Sockwell, Phillip Broyles, Joseph Eckhaus, Roberta Baruch, William Baer, Jeffrey Fischer,* and *Kenneth Kelly*.

For the respondent: *C. Benjamin Crisman, Skadden, Arps, Slate, Meagher & Flom,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("FTC" or "Commission"), having reason to believe that respondent CMS Energy Corporation ("CMS"), a corporation, and Duke Energy Company ("Duke"), a corporation, have entered into a stock purchase agreement whereby CMS proposes to acquire all voting securities of Panhandle Eastern Pipe Line Company ("Panhandle"), Panhandle Storage Company, and Trunkline LNG Company ("Trunkline"), now held by Duke, its subsidiaries or affiliates, that such agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such agreement, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent CMS is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 330 Town Center Drive, Dearborn, Michigan.

2. Respondent CMS is a holding company for its principal subsidiary, Consumers Energy Company ("Consumers Energy"). Consumers Energy is a combination electric and gas utility company that serves consumers in broad sections of Michigan. Consumers Energy generates, purchases, transmits and distributes electricity throughout Michigan. Consumers Energy purchases, transports, stores and distributes natural gas to Michigan consumers.

3. Respondent CMS is, and at all times relevant herein has been, engaged in interstate commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. THE PROPOSED ACQUISITION

4. Respondent CMS entered into a Stock Purchase Agreement dated as of October 31, 1998, with Pan Energy Corp. and Texas Eastern Corp., subsidiaries of Duke, to acquire voting securities currently held by Duke for $1.9 billion plus the assumption of $300 million in debt.

III. TRADE AND COMMERCE

5. A relevant line of commerce in which to analyze the effects of the acquisition is the pipeline transportation of natural gas into Consumers Energy's natural gas service area (the "Service Area"). The Service Area includes all or portions of 54 counties in the lower peninsula of Michigan. Principal cites served include Bay City, Flint, Jackson, Kalamazoo, Lansing, Pontiac, and Saginaw.

6. Consumers Energy owns and operates an intra-state natural gas transmission system that delivers natural gas to residential, commercial and industrial customers in the Service Area. Consumers Energy is required by the Michigan Public Service Commission to transport gas for others on its transmission system.

7. Consumers Energy's intra-state natural gas transmission system is the only transmission system from which customers in the Service Area receive natural gas. Many customers within the Service Area

can buy their own natural gas from suppliers, but need access to Consumers Energy's transmission system.

8. Natural gas consumed in the Service Area is transported to Consumers Energy's natural gas transmission system by pipelines owned by Duke (Trunkline and Panhandle), ANR Pipeline Co. ("ANR"), Great Lakes Transmission, L.P. ("Great Lakes"), Michigan Consolidated Gas Co. ("MichCon") and other companies. Each of these pipelines has one or more points of interconnection with Consumers Energy's transmission system.

9. The maximum rates that can be charged by Trunkline, Panhandle, ANR, Great Lakes, and MichCon to transport gas to interconnection points with Consumers Energy are established by the Federal Energy Regulatory Commission ("FERC") or the Michigan Public Service Commission ("MPSC"). Competition between these pipelines has resulted in actual prices for transportation significantly below the maximum established rates.

10. It is within Consumers Energy's discretion to establish an interconnection with another pipeline or to terminate, or reduce the capacity of, existing pipeline interconnections.

11. The cost for the pipeline transportation of gas into Consumers Energy's transmission system is a significant component in the cost of natural gas sold to customers in the Service Area.

12. Consumers Energy, as an electric utility, competes with self-generators of electricity in the Service Area who depend upon natural gas as a feedstock. An increase in the cost of gas transportation would increase the cost of self-generation of electricity.

IV. EFFECTS OF THE PROPOSED TRANSACTION

13. After the acquisition set forth in paragraph four, CMS would have an incentive to terminate, or reduce the capacity of, the interconnections with non-CMS pipelines. CMS would have such an incentive because the likely results of such action would be to increase volume and tariffs on Panhandle and Trunkline pipelines.

14. An anticompetitive effect of the acquisition set forth in paragraph four is to increase the likelihood that Panhandle and Trunkline will charge higher tariffs to shippers.

15. A second anticompetitive effect of the acquisition set forth in paragraph four is to increase the likelihood that natural gas prices will increase to customers in the Service Area.

16. A third anticompetitive effect of the acquisition set forth in paragraph four is to increase the likelihood that the price of electricity will increase for industrial customers located in the Service Area that can self-generate electricity.

17. It is unlikely that regulation by the Federal Energy Regulatory Commission or the Michigan Public Service Commission could prevent the likely anticompetitive effects of the acquisition.

V. STATUTES VIOLATED

18. The Stock Purchase Agreement described in paragraph four constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

19. The acquisition described in paragraph four, 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 FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of the voting securities of Panhandle Eastern Pipe Line Company ("Panhandle"), Panhandle Storage Company, and Trunkline LNG Company ("Trunkline"), now held by Duke Energy Company, its subsidiaries or affiliates, by CMS Energy Corporation ("CMS"), and it now appearing that CMS, hereinafter sometimes referred to as "respondent," having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of 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 CMS is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 330 Town Center Drive, Dearborn, Michigan.

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

ORDER

I.

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

A. "*Respondent*" or "*CMS*" means CMS Energy Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by CMS, including but not limited to Consumers Energy Company, a wholly-owned subsidiary of CMS Energy Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*Adjusted Designated Capacity*" means Designated Capacity less the amount by which capacity is reduced for maintenance or force majeure.

C. "*Amount Confirmed*" means the Amount Nominated that Consumers Energy Company matches to corresponding recipients (*i.e.*, customers, brokers, marketers, or storage accounts) at an Interconnection Point.

D. "*Amount Nominated*" means the amount of natural gas that a shipper proposes to deliver to Consumers Energy Company at an Interconnection Point.

E. "*Available Interconnection Capacity*" means the amount of natural gas that Consumers Energy Company is ready, willing, and able to receive at an Interconnection Point.

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

G. "*Consumers Energy System*" means the natural gas transmission system of Consumers Energy Company.

H. "*Designated Capacity*" means the capacity for each Interconnection Point as stated in Exhibit A.

I. "*Interconnection Point*" means the eight interconnection points listed in Exhibit A, as points where Consumers Energy Company receives gas into its system.

J. "*MPSC*" means the Michigan Public Service Commission.

K. "*Recorded Throughput*" means the data obtained electronically by Consumers Energy Company from its Supervisory Control And Data Acquisition system units located at each Interconnection Point.

II.

It is further ordered, That:

A. Respondent shall provide information on an electronic bulletin board showing for each Interconnection Point: (i) the Designated Capacity; (ii) the Adjusted Designated Capacity, identifying the cause of the adjustment and the planned date the adjustment is expected to end; (iii) the Available Interconnection Capacity; (iv) no later than the second business day of each month (a) the Amounts Nominated and (b) the Amounts Confirmed; and (v) the Recorded Throughput for the previous month.

B. If respondent declines any shipper's nomination of gas into the Consumers Energy System at any Interconnection Point because Available Interconnection Capacity is less than Adjusted Designated Capacity, respondent shall afford the shipper two alternatives: (i) if the shipper is able to nominate its shipments to another pipeline interconnection point into the Consumers Energy System at no additional cost to the shipper, respondent will accept the gas at such other pipeline interconnection point; (ii) if the shipper provides a certification in the form set forth in Exhibit B hereto stating that the shipper is unable to nominate its shipments to another pipeline interconnection point into the Consumers Energy System at no additional cost to the shipper, then respondent shall provide gas from its own supply of gas and without interruption on the Consumers

Energy System for the shipper's account equal to the volume of gas nominated by the shipper that could not be transferred through any of the Interconnection Points by reason of the Available Interconnection Capacity being less than Adjusted Designated Capacity.

C. If the shipper exercises the option set out in paragraph II.B. (ii), respondent may require the shipper to return to respondent the volume of gas respondent had provided on the shipper's behalf, but no earlier than the end of the calendar month following the month in which Available Interconnection Capacity was less than the Adjusted Designated Capacity. Respondent shall give shipper the option to return the gas at any pipeline interconnection point into the Consumers Energy System. Respondent shall not charge an unauthorized gas usage charge to any shipper who replaces the gas by the end of the calendar month following the month in which the shipper's Amount Confirmed was less than the shipper's Amount Nominated because the Available Interconnection Capacity was less than the Adjusted Designated Capacity.

D. If respondent declines a shipper's nomination of gas that the shipper is obligated to return to respondent under paragraph II.C. because the Available Interconnection Capacity is less than Adjusted Designated Capacity, respondent shall again afford the shipper options (i) and (ii) in paragraph II.B., including the provision in paragraph II.C. regarding suspension of the unauthorized gas usage charge.

E. Respondent shall amend the tariffs it has filed with the MPSC to incorporate its obligations under paragraph II. of this order. Respondent shall incorporate its obligations under paragraph II. into any of its contracts with shippers.

F. The purpose of this paragraph II. of this order is to prevent the substantial lessening of competition from the acquisition, as alleged in the complaint.

III.

It is further ordered, That:

Ninety (90) days from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraph II. of this order.

IV.

It is further ordered, That:

A. Respondent shall notify the Commission at least thirty (30) days before any proposed change in the corporate respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.

B. Upon consummation of the acquisition, respondent shall cause the merged entity to be bound by the terms of this order.

V.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

VI.

It is further ordered, That this order shall terminate on June 2, 2009.

EXHIBIT A

EXHIBIT B

IN THE MATTER OF

GOTTSCHALKS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF TEXTILE FIBER PRODUCTS IDENTIFICATION ACT, WOOL PRODUCTS LABELING ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3878. Complaint, June 3, 1999--Decision, June 3, 1999

This consent order, among other things, prohibits Gottschalks, Inc., a California-based retailer, from advertising any textile fiber product or wool product in any mail order catalog or mail order promotional material without disclosing clearly and conspicuously that the product was either made in the U.S.A., imported, or both.

Participants

For the Commission: *Eleanor Durham, Charles Harwood, Carol Jennings,* and *Elaine Kolish.*

For the respondent: *Warren Williams,* in-house counsel, Fresno, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Gottschalks, Inc., ("respondent") has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.* (FTC Act), the Textile Fiber Products Identification Act, 15 U.S.C. 70 (Textile Act), and the Wool Products Labeling Act, 15 U.S.C. 68 (Wool Act), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a California corporation with its principal office or place of business at 7 River Park Place E., Fresno, California.

2. Respondent is a retail seller that has advertised, offered for sale, sold, and distributed to the public various products, including textile products subject to the requirements of the Textile Act, and wool products subject to the requirements of the Wool Act.

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

4. Respondent has offered for sale and sold, by means of an online shopping service or catalog on the Internet, various products, including products subject to the requirements of the Textile Act and the Wool Act.

5. Since October 1, 1998, respondent has offered for sale and sold, by means of an online shopping service or catalog on the Internet, textile products subject to the requirements of the Textile Act and wool products subject to the requirements of the Wool Act, without disclosing in its product descriptions whether such products were made in the U.S.A., imported, or both, thus violating 15 U.S.C. 70b(i), and implementing regulations in 16 CFR 303.34 (as amended 63 Fed. Reg. 7508, 7518 (Feb. 13, 1998)), and 15 U.S.C. 68b(e), and implementing regulations in 16 CFR 300.25a (as amended 63 Fed. Reg. 7508, 7516, 7517 (Feb. 13, 1998)).

6. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

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 complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act, the Textile Fiber Products Identification Act, and the Wool Products Labeling Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondent of all the jurisdictional facts set forth in the draft 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 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, 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 Gottschalks, Inc. is a California corporation with its principal office or place of business at 7 River Park Place E., Fresno, CA.

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

ORDER

I.

It is ordered, That respondent Gottschalks, Inc., its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, shall not advertise any textile fiber product or any wool product in any *mail order catalog* or *mail order promotional material*, as those terms are defined in 16 CFR 303.1(u) and 300.1(h), respectively, or as they may hereafter be amended, without disclosing clearly and conspicuously that the product was either made in the U.S.A., imported, or both.

II.

It is further ordered, That respondent Gottschalks, Inc., and its successors and assigns, for five (5) years after the date of issuance of this order, shall maintain, and upon request make available to the Federal Trade Commission, business records demonstrating compliance with the terms and provisions of this order, including but not limited to:

A. Copies of all mail order catalogs and mail order promotional materials, as defined in 16 CFR 303.1(u) and 16 CFR 300.1(h), that offer textile and/or wool products for direct sale to consumers. If such mail order catalogs and mail order promotional materials are disseminated to consumers in electronic form, copies may also be maintained in an electronic format.

B. All complaints and other communications with consumers, or with governmental or consumer protection organizations, that pertain to country of origin disclosures for textile and/or wool products.

III.

It is further ordered, That respondent Gottschalks, Inc., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

It is further ordered, That respondent Gottschalks, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent Gottschalks, Inc., and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

VI.

This order will terminate on June 3, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

MEDTRONIC, INC.

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-3879. Complaint, June 3, 1999--Decision, June 3, 1999

This consent order, among other things, requires Medtronic, Inc., a Minnesota-based corporation engaged in the research, development, manufacture and sale of medical devices, to divest Avecor's non-occlusive arterial pump assets to Baxter Healthcare Corporation or another Commission-approved buyer. The consent order also requires Medtronic to provide substantial assistance to enable the buyer to obtain FDA approval to manufacture and market Avecor pumps and reservoirs to use with the pump.

Participants

For the Commission: *Stephen Riddell, Mark Menna, Paul Frangie, Phillip Broyles, Kenneth Davidson, Roberta Baruch, William Baer, Louis Silvia, Roy Levy,* and *Christopher Taylor*.

For the respondent: *Philip Larson, Hogan & Hartson*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that respondent Medtronic, Inc. ("Medtronic"), a corporation, has entered into an agreement and plan of merger with Avecor Cardiovascular, Inc. ("Avecor"), a corporation, whereby Medtronic proposes to acquire all of the outstanding common stock of Avecor, that such agreement and plan of merger violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended, and that such agreement and plan of merger, if consummated would violate Section 7 of the Clayton Act, 15 U.S.C. 18, as amended, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Medtronic, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 7000 Central Avenue, Northeast, Minneapolis, Minnesota.

2. Respondent Medtronic is, and at all times relevant herein has been, engaged in the research, development, manufacture and sale of medical devices, including implantable devices, such as pacemakers and defibrillators, that regulate heart rhythm, tissue and mechanical heart valves, coronary stents, and perfusion devices that are used in heart/lung machines. Medtronic's perfusion devices include non-occlusive arterial pumps.

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

II. THE ACQUIRED COMPANY

4. Avecor is a corporation organized, existing and doing business under the laws of the State of Minnesota with its office and principal place of business located at 7611 Northland Drive, Minneapolis, Minnesota.

5. Avecor is, and at all times relevant herein has been, engaged in, the research, development, manufacture and sale of perfusion devices used in heart/lung machines, including non-occlusive arterial pumps.

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

III. THE PROPOSED ACQUISITION

7. Pursuant to an agreement and plan of merger, dated July 12, 1998, as amended, Medtronic intends to acquire all of the outstanding common voting stock of Avecor in exchange for stock of Medtronic valued at approximately $106 million.

IV. TRADE AND COMMERCE

8. Perfusion devices are the blood-handling products used in heart/lung machines. These devices circulate and oxygenate the blood and regulate body temperature during heart bypass surgery and other procedures where the heart must be relieved of its pumping function. Arterial pumps are the devices that circulate the blood. Non-occlusive arterial pumps are safer and less damaging than occlusive arterial pumps. There are no close substitutes for non-occlusive arterial pumps.

9. The research, development, manufacture and sale of non-occlusive arterial pumps is a relevant line of commerce in which to evaluate the effects of this proposed acquisition.

10. The United States as a whole is the relevant section of the country in which to evaluate the effects of this proposed acquisition on the research, development, manufacture and sale of non-occlusive arterial pumps.

11. The United States market for research, development, manufacture and sale of non-occlusive arterial pumps is highly concentrated and would become significantly more concentrated as a result of the proposed acquisition. Premerger concentration in the research, development, manufacture and sale of non-occlusive arterial pumps, as measured by the Herfindahl-Hirschman Index, is over 5700, and as a result of the proposed acquisition concentration would increase by more than 340 points to a level of more than 6050.

12. Entry into the United States market for research, development, manufacture and sale of non-occlusive arterial pumps is difficult and would not be timely, likely or sufficient to prevent anticompetitive effects that may result from the proposed acquisition.

V. VIOLATIONS CHARGED

13. Respondent Medtronic and Avecor are actual competitors in the United States market for research, development, manufacture and sale of non-occlusive arterial pumps.

14. The effects of the proposed acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the United States market for research, development, manufacture and sale of non-occlusive arterial pumps in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating actual, direct, and substantial competition between Medtronic and Avecor in the United States market for research, development, manufacture and sale of non-occlusive arterial pumps;

b. By increasing the likelihood that Medtronic would unilaterally exercise market power in the United States market for research, development, manufacture and sale of non-occlusive arterial pumps;

c. By increasing the likelihood that consumers in the United States will be charged higher prices for non-occlusive arterial pumps; and

d. By reducing the likelihood of innovation in the United States market for the research, development, manufacture and sale of non-occlusive arterial pumps.

VI. STATUTES VIOLATIONS

15. The agreement and plan of merger between Medtronic and Avecor constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

16. 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 ("Commission") having initiated an investigation of the acquisition of all of the voting stock of Avecor Cardiovascular, Inc. ("Avecor") by Medtronic, Inc. ("Medtronic"), hereinafter sometimes referred to as "respondent," and respondent having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an

admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of 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 Medtronic, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of Minnesota, with its principal executive offices located at 7000 Central Avenue, Northeast, Minneapolis, Minnesota.

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

ORDER

I.

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

A. "*Medtronic*" or "*respondent*" means Medtronic, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Medtronic, Inc, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*Avecor*" means Avecor Cardiovascular, Inc., a corporation organized, existing and doing business under the laws of Minnesota with its headquarters located at 7611 Northland Drive, Minneapolis, Minnesota, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Avecor Cardiovascular, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "*Proposed Acquisition*" means the proposed acquisition by Medtronic of 100% of the voting stock of Avecor pursuant to an Agreement and Plan of Merger, dated July 12, 1998, as amended.

D. "*Acquirer*" means Baxter Healthcare Corporation, a corporation organized, existing and doing business under the laws of Delaware with its principal place of business located at One Baxter Parkway, Deerfield, Illinois, or the entity to whom Medtronic shall divest the Avecor Pump Assets pursuant to paragraph II. of this order, as applicable.

E. "*Associated Reservoirs*" means a family of venous reservoirs for use with the Avecor Blood Pump System that includes both a hard shell and a venous reservoir bag and a reservoir holder.

F. "*Avecor Blood Pump Reservoirs*" means the Associated Reservoirs manufactured and sold by Avecor.

G. "*Avecor Blood Pump System*" means the arterial pump system manufactured and sold by Avecor, used for pumping blood during cardiopulmonary bypass procedures and consisting of a pump console (controller, rotor housing, and flow meter), and associated pump disposables (pump chamber and pump tubing).

H. "*Avecor Pump Assets*" means all Avecor's assets, business, goodwill and rights, other than real property, as of the date this agreement containing consent order is accepted for public comment, relating to the research, development, manufacture, and sale of the Avecor Blood Pump System and the products included therein throughout the world, including, but not limited to:

1. All machinery, fixtures, equipment, and other tangible property, trade names, trademarks, brand names, formulations, inventory, Patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, marketing and distribution information, customer lists, software, information stored on management information systems (and specifications sufficient for the Acquirer or New Acquirer to use such information) and all data, contractual rights, materials and information relating to FDA and other governmental or regulatory approvals relating to the Avecor Blood Pump System and the products included therein;

2. The MC3 License Agreement;

3. An exclusive, royalty-free, transferrable, worldwide license, in perpetuity, to Avecor's Patents, trade secrets and know-how in the field of use of making, using, exporting, importing and selling Associated Reservoirs for use in connection with the Avecor Blood Pump System and any improvements thereto, provided however, that the foregoing license shall be non-exclusive as to:

a. Hard shell reservoirs and venous reservoir bags with an outlet size other than 5/8 inch; and

b. The reservoir holders;

and all as subject to the applicable provisions of the Divestiture Agreement approved by the Commission.

I. "*Avecor's Costs*" means Avecor's cost of manufacturing such item, as determined by Generally Accepted Accounting Principles, including the actual cost of raw materials, direct labor and reasonable, actual contracted services, but excluding factory overhead used in manufacturing the item. Raw materials and direct labor are the actual cost of materials and labor consumed to manufacture the item.

J. "*Contract Manufacture*" means the manufacture of Avecor Blood Pump Systems and Associated Reservoirs supplied pursuant to a Divestiture Agreement by Medtronic for sale to the Acquirer or New Acquirer, as applicable.

K. "*Divestiture Trustee*" means the trustee(s) appointed pursuant to paragraph IV. of this order, as applicable.

L. "*FDA*" means the United States Food and Drug Administration.

M. "*Interim Trustee*" means the trustee(s) appointed pursuant to paragraph III. of this order, as applicable.

N. "*Commercial Capability to Manufacture*" means the practical ability to manufacture (including by subcontracting other than by respondent or Avecor) the Avecor Blood Pump System and Associated Reservoirs whether or not any have actually been sold.

O. "*MC3 Agreement*" means the license agreement, dated January 16, 1995, as amended between Michigan Critical Care Consultants and Avecor.

P. "*New Acquirer*" means the entity to whom the Divestiture Trustee shall divest the Avecor Pump Assets pursuant to paragraph IV. of this order.

Q. "*Patents*" means any patent and patent right, patent applications, patents of addition, re-examination, reissues, extensions,

granted supplementary protection certificates, substitutions, confirmations, registrations, revalidations, revisions, additions and the like, of or to said patent and patent right and any and all continuations and continuations-in-part and divisionals.

R. "*Reimbursable Costs*" means the reasonable, direct, out-of-pocket expenses incurred by Avecor in providing referenced assistance.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, the Avecor Pump Assets as a competitively viable, on-going product line to: (1) an Acquirer, in accordance with the Asset Purchase Agreement, dated February 5, 1999; or (2) within ninety (90) days of the date on which this order becomes final and at no minimum price, 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 the divestiture of the Avecor Pump Assets is to ensure their continued use in the research, design, development, manufacture, marketing and sale for use in cardiopulmonary bypass procedures and to remedy the lessening of competition resulting from the Proposed Acquisition as alleged in the Commission's complaint.

B. Respondent's agreement with the Acquirer (hereinafter "Divestiture Agreement") shall include the following provisions, and respondent shall commit to satisfy the following:

1. Respondent shall Contract Manufacture and deliver to the Acquirer or the New Acquirer in a timely manner and under reasonable terms and conditions, a supply of the Avecor Blood Pump System and the Avecor Blood Pump Reservoirs, specified in the Divestiture Agreement at Avecor’s Cost or such other price specified in the Divestiture Agreement with the approval of the Commission for a period not to exceed one (1) year from the date of the Divestiture; provided, however, that the one (1) year period may be extended by the Acquirer or New Acquirer with respect to the Avecor Blood Pump Reservoirs for a period not to exceed one (1) year at prices that are 15% higher than those in effect during the first year of Contract Manufacture. In the event that the Acquirer does not choose to have all of the Avecor Blood Pump System and the Avecor Blood

Pump Reservoirs Contract Manufactured because the Acquirer does not require such supply in order to manufacture or sell the Avecor Blood Pump System in a competitive manner, respondent shall not be required to Contract Manufacture those Avecor Blood Pump Systems and Avecor Blood Pump Reservoirs the Acquirer does not require.

2. After respondent commences delivery of the Avecor Blood Pump System and the Avecor Blood Pump Reservoirs to the Acquirer or the New Acquirer pursuant to the Divestiture Agreement and for the term of the Contract Manufacturing arrangement for the Avecor Blood Pump System and the Avecor Blood Pump Reservoirs, referred to in paragraph II.B. of this order, respondent will produce the Avecor Blood Pump System and the Avecor Blood Pump Reservoirs only for sale to the Acquirer or the New Acquirer; provided, however respondent is in no way limited in its production of the reservoir holder or of hard shell reservoirs and venous reservoir bags with an outlet size other than 5/8 inch.

3. Respondent shall make representations and warranties that the Avecor Blood Pump System and the Avecor Blood Pump Reservoirs supplied pursuant to the Divestiture Agreement meet the FDA approved specifications. Respondent shall agree to indemnify, defend and hold the Acquirer or the New Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses resulting from the failure of the Avecor Blood Pump System and the Avecor Blood Pump Reservoirs supplied to the Acquirer or New Acquirer pursuant to the Divestiture Agreement by respondent to meet FDA specifications. This obligation shall be contingent upon the Acquirer or the New Acquirer giving respondent prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting respondent to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel; provided, however, any such defense and/or settlement shall be consistent with the obligations assumed by respondent under this order. This obligation shall not require respondent to be liable for any negligent act or omission of the Acquirer or the New Acquirer or for any representations and warranties, express or implied, made by the Acquirer or the New Acquirer that exceed the representations and warranties made by respondent to the Acquirer or the New Acquirer.

4. Respondent shall make representations and warranties that respondent will hold harmless and indemnify the Acquirer or New Acquirer for any liabilities or loss of profits resulting from the failure

by respondent to deliver the Avecor Blood Pump System and the Avecor Blood Pump Reservoirs in a timely manner as required by the Divestiture Agreement unless respondent can demonstrate that its failure was entirely beyond the control of respondent and in no part the result of negligence or willful misconduct on respondent's part.

5. During the term of the Contract Manufacturing between respondent and the Acquirer or the New Acquirer, upon request by the Acquirer, New Acquirer or the Interim Trustee, respondent shall make available to the Interim Trustee all records that relate to the manufacture of the Avecor Blood Pump System and the Avecor Blood Pump Reservoirs.

6. Upon reasonable notice and request from the Acquirer or the New Acquirer to respondent, respondent shall use all commercially reasonable efforts to provide in a timely manner: (a) assistance and advice to enable the Acquirer or the New Acquirer (or the Designees of the Acquirer or New Acquirer) to obtain all necessary FDA approvals to manufacture and sell the Avecor Blood Pump System and the Avecor Blood Pump Reservoirs; (b) assistance to the Acquirer or New Acquirer (or the Designee thereof) as is necessary to enable the Acquirer or New Acquirer (or the Designee thereof) to obtain the Commercial Capability to Manufacture the Avecor Blood Pump System and the Associated Reservoirs; and (c) consultation with knowledgeable employees of respondent and training, at the request of and at the facility of the Acquirer's or the New Acquirer's choosing, until the Acquirer or New Acquirer (or the Designee thereof) receives certification from the FDA or abandons its efforts for certification from the FDA and until the Acquirer or the New Acquirer has the Commercial Capability to Manufacture the Avecor Blood Pump System and the Associated Reservoirs or abandons its efforts to obtain the Commercial Capability to Manufacture such products, reasonably sufficient to satisfy the management of the Acquirer or New Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of the Avecor Blood Pump System and the Avecor Blood Pump Reservoirs. Such assistance shall include on-site inspections of the Northland Plant (or inspections of whatever facility to which respondent may have transferred the manufacture of the Avecor Blood Pump System or the Avecor Blood Pump Reservoirs), at the Acquirer's or New Acquirer's request, which is the specified source of supply of the Contract

Manufacturing. Respondent may require reimbursement from the Acquirer or New Acquirer for all its Reimbursable Costs incurred in providing the services required by this paragraph II.B.6.

7. The Divestiture Agreement shall require the Acquirer or the New Acquirer to submit to the Commission within 10 days of signing the Divestiture Agreement a certification attesting to the good faith intention of the Acquirer or the New Acquirer, including a plan by the Acquirer or the New Acquirer, to obtain in an expeditious manner all necessary FDA approvals to manufacture and sell the Avecor Blood Pump System and the Associated Reservoirs and to obtain the Commercial Capability to Manufacture such products.

8. The Divestiture Agreement shall require the Acquirer or the New Acquirer to submit to the Commission and Interim Trustee periodic verified written reports, setting forth in detail the efforts of the Acquirer or the New Acquirer to sell the Avecor Blood Pump System and Avecor Blood Pump Reservoirs obtained pursuant to the Divestiture Agreement and to obtain all FDA approvals necessary to manufacture and sell the Avecor Blood Pump System and the Associated Reservoirs and the efforts of the Acquirer or the New Acquirer to obtain the Commercial Capability to Manufacture such products. The Divestiture Agreement shall require the first such report to be submitted 60 days from the date the Divestiture Agreement is accepted for public comment by the Commission and every 60 days thereafter until all necessary FDA approvals are obtained by the Acquirer or the New Acquirer to manufacture and sell the Avecor Blood Pump System and the Associated Reservoirs and until the Acquirer or the New Acquirer has obtained the Commercial Capability to Manufacture such products. The Divestiture Agreement shall also require the Acquirer or the New Acquirer to report to the Commission and the Interim Trustee within ten (10) days of its ceasing the sale in the United States of the Avecor Blood Pump System and the Avecor Blood Pump Reservoirs obtained pursuant to the Divestiture Agreement for any time period exceeding sixty (60) days or abandoning its efforts to obtain all necessary FDA approvals to manufacture and sell the Avecor Blood Pump System and the Associated Reservoirs or to obtain the Commercial Capability to Manufacture such products. The Acquirer or New Acquirer shall provide the Interim Trustee access to all records and all facilities that relate to its efforts, pursuant to the Divestiture Agreement, to sell or

manufacture the Avecor Blood Pump System and the Associated Reservoirs or obtain FDA approvals.

9. The Divestiture Agreement shall provide that the Commission may terminate the Divestiture Agreement if the Acquirer or the New Acquirer: (a) voluntarily ceases for sixty (60) days or more the sale of, or otherwise fails to pursue good faith efforts to sell, the Avecor Blood Pump System in the United States prior to obtaining all necessary FDA approvals to manufacture and sell the Avecor Blood Pump System and the Associated Reservoirs and to obtaining the Commercial Capability to Manufacture such products; (b) fails to pursue good faith efforts to obtain all necessary FDA approvals to manufacture and sell the Avecor Blood Pump System and the Associated Reservoirs in the United States; or (c) fails to obtain all necessary FDA approvals of its own to manufacture and sell the Avecor Blood Pump System and the Associated Reservoirs and to obtain the Commercial Capability to Manufacture such products within one (1) year from the date the Commission approves the Divestiture Agreement between respondent and the Acquirer or the New Acquirer; provided, however, that the one (1) year period may be extended by the Commission in three (3) month increments for a period not to exceed an additional one (1) year if it appears that such FDA approvals are likely to be obtained or the Acquirer or the New Acquirer is likely to obtain the Commercial Capability to Manufacture such products within such extended time period.

10. The Divestiture Agreement shall provide that if it is terminated, the Avecor Blood Pump Assets shall revert back to Medtronic and the Avecor Pump Assets shall be divested by the Divestiture Trustee to a New Acquirer pursuant to the provisions of paragraph IV. of this order.

C. During the pendency of any patent dispute that: (1) challenges or seeks to render invalid any of the patents divested or licensed pursuant to paragraph II.A.; and (2) could affect the manufacture or sale of the Avecor Blood Pump System and Associated Reservoirs, respondent shall cooperate, at its own expense, in the defense of rights it has transferred to the Acquirer or New Acquirer.

D. By the time the Divestiture Agreement between respondent and the Acquirer or New Acquirer of the Avecor Pump Assets is signed, respondent shall provide the Acquirer or New Acquirer with a complete list of all employees who were then engaged (or were

engaged at any time subsequent to July 12, 1998, the date of the Proposed Acquisition agreement) in the research, development, manufacture or marketing of the Avecor Blood Pump System or the Avecor Blood Pump Reservoirs and shall supplement that list on the date this order is accepted for public comment with the names of any additional employees who then meet these definitions. Such list(s) shall state each such individual's name, position, address, business telephone number, or if no business telephone number exists, a home telephone number, if available and with the consent of the employee, and a description of the duties and work performed by the individual in connection with the Avecor Pump Assets. Respondent shall provide the Acquirer or New Acquirer the opportunity to enter into employment contracts with such individuals provided that such contracts are contingent upon the Commission's approval of the Divestiture Agreement.

E. Within no more than five (5) business days after the respondent and the Acquirer or New Acquirer have signed the Divestiture Agreement and subject to the consent of the employees, respondent shall provide the Acquirer or New Acquirer with an opportunity to inspect the personnel files and other documentation relating to the individuals identified in paragraph II.D. of this order to the extent possible under applicable laws. For a period of two (2) months following the divestiture, respondent shall provide the Acquirer or New Acquirer with a further opportunity to interview such individuals and negotiate employment contracts with them.

F. Respondent shall provide all employees identified in paragraph II.D. of this order with reasonable financial incentives to continue in their employment positions pending divestiture of the Avecor Pump Assets in order that such employees may be in a position to accept employment with the Acquirer or New Acquirer at the time of the divestiture. Such incentives shall include continuation of all employee benefits offered by respondent until the date of the divestiture, and vesting of all pension benefits (as permitted by law) for each such employee who accepts an offer of employment from the Acquirer or New Acquirer within one hundred and eighty (180) days after the Divestiture Agreement is accepted for pubic comment by the Commission. In addition, respondent shall not enforce any confidentiality or non-compete restrictions relating to the Avecor Pump Assets that apply to any employee identified in paragraph II.D. who accepts employment with any Acquirer or New Acquirer, but

respondent may enforce all other rights thereunder relating to any other products or services.

G. For a period of one(1) year commencing on the date of the individual's employment by the Acquirer or New Acquirer, respondent shall not solicit for employment any of the individuals identified in paragraph II.D. of this order who accept employment with the Acquirer or New Acquirer, unless such individual has been separated from employment by the Acquirer or New Acquirer against that individual's wishes.

H. Prior to divestiture, respondent shall not transfer, without consent of the Acquirer or New Acquirer, any of the individuals identified in paragraph II.D. of this order to any other position.

I. Nothing in paragraphs II.D. through II.H. shall apply with respect to Anthony Badolato, William Haworth and Al Seck.

J. While the obligations imposed by paragraphs II., III. or IV. of this order are in effect, respondent shall take such actions as are necessary: (1) to maintain all necessary FDA approvals to manufacture and sell the Avecor Blood Pump System and the Avecor Blood Pump Reservoir; (2) to maintain the viability and marketability of the Avecor Pump Assets consistent with general practices in the medical devices industry, as well as all tangible assets, including respondent's facilities, used to manufacture and sell the Avecor Blood Pump System and the Avecor Blood Pump Reservoir; and (3) to prevent the destruction, removal, wasting, deterioration or impairment of the Avecor Pump Assets and the Northland Plant, except for ordinary wear and tear.

III.

It is further ordered, That:

A. At any time after respondent signs the Agreement Containing Consent Order in this matter, the Commission may appoint an Interim Trustee to ensure that respondent and the Acquirer or New Acquirer expeditiously perform their respective responsibilities as required by this order and the Divestiture Agreement approved by the Commission. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Trustee appointed pursuant to this paragraph III.:

1. The Commission shall select the Interim Trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. The Interim Trustee shall have the power and authority to monitor respondent's compliance with the terms of this order and with the terms of the Divestiture Agreement with the Acquirer or New Acquirer.

3. Within ten (10) days after appointment of the Interim Trustee, respondent shall execute a trust agreement (in the form attached) that, subject to the prior approval of the Commission, confers on the Interim Trustee all the rights and powers necessary to permit the Interim Trustee to monitor respondent's compliance with the terms of this order and with the Divestiture Agreement with the Acquirer or New Acquirer, and to monitor the compliance of the Acquirer or New Acquirer under the Divestiture Agreement.

4. The Interim Trustee shall serve for two (2) years from the date the respondent and the Acquirer have signed the Divestiture Agreement, or in the event that there is a New Acquirer pursuant to the provisions of paragraph IV. of this order, the Interim Trustee shall serve for two (2) years from date the respondent and the New Acquirer have signed the Divestiture Agreement; provided however, that the term shall end earlier if the Interim Trustee has reported that the Acquirer or New Acquirer has received all necessary FDA approvals and has obtained the Commercial Capability to Manufacture the Avecor Blood Pump System and the Associated Reservoirs and the Commission has accepted that report.

5. The Interim Trustee shall have full and complete access to respondent's personnel, books, records, documents, facilities and technical information relating to the research, design, development, manufacture, importation, marketing, distribution and sale of the Avecor Blood Pump System and the Avecor Blood Pump Reservoir, or to any other relevant information, as the Interim Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the manufacture of the Avecor Blood Pump System and the Avecor Blood Pump Reservoir. Respondent shall cooperate with any

reasonable request of the Interim Trustee. Respondent shall take no action to interfere with or impede the Interim Trustee's ability to monitor respondent's compliance with paragraphs II., III. and IV. of this order and the Divestiture Agreement between respondent and the Acquirer or New Acquirer.

6. The Interim Trustee shall serve, without bond or other security, at the expense of respondent, on such reasonable and customary terms and conditions as the Commission may set. The Interim Trustee shall have authority to employ, at the expense of respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Trustee's duties and responsibilities. The Interim Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

7. Respondent shall indemnify the Interim Trustee and hold the Interim Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Interim Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparations for, or defense of, any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Trustee.

8. If the Commission determines that the Interim Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in paragraph III.A.1. of this order.

9. The Commission may on its own initiative or at the request of the Interim Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this order and the Divestiture Agreement with the Acquirer or New Acquirer.

10. The Interim Trustee shall evaluate reports submitted to it by the Acquirer or the New Acquirer with respect to the efforts of the Acquirer or the New Acquirer to obtain all necessary FDA approvals to manufacture and sell the Avecor Blood Pump System and the Associated Reservoirs and to obtain the Commercial Capability to Manufacture such products. The Interim Trustee shall report in writing, concerning compliance by respondent and the Acquirer or

New Acquirer with the provisions of paragraphs II. and III. to the Commission within ten (10) days from the date the Divestiture Agreement is approved and every sixty (60) days thereafter until the Acquirer or New Acquirer obtains, or abandons efforts to obtain, all necessary FDA approvals to manufacture and sell the Avecor Blood Pump System and the Associated Reservoirs and to obtain the Commercial Capability to Manufacture such products. Such reports shall include at least the following:

a. Whether respondent has supplied The Avecor Blood Pump System and the Avecor Blood Pump Reservoir in conformity with the requirements of paragraph II.B. of this order;

b. Whether respondent has given the Interim Trustee access to records pursuant to paragraph II.B.5. of this order;

c. Whether the Acquirer or New Acquirer has given the Interim Trustee reports and access pursuant to paragraph II.B.8. of this order;

d. Whether the Acquirer or New Acquirer is making good faith efforts to sell the Avecor Blood Pump System and the Associated Reservoirs, to obtain all necessary FDA approvals to manufacture and sell the Avecor Blood Pump System and the Associated Reservoirs, and to obtain the Commercial Capability to Manufacture such products and whether these actions meet the projections of the business plan of the Acquirer or New Acquirer as required by paragraphs II.B.7. and II.B.8. of this order;

e. If six (6) months have elapsed from the date of approval of the Divestiture Agreement and the Acquirer or New Acquirer has not obtained all necessary FDA approvals to manufacture and sell the Avecor Blood Pump System the Associated Reservoirs, and the Commercial Capability to Manufacture such products, whether such approvals and such Capability are likely to be obtained if the Commission extends the one (1) year period specified in paragraph II.B.9. of this order; and

f. Whether respondent has maintained the Avecor Pump Assets as required in paragraph II.J. of this order.

B. If the Commission terminates the Divestiture Agreement pursuant to paragraph II.B.9. of this order, the Commission may direct the Divestiture Trustee to seek a New Acquirer, as provided for in paragraph IV. of this order.

IV.

It is further ordered, That:

A. If respondent fails to divest absolutely and in good faith, and with the Commission's prior approval, the Avecor Pump Assets and to comply with the requirements of paragraph II. of this order, or if the Acquirer abandons its efforts or fails to obtain all necessary regulatory approvals and the Commercial Capability to Manufacture the Avecor Blood Pump System and the Associated Reservoirs in the manner set out in paragraph II.B.9., then any executed Divestiture Agreement between respondent and the Acquirer shall be terminated and the Commission may appoint a Divestiture Trustee to divest the Avecor Pump Assets and execute a new Divestiture Agreement that satisfies the requirements of paragraph II. of this order. The Divestiture Trustee may be the same person as the Interim Trustee and will have the authority and responsibility to divest the Avecor Pump Assets absolutely and in good faith, and with the Commission's prior approval. Neither the decision of the Commission to appoint the Divestiture Trustee, nor the decision of the Commission not to appoint the Divestiture Trustee, to divest any of the assets under this paragraph IV.A. 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 the respondent to comply with this order.

B. If a Divestiture Trustee is appointed by the Commission or a court pursuant to paragraph IV.A. to divest the Avecor Pump Assets to a New Acquirer, respondent shall consent to the following terms and conditions regarding the Divestiture Trustee’s powers, duties, authority, and responsibilities:

1. The Commission shall select the Divestiture Trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed Divestiture Trustee, respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Avecor Pump Assets to a New Acquirer pursuant to the terms of this order and to enter into a Divestiture Agreement with the New Acquirer pursuant to the terms of this order, which Divestiture Agreement shall be subject to the prior approval of the Commission.

3. Within ten (10) days after appointment of the Divestiture Trustee, respondent shall execute a (or amend the existing) trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to divest the Avecor Pump Assets to a New Acquirer and to enter into a Divestiture Agreement with the New Acquirer.

4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph IV.B.3. of this order to divest the Avecor Pump Assets and to enter into a Divestiture Agreement with the New Acquirer that satisfies the requirements of paragraph II. of this order. If, however, at the end of the applicable twelve (12) month period, the Divestiture Trustee has submitted to the Commission a plan of divestiture or believes that divestiture can be achieved within a reasonable time, such divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend such divestiture period only two (2) times.

5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities of respondent related to the manufacture, distribution, or sale of the Avecor Pump Assets or to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee’s accomplishment of his or her responsibilities.

6. The Divestiture Trustee shall use reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price and the Divestiture Trustee’s obligation to expeditiously accomplish the

remedial purpose of the order; to assure that respondent enters into a Divestiture Agreement that complies with the provisions of paragraph II.B.; to assure that respondent complies with the remaining provisions of paragraph IV. of this order; and to assure that the New Acquirer obtains all necessary FDA approvals to manufacture and sell the Avecor Blood Pump System and the Associated Reservoirs and the Commercial Capability to Manufacture such products. The divestiture shall be made to, and the Divestiture Agreement executed with, the New Acquirer in the manner set forth in paragraph II. of this order; provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one (1) such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by respondent from among those approved by the Commission.

7. The Divestiture Trustee shall serve, without bond or other security, at the expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture 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 respondent. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Divestiture Trustee's locating a New Acquirer and assuring compliance with this order.

8. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross

negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

9. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in paragraph IV. of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to comply with the terms of this order.

11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Avecor Pump Assets.

12. The Divestiture Trustee shall report in writing to respondent and the Commission every two (2) months concerning his or her efforts to divest the relevant assets and respondent's compliance with the terms of this order.

V.

It is further ordered, That:

A. Within sixty (60) days of the date this order becomes final and every ninety (90) days thereafter until respondent has fully complied with the provisions of paragraphs II. through IV. of this order, respondent 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, and has complied with these paragraphs of this order; provided, however, that respondent shall not be obligated to continue to submit such reports regarding its compliance with its obligations under paragraphs II.C, II.F. (the last sentence only), II.G. and IV.B.8. of this order once respondent has complied with the other provisions of paragraphs II. through IV. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with these paragraphs of this order, including a description of all substantive contacts or negotiations for accomplishing the divestitures and entering into the Divestiture Agreements required by this order, including the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the Divestiture Agreements

required by paragraph II. of this order, subject to any legally recognized privilege.

B. One (1) year from the date this order becomes final and annually thereafter until respondent has complied with all of the terms of this order, and at such other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order.

VI.

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

A. Access, during office hours and in the presence of counsel, to any facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent, relating to any matters contained in this consent order; and

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

VII.

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

VIII.

It is further ordered, That this order shall terminate on June 3, 2009.

TRUST AGREEMENT

TRUST AGREEMENT

TRUST AGREEMENT

TRUST AGREEMENT

TRUST AGREEMENT

TRUST AGREEMENT

ATTACHMENT 1

ATTACHMENT 1

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IN THE MATTER OF

ZENECA GROUP PLC

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-3880. Complaint, June 7, 1999--Decision, June 7, 1999

This consent order, among other things, requires Zeneca, a corporation engaged in the research and development of long-acting local anesthetics, to transfer and surrender certain assets in accordance with the Chiroscience/Zeneca Agreement, and to divest the Chiroscience shares.

Participants

For the Commission: *Steven K. Bernstein, David Inglefield, Ann Malester, Joseph Eckhaus, Elizabeth Piotrowski, William Baer, J. Elizabeth Callison,* and *Christopher Garmon*.

For the respondent: *Ronan Harty, Davis, Polk & Wardwell*, New York, N.Y.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Zeneca Group PLC ("Zeneca"), a corporation subject to the jurisdiction of the Commission, has proposed to merge with Astra AB ("Astra"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. "*Long-Acting Local Anesthetics*" means pharmaceutical products used to relieve pain during the course of surgical or other medical procedures by blocking pain impulses from reaching the central nervous system. Long-Acting Local Anesthetics have an effective duration of up to six to seven hours, and allow patients to remain awake and conscious throughout the medical procedure.

2. "*Zeneca/Chiroscience License Agreement*" means the "Patent and Know-How Licence relating to Levobupivacaine and Trademark Assignment relating to Chirocaine," dated March 30, 1998, between

Chiroscience Group plc and Darwin Discovery Limited and Zeneca Limited; the "Share Subscription Agreement," dated March 30, 1998, between Chiroscience Group plc and Zeneca Limited; and the "Supply Agreement," dated March 30, 1998, between Chiroscience R&D Limited and Zeneca Limited.

3. "*Chiroscience*" means Chiroscience Group plc, Darwin Discovery Limited and Chiroscience R&D Limited.

II. RESPONDENT

4. Respondent Zeneca is a corporation organized, existing and doing business under and by virtue of the laws of England, with its office and principal place of business located at 15 Stanhope Gate, London W1Y 6LN, England.

5. Respondent Zeneca, through the Zeneca/Chiroscience License Agreement, is engaged in the research and development of Long-Acting Local Anesthetics.

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

III. THE ACQUIRED COMPANY

7. Astra is a corporation organized, existing and doing business under and by virtue of the laws of Sweden, with its office and principal place of business located at S-151 85 Södertälje, Sweden.

8. Astra is engaged in, among other things, the research, development, manufacture and sale of Long-Acting Local Anesthetics.

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

IV. THE MERGER

10. On or about December 9, 1998, Zeneca and Astra entered into a Merger Agreement and Plan of Merger, whereby Zeneca agreed to acquire 100 percent of all issued shares of Astra stock for

approximately $30.5 billion ("Merger"). Upon completion of the Merger, Zeneca will be renamed AstraZeneca.

V. THE RELEVANT MARKET

11. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the Merger is the manufacture and sale of Long-Acting Local Anesthetics.

12. For purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the Merger in the relevant line of commerce.

VI. STRUCTURE OF THE MARKET

13. The market for the manufacture and sale of Long-Acting Local Anesthetics is highly concentrated as measured by the Herfindahl-Hirschman Index ("HHI"). The pre-merger HHI is 6,682 points. Astra is the leading supplier of Long-Acting Local Anesthetics in the United States and worldwide, and is one of only two companies with Food and Drug Administration ("FDA") approval for the manufacture and sale of Long-Acting Local Anesthetics in the United States. Abbott Laboratories is the only other company with FDA approval for the manufacture and sale of Long-Acting Local Anesthetics in the United States.

14. Zeneca does not currently compete in the relevant market for the manufacture and sale of Long-Acting Local Anesthetics. However, through the Zeneca/Chiroscience License Agreement, Zeneca is engaged in the research and development of a new Long-Acting Local Anesthetic, which it plans to begin marketing and selling in the United States in 1999.

15. Astra is an actual competitor in the relevant market for the manufacture and sale of Long-Acting Local Anesthetics. Zeneca, through the Zeneca/Chiroscience License Agreement, is an actual potential competitor in the relevant market for the manufacture and sale of Long-Acting Local Anesthetics.

VII. BARRIERS TO ENTRY

16. Entry into the relevant market, other than the expected introduction of a new Long-Acting Local Anesthetic product by Zeneca and Chiroscience, would not be timely, likely, or sufficient to deter or counteract the adverse competitive effects described in paragraph 17 because of, among other things, the difficulty of

researching and developing a new product, obtaining FDA approval and gaining customer acceptance.

VIII. EFFECTS OF THE MERGER

17. The effects of the Merger, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) By eliminating actual potential competition between Zeneca and Astra in the relevant market for the manufacture and sale of Long-Acting Local Anesthetics;

(b) By increasing the likelihood that customers of Long-Acting Local Anesthetics would be forced to pay higher prices, or by reducing the likelihood that customers of Long-Acting Local Anesthetics would benefit from price reductions; and

(c) By reducing innovation in the relevant market for the manufacture and sale of Long-Acting Local Anesthetics.

IX. VIOLATIONS CHARGED

18. The Merger agreement described in paragraph 10 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

19. The Merger described in paragraph 10, 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 FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed merger of Zeneca Group PLC ("Zeneca") and Astra AB ("Astra"), and Zeneca, hereinafter sometimes referred to as "respondent," having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true 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 agreement containing consent order and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Zeneca is a corporation organized, existing, and doing business under and by virtue of the laws of England, with its office and principal place of business located at 15 Stanhope Gate, London W1Y 6LN, England.

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

ORDER

I.

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

A. "*Zeneca*" means Zeneca Group PLC, its directors, officers, employees, agents, representatives, successors (including but not limited to AstraZeneca) and assigns; its subsidiaries, divisions, groups and affiliates controlled by Zeneca Group PLC (including but not limited to Zeneca Limited) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Following the Merger, Zeneca includes Astra AB, its directors, officers, employees, agents, representatives, successors, and assigns;

its subsidiaries, divisions, groups and affiliates controlled by Astra AB, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*Astra*" means Astra AB, a corporation organized, existing and doing business under and by virtue of the laws of Sweden, with its office and principal place of business located at S151 85 Södertälje, Sweden.

C. "*Respondent*" means Zeneca.

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

E. "*Chiroscience*" means Chiroscience Group plc, a corporation organized, existing and doing business under and by virtue of the laws of England with its office and principal place of business located at 283 Cambridge Science Park, Milton Road, Cambridge CB4 4WE, England; Darwin Discovery Limited, a corporation organized, existing and doing business under and by virtue of the laws of England with its office and principal place of business located at 283 Cambridge Science Park, Milton Road, Cambridge CB4 4WE, England; and Chiroscience R&D Limited, a corporation organized, existing and doing business under and by virtue of the laws of England with its office and principal place of business located at 283 Cambridge Science Park, Milton Road, Cambridge CB4 4WE, England.

F. "*Chirocaine™ License*" means the "Patent and Know-How Licence Relating to Levobupivacaine and Trade Mark Assignment Relating to 'Chirocaine,'" dated March 30, 1998, between Chiroscience Group plc and Darwin Discovery Limited and Zeneca Limited.

G. "*Chiroscience/Zeneca Agreement*" means the "Surrender and Termination of Patent and Know-How Licence Relating to Levobupivacaine and Trade Mark Assignment Relating to 'Chirocaine,'" dated March 12, 1999, between Chiroscience Group plc, Darwin Discovery Limited, Zeneca Group PLC, and Zeneca Limited; the Agreement Amending Share Subscription Agreement; and the "Agreement Terminating Supply Agreement of 30 March 1998," dated March 12, 1999, between Chiroscience R&D Limited and Zeneca Limited.

H. "*Agreement Amending Share Subscription Agreement*" means the "Agreement Amending Share Subscription Agreement of 30 March 1998," dated March 12, 1999 between Chiroscience Group plc and Zeneca Limited.

I. "*Chiroscience/Zeneca Agreement End Date*" means the "End Date" as defined in clause 11.3 of the Chiroscience/Zeneca Agreement.

J. "*FDA*" means the United States Food and Drug Administration.

K. "*Chirocaine*™" means the chemical compound (S)-1-butyl-(N)-(2,6-dimethylphenyl)-2-piperidinecarboxamide known as levo-bupivacaine and having CAS registration number 27262-47-1 in all its forms including base and hydrochloride salt.

L. "*Chirocaine*™ *Product*" means Chirocaine™ and any "Licensed Products" as defined in the Chiroscience/Zeneca Agreement.

M. "*Chirocaine*™ *Improvements*" means any "Improvement" as defined in the Chiroscience/Zeneca Agreement.

N. "*Chirocaine*™ *Information*" means all "Chirocaine Know-how" as defined in the Chiroscience/Zeneca Agreement.

O. "*Chirocaine*™ *Intellectual Property Rights*" means the "Intellectual Property Rights" as defined in the Chiroscience/Zeneca Agreement.

P. "*Chirocaine*™ *Assets*" means:

1. The Chirocaine™ Product;
2. The Chirocaine™ Improvements;
3. The Chirocaine™ Information;
4. The Chirocaine™ Intellectual Property Rights; and
5. The Chirocaine™ License.

Q. "*Chiroscience Shares*" means all of the stock, share capital, equity or other interest of Chiroscience owned by respondent.

R. "*Merger*" means the acquisition by Zeneca of all or substantially all of the share capital of Astra.

II.

It is further ordered, That:

A. Within ten (10) business days after the date the Commission accepts this agreement containing consent order for public comment, respondent shall transfer and surrender, absolutely and in good faith, all the Chirocaine™ Assets, in accordance with the Chiroscience/Zeneca Agreement.

B. Within four (4) months after the expiration of the Agreement Amending Share Subscription Agreement, respondent shall divest, absolutely and in good faith, the Chiroscience Shares. Pending such divestiture, respondent shall not, directly or indirectly: (i) exercise

dominion or control over, or otherwise seek to influence, the management, direction or supervision of the business of Chiroscience; (ii) seek or obtain representation on the Board of Directors of Chiroscience; (iii) exercise any voting rights attached to the Chiroscience Shares; (iv) seek or obtain access to any confidential or proprietary information of Chiroscience; or (v) take any action or omit to take any action in a manner that would be incompatible with the status of respondent as a passive investor in Chiroscience.

C. Pending the transfer and surrender of the Chirocaine™ Assets, respondent shall take such actions as are necessary to maintain the viability and marketability of the Chirocaine™ Assets, and to prevent the destruction, deterioration, or impairment of any of the Chirocaine™ Assets. Respondent shall also take such actions as are necessary to maintain the viability and marketability of the Chirocaine™ Assets, and to prevent the destruction, deterioration, or impairment of any of the Chirocaine™ Assets, in accordance with the Chiroscience/Zeneca Agreement.

D. Respondent shall comply with all terms of the Chiroscience/Zeneca Agreement, and such agreement is incorporated by reference into this order and made part hereof as Confidential Appendix I. Any failure by respondent to comply with the requirements of such agreement may constitute a failure to comply with this order.

E. The purpose of this order is to ensure the continued use of the Chirocaine™ Assets in the same business in which the Chirocaine™ Assets are engaged at the time of the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

III.

It is further ordered, That:

A. At any time after respondent signs the agreement containing consent order in this matter, the Commission may appoint an Interim Trustee to assure that respondent expeditiously performs its responsibilities as required by this order and the Chiroscience/Zeneca Agreement.

B. If an Interim Trustee is appointed pursuant to paragraph III.A. of this order, respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Trustee:

1. The Commission shall select the Interim Trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. The Interim Trustee shall have the power and authority to monitor respondent's compliance with the terms of this order and with the terms of the Chiroscience/Zeneca Agreement, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Trustee in a manner consistent with the purposes of this order and in consultation with the Commission.

3. Within ten (10) days after appointment of the Interim Trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Interim Trustee all the rights and powers necessary to permit the Interim Trustee to monitor respondent's compliance with the terms of this order and with the terms of the Chiroscience/Zeneca Agreement in a manner consistent with the purposes of this order.

4. The Interim Trustee shall serve until the Chiroscience/Zeneca Agreement End Date; provided, however, the Commission may extend this period as may be necessary or appropriate to accomplish the purposes of this order.

5. The Interim Trustee shall have full and complete access to respondent's personnel, books, records, documents, facilities and technical information relating to the research, development, manufacture, importation, distribution and sale of Chirocaine™ and any Chirocaine™ Product, or to any other relevant information, as the Interim Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the manufacture of Chirocaine™ or any Chirocaine™ Product and all materials and information relating to FDA and other government or regulatory approvals. Respondent shall cooperate with any reasonable request of the Interim Trustee. Respondent shall take no action to interfere with or impede the Interim Trustee’s ability to monitor respondent's compliance with this order and the Chiroscience/Zeneca Agreement.

6. The Interim Trustee shall serve, without bond or other security, at the expense of respondent, on such reasonable and customary terms

and conditions as the Commission may set. The Commission may, among other things, require the Interim Trustee to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with performance of the Interim Trustee's duties. The Interim Trustee shall have authority to employ, at the expense of respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Trustee's duties and responsibilities. The Interim Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

7. Respondent shall indemnify the Interim Trustee and hold the Interim Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Interim Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparations for, or defense of, any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Trustee.

8. If the Commission determines that the Interim Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Trustee in the same manner as provided in paragraph III.A.1. of this order.

9. The Commission may on its own initiative or at the request of the Interim Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this order and the Chiroscience/Zeneca Agreement.

10. The Interim Trustee shall obtain and evaluate reports submitted to it by Chiroscience with respect to the performance of respondent's obligations under the Chiroscience/Zeneca Agreement. The Interim Trustee shall report in writing to the Commission every two (2) months from the date the Interim Trustee is appointed concerning compliance by respondent and Chiroscience with the provisions of this order and the Chiroscience/Zeneca Agreement until the Chiroscience/Zeneca Agreement End Date.

IV.

It is further ordered, That within thirty (30) days after the date this order becomes final and every ninety (90) days thereafter until

respondent has fully complied with the provisions of this order, respondent 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, and has complied with this order. Respondent shall include in such compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with the order.

V.

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

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

B. Upon five days' notice to any respondent and without restraint or interference from it, to interview officers, directors, employees, agents or independent contractors of respondent, who may have counsel present, regarding such matters.

[Confidential Appendix I Redacted from Public Version of Decision & Order]

IN THE MATTER OF

DESIGN ZONE, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF TEXTILE FIBER PRODUCTS IDENTIFICATION ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3881. Complaint, June 10, 1999--Decision, June 10, 1999

This consent order, among other things, prohibits Design Zone, Inc., a California-based manufacturer and distributor of t-shirts and other textile wearing apparel, from misrepresenting the extent to which any t-shirt or other textile wearing apparel is made in the United States or any other country.

Participants

For the Commission: *Robert E. Easton, Sr., Mary Engle,* and *Elaine Kolish.*

For the respondent: *Donald Stein, Manatt, Phelps & Phillips*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Design Zone, Inc., a corporation ("respondent"), has violated the provisions of the Textile Fiber Products Identification Act and of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Design Zone, Inc. is a California corporation with its principal office or place of business at 337 South Anderson Street, Los Angeles, California.

2. Respondent has manufactured, assembled, labeled, and offered for sale, sold, and distributed t-shirts and other textile wearing apparel that are sold through retailers to consumers. Such t-shirts and other textile wearing apparel are textile fiber products as the term "textile fiber product" is defined in the Textile Fiber Products Identification Act, 15 U.S.C. 70.

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

4. Respondent has sold and distributed, or has caused to be sold and distributed, certain t-shirts manufactured in China. In at least one instance, respondent removed the foreign country-of-origin labels

from these t-shirts and affixed labels containing the statement "Made in USA," or affixed labels to these t-shirts containing the statement "Made in USA" without removing the foreign country-of-origin labels.

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that respondent's t-shirts referred to in paragraph four were made in the United States.

6. In truth and in fact, the t-shirts referred to in paragraph four were manufactured in a foreign country with foreign component parts. Therefore, the representation set forth in paragraph five was, and is, false or misleading.

7. The acts and practices of respondent as alleged in this complaint in misrepresenting foreign-manufactured t-shirts as made in the United States constitute a violation of the Textile Fiber Products Identification Act and the Commission's Rules and Regulations promulgated thereunder, and constitute unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft 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 violations of the Federal Trade Commission Act and the Textile Fiber Products Identification Act; and the Commission's Rules adopted thereunder; 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 draft 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 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, 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 Design Zone, Inc. is a California corporation with its principal office or place of business at 337 South Anderson Street, Los Angeles, California.

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

ORDER

I.

It is ordered, That respondent Design Zone, 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 manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any t-shirt or other item of textile wearing apparel in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall not violate any provision of the Textile Fiber Products Identification Act (15 U.S.C. 70) and the Commission's Rules adopted thereunder (16 CFR Part 303), and shall not misrepresent in any manner, directly or by implication, the extent to which any such t-shirt or other item of textile wearing apparel is made in the United States or any other country.

II.

It is further ordered, That respondent Design Zone, Inc. and its successors and assigns shall, for five (5) years after the date of issuance of this order, maintain and upon request make available to the Federal Trade Commission business records demonstrating its compliance with the terms and provisions of this order, including but

not limited to records demonstrating the country of origin of any textile wearing apparel subject to Part I of this order.

III.

It is further ordered, That respondent Design Zone, Inc. and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

It is further ordered, That respondent Design Zone, Inc. and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learn less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent Design Zone, Inc. and its successors and assigns shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade 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.

VI.

This order will terminate on June 10, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

AMERICAN COLLEGE FOR ADVANCEMENT IN MEDICINE

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

Docket C-3882. Complaint, June 22, 1999--Decision, June 22, 1999

This consent order, among other things, prohibits the American College for Advancement in Medicine, a California-based association of physicians, from representing, in advertising, promotion, sale, or distribution, that chelation therapy is effective treatment for atherosclerosis without possessing and relying upon competent and reliable scientific evidence to support the representation. In addition, the consent order prohibits the respondent from making any representation regarding the efficacy of chelation therapy for any disease of the human circulatory system unless substantiated by competent and reliable scientific evidence.

Participants

For the Commission: *Walter Gross, Dean Graybill* and *Russell Porter*.

For the respondent: *Elizabeth Guarino* and *William MacLeod, Collier, Shannon, Rill & Scott,* Washington, D.C. and *Robert Skitol, Drinker, Biddle & Reath,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the American College for Advancement in Medicine ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent American College for Advancement in Medicine (ACAM) is a California corporation with its principal office or place of business at 23121 Verdugo Drive, Suite 204, Laguna Hills, California. ACAM is a nonprofit professional association comprised principally of physicians who administer traditional and complementary/ alternative medical therapies including chelation therapy.

2. Respondent has disseminated to the public brochures and other written materials that constitute advertising under the Federal Trade Commission Act. These materials contain statements about a treatment modality identified as "chelation therapy," which involves the use of "drugs," within the meaning of Sections 12 and 15 of the

Federal Trade Commission Act. Chelation therapy consists of the intravenous injection into the body of a substance which, after bonding with metals and minerals in the bloodstream, is expelled through the body's excretory functions. The principal bonding substance called for in the ACAM treatment protocols, and used generally by practitioners is a synthetic amino acid called *ethylene diamine tetraacetic acid* (EDTA). Respondent distributes its brochures and other written materials to its members who disseminate the material to consumers. Additionally, respondent disseminates its material to consumers through an Internet Web Page and to consumers who contacted respondent through its toll-free telephone number.

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

4. Respondent has disseminated or has caused to be disseminated advertising for chelation therapy including but not necessarily limited to the attached Exhibits A (an Internet Web Page) and B (a pamphlet), which contain identical text. These advertisements contain the following statements, among others:

A. "Chelation therapy is a safe, effective and relatively inexpensive treatment to restore blood flow in victims of atherosclerosis without surgery."

B. "EDTA improves calcium and cholesterol metabolism by eliminating metallic catalysts which cause damage to cell membranes by producing 'oxygen free radicals.' Free radical pathology is now believed by many scientists to be an important contributing cause of atherosclerosis, cancer, diabetes and other diseases of aging. EDTA helps to prevent the production of harmful free radicals."

C. "Chelation therapy is used to reverse symptoms of hardening of the arteries, also known as atherosclerosis or arteriosclerosis."

D. "Every single study of the use of chelation therapy for atherosclerosis which has ever been published, without exception, has described an improvement in blood flow and symptoms."

E. "Chelation therapy promotes health by correcting the major underlying cause of arterial blockage. Damaging oxygen free radicals are increased by the presence of metallic elements and act as a chronic irritant to blood vessel walls and cell membranes. EDTA removes those metallic irritants, allowing leaky and damaged cell walls to heal. Plaques smooth over and shrink, allowing more blood to pass. Arterial walls become softer and more pliable, allowing easier expansion. Scientific studies have proven that blood flow increases after chelation therapy."

F. "Chelation therapy is an office treatment which improves blood flow throughout the entire vascular system ...."

G. "The reader is advised that varying and even conflicting views are held by other segments of the medical profession .... This information represents the current opinion of independent physician consultants to ACAM at the time of publication."

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that EDTA chelation therapy is an effective treatment for atherosclerosis.

6. Through the means described in paragraph four, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representation set forth in paragraph five, at the time the representation was made.

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation set forth in paragraph five, at the time the representation was made. Therefore, the representation set forth in paragraph six was, and is, false or misleading.

8. Through the means described in paragraph four, respondent has represented, expressly or by implication, that scientific studies prove that EDTA chelation therapy is an effective treatment for atherosclerosis.

9. In truth and in fact, scientific studies do not prove that EDTA chelation therapy is an effective treatment for atherosclerosis. Therefore, the representation set forth paragraph eight was, and is, false or misleading.

10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT A

EXHIBIT A

EXHIBIT B

EXHIBIT B

EXHIBIT B

EXHIBIT B

EXHIBIT B

EXHIBIT B

EXHIBIT B

EXHIBIT B

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, 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 of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 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 comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent American College for Advancement in Medicine is a California corporation with its principal office or place of business at 23121 Verdugo Drive, Suite 204, Laguna Hills, California.

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

ORDER

DEFINITIONS

For the purposes of this order:

1. Unless otherwise specified, "*respondent*" shall mean American College for Advancement in Medicine, its agents, representatives and employees.

2. "*EDTA*" shall mean the drug, *ethylene diamine tetraacetic acid*.

3. "*Chelation therapy*" shall mean the introduction into the human body of any agent for the purpose of bonding with and removing any compound or chemical element from the body. "*EDTA chelation therapy*" means that EDTA is the bonding agent used.

4. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

5. "*In or affecting commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution, in or affecting commerce, of chelation therapy, shall not make any representation, in any manner, expressly or by implication:

A. That EDTA chelation therapy is an effective treatment for atherosclerosis, or

B. About the effectiveness or comparative effectiveness of chelation therapy for treating or preventing any disease or condition related to the human circulatory system,

unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution, in or affecting commerce, of chelation therapy, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study, or research.

III.

Nothing in this order shall prohibit respondent from making any representation for any drug that is specifically permitted in labeling for such drug under any tentative final or final standard promulgated by the U. S. Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

IV.

It is further ordered, That respondent and its successors and assigns, shall mail, or otherwise deliver, a copy of this order and an exact copy of the letter attached hereto as Attachment A to each member of respondent within thirty (30) days after the date of service of this order.

V.

It is further ordered, That respondent and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

It is further ordered, That respondent and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

It is further ordered, That respondent and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VIII.

It is further ordered, That respondent and its successors and assigns shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

IX.

This order will terminate on June 22, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

ATTACHMENT A

By First Class Mail, Postage Prepaid and Address Correction Requested

[To be printed on American College for Advancement in Medicine letterhead]

[date]

Dear [recipient]:

ACAM has agreed to settle a civil dispute with the Federal Trade Commission (FTC) involving information we disseminated to the public about chelation therapy. A copy of the complaint and order is enclosed. The FTC alleged that we did not have a reasonable basis for certain statements we made concerning the efficacy of chelation therapy as a treatment for atherosclerosis. The FTC also alleged that we misrepresented that chelation therapy had been proven to be effective in treating atherosclerosis. The complaint and consent agreement in this matter address issues raised by certain statements that we made in promotional brochures and other materials that were distributed to the public. The Commission's action should not be construed to regulate how doctors use or prescribe drugs in the course of treating their patients or other choice of therapy issues.

Although we do not admit that the FTC's allegations are true, we have agreed not to make unsubstantiated claims, not to misrepresent the implications of any tests or studies, and to send this letter as part of our settlement with FTC. Individual members of ACAM, when acting in their individual capacities, are not parties to this settlement. Nevertheless, the FTC has advised that if you disseminate advertising or promotional materials that contain unsubstantiated claims for the efficacy of chelation therapy in treating diseases of the human circulatory system, or that make misrepresentations about any tests or studies, you could be subject to investigation and possible enforcement action by the FTC.

Sincerely yours,

Re: Petition of Associates First Capital Corporation to Quash or Limit Civil Investigative Demands and to Establish Order Safeguarding Handling of Confidential Information –- File Nos. 982-3506 and P944809

January 12, 1999

Dear Messrs. Sandler and Klubes and Ms. Steptoe:

This letter advises you of the Federal Trade Commission's ruling on the above-referenced Petition to Quash or Limit and for a protective Order ("Petition"). The decision was made by Commissioner Sheila F. Anthony, acting as the Commission's delegate. *See* 16 CFR 2.7(d)(4).

The Petition is denied for the reasons stated below. In light of this ruling, the new deadline for Associates First Capital Corporation ("Petitioner" or "Associates") to respond and otherwise comply with the Civil Investigative Demands ("CID") for written interrogatories and documentary material is Tuesday, January 26, 1999. The CIDs for oral testimony are rescheduled as follows: Michael J. Gade - February 8, 1999; Gil Schielbalhut - February 9, 1999; Gavin P. Goss - February 10, 1999; Owen P. Davis, February 11, 1999; Ken Mize - February 16, 1999; H.J. Fullen - February 18, 1999; Timothy W. Bellows - February 22, 1999; Stephanie C. Rumph - February 23, 1999; Mary Kinsey - February 24, 1999. Each hearing will begin at 9:30 a.m. and take place at the Commission's Dallas Regional Office, as previously scheduled.

Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.[1] Filing of a request for such a review does not stay or otherwise affect the new return date – January 26, 1999 – unless the Commission rules otherwise. *See* 16 CFR 2.7(f) (1998).

[1] This letter is being delivered by facsimile transmission and by express U.S. mail service. The facsimile is provided only as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date on which you receive the express mail copy of this letter.

I. BACKGROUND

Petitioner is a diversified financial services company and is one of the nation's largest subprime lenders.[2] Subprime lending is the extension of credit to higher-risk borrowers at higher rates and fess. Petitioner's domestic consumer operations, *i.e.*, the subject of the Commission's current investigation, are organized into eight geographic regions that include currently about 1,350 branch offices, with a loan portfolio of more than 3 million loans valued in excess of $26 billion. Petitioner's Memorandum of Points and Authorities in Support of Petition to Quash or Limit Civil Investigative Demands and for an Order Establishing Safeguards for the Handling of Confidential Information ("Pet. Mem.") at 6-7. The Commission's investigation focuses on a variety of practices, including possible violations of the Equal Credit Opportunity Act ("ECOA") (codified as amended at 15 U.S.C. 1681 *et seq.* (1998)) and its implementing rule, Regulation B, 12 CFR 202 *et seq.* (1998) ("Reg. B"); the Truth-in-Lending Act ("TILA") (codified as amended at 15 U.S.C. 1601 *et seq.* (1998)), as amended by the Home Ownership and Equity Protection Act of 1994 ("HOEPA") and its implementing rule, Regulation Z, 12 CFR 226 (1998) ("Reg. Z"); and Section 5 of the Federal Trade Commission Act of 1914 ("FTC") (codified as amended at 15 U.S.C. 45 (1997)); or other laws enforced by the Federal Trade Commission.

On October 6, 1998, after months of attempting to obtain information necessary to its investigation through the voluntary cooperation of Petitioner, the Commission issued eleven CIDs to Petitioner pursuant to two omnibus compulsory process resolutions (File Nos. 982 3506 and P944809). The two resolutions collectively authorize the use of compulsory process to determine whether subprime lenders or others may be violating the TILA, including the HOEPA, the ECOA, or Section 5 of the FTC Act, as well as the relevant implementing regulations; and to determine whether Commission action to obtain consumer redress would be in the public interest.

The eleven issued CIDs include one for documents, one for written interrogatories, and nine for oral testimony. The CIDs seek information related to Petitioner's corporate structure, affiliates,

[2] *See* Heather Timmons, *Finance Firm Mergers Heat Up As Associates Nabs Avco for $3.9B*, AMER. BANKER, Aug. 12, 1998, at 1 (noting Petitioner's "long held position as the largest consumer finance company in the United States").

business plans, and annual reports; loan products; computer systems; employee training, performance, evaluation, and compensation; audits; marketing; pricing policies; appraisals; underwriting criteria; payment procedures; insurance sales; record retention and destruction policies; and consumer complaints, lawsuits, and internal investigations. They also seek mortgage and other consumer loan data, as well as the identity of current and former employees.

On November 4, 1998, Petitioner's counsel met Commission staff to raise concerns about the compliance burden of several CID specifications. Following the meeting, pursuant to 16 CFR 2.7(c), the Associate Director for the Commission's Division of Financial Practices ("DFP") agreed by letter to modify the CIDs in an effort to reduce Petitioner's production burden. The CIDs were modified to exclude a national bank and its credit card operations; to narrow several specifications to cover only branches within certain designated geographic areas and the chains of command within those areas, thereby reducing the search burden from 1,350 branches to only 30 branches; to exclude open-end loans and two subsidiary companies from the universe of loans to be searched for certain loan data; and, contingent upon Petitioner fully complying with the CIDs, to end the continuing obligation to produce newly-generated documents. On November 10, 1998, Petitioner filed the Petition that is the subject of this opinion.

II. ANALYSIS

A. Scope of Commission's Legal Authority to Conduct Investigations

The Federal Trade Commission Act grants the Commission extensive investigatory powers. *See* Sections 6,9,10, and 20 of the FTC Act (codified as amended at 15. U.S.C. 46, 49, 50, and 57b-1). These powers are essential to allow the Commission to carry out its broad mandate. As the Supreme Court explained almost fifty years ago, the Commission in its investigatory power is analogous to "the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

Among the Commission's investigatory powers is the ability to use CIDs to gather information and the concomitant right to enforce those demands in the federal district courts. *See* 15 U.S.C. 57b-1. The federal courts apply a deferential standard in deciding whether to enforce compulsory process issued by the Commission. *See FTC v. Invention Submission Corp.*,965 F.2d 1086, 1089 (D.C. Cir. 1992), *rehearing en banc denied* (1992), *cert. denied*, 507 U.S. 910 (1993) (quoting *FTC v. Anderson*, 631 F.2d 741, 746 (D.C. Cir. 1979) (quoting *FTC v. Lonning*, 539 F.2d 202, 210 n.14 (D.C. Cir. 1976)). Generally, the federal court ask only whether: 1) the information sought is within the Commission's authority, *see U.S. v. Morton Salt Co.*, 338 U.S. at 643; 2) the information sought is reasonably relevant to the investigation, *see Invention Submission Corp.*, 965 F.2d at 1089 (quoting *FTC v. Texaco, Inc.*, 555 F.2d 862, 872, 873n.23 (D.C. Cir.) (quoting *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)), *cert. denied*, burdensome, *see e.g., Invention Submission Corp.*, 965 F.2d at 1090.

B. Statutory Compliance of Civil Investigative Demands

Petitioner argues that the CIDs do not comport with legal requirements because they do not identify the nature of the conduct under investigation. *See* Petition at 1, 3; Pet. Mem. at 1 (citing 15 U.S.C. 57b-1(c)(2) (1997),[3] 16 CFR 2.6 (1998)); *id.* at 2, 35 (quoting S. Rep. No. 96-500, at 23 (1979));[4] *id.* at 3, 36 (quoting now Chairman Pitofsky) (citing S. Rep. No. 96-500, at 23-24);[5] *id*. at

[3] Petitioner cites to 15 U.S.C. 45(c)(2) as statutory authority requiring CIDs to identify the nature of conduct under investigation. Pet. Mem. at 1. No such section exists. Corrected in the text above, the properly cited authority provides, "Each [CID] ... shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of the law applicable to such violation." 15 U.S.C. 57b-1(c)(2) (1997).

[4] Petitioner cites to non-existent pages in S. Rep. No. 96-500, which numbers to page 64. The correct citation for quoted material excerpted in Pet. Mem. is found in the text above. The complete language of the material excerpted from the cited Report of the Senate Committee on Commerce, Science, and Transportation on S. 1991, the Federal Trade Commission Act of 1979, reads, "The adoption of this provision is intended to limit the practice of the Commission of giving vague description of the general subject matter of the inquiry and provides a standard by which relevance may be determined." S. Rep. No. 96-500, at 23 (1979). Petitioner, however, fails to point out an important qualification that follows this excerpted sentence, which reads, "However, this requirement is not intended to be overly strict so as to defeat the purpose of the [FTC A]ct or to breed litigation and encourage parties investigated to challenge the sufficiency of the notice." *Id.*

[5] Petitioner cites to non-existent pages in S. Rep. No. 96-500. Chairman Pitofsky's comments are found properly as cited in the text above.

33n.5 (quoting FTC Act § 20(c)(2) (codified as amended at 15 U.S.C. 57b-1(c)(2) (1997); *id.* at 34n.6 (quoting 16CFR 2.6 (1998)).

Petitioner further cites *FTC v. Carter*, 636 F.2d 781, 788 (D.C. Cir. 1980), for the proposition that references to "statutes that are the basis for the investigation" do not constitute statements as to the nature of conduct under investigation. Petitioner avers that the subject CIDs do not adequately notify it of the precise conduct under investigation but merely cite to the two omnibus resolutions, dated August 1, 1994 and June 1, 1998, which collectively refer to the ECOA and its implementing rule, Reg. B; the TILA, including the HOEPA and its implementing rule, Reg. Z; and Section 5 of the FTC Act. Pet. at 2; Pet. Mem. at 33-35 & 34n.7 (citing Exs. 41-42). Petitioner also complains that the Commission has rejected its repeated requests during more than two years to identify the conduct under investigation. *See* Pet. Mem. at 3-4.

Petitioner's challenge to the legal sufficiency of the CIDs fails in two points. First, the CIDs recitation of statutory authorities provides adequate notice to Petitioner as to purposes of the investigation. In fact, *Carter*, the very case cited by Petitioner for the proposition that recitation of statutory authorities is insufficient, holds the opposite. In *Carter* the court upheld the Commission's subpoenas, noting that although Section 5's prohibitions standing alone might not serve very specific notice, when it was defined by its relationship to a more specific statute, (*i.e.*, Section 8(b) of the Cigarette Labeling and Advertising Act), notice was sufficient. *Carter*, 636 F.2d at 788. In *Carter* the Court stated that "an agency will be deemed to have given adequate notice of the purposes of the investigation by reciting its statutory duties when the statutes themselves alert the parties to the purposes of the investigation." *Id.* at 787. Similarly, the statutes recited in the Resolutions at issue in this matter provide adequate notice as to the nature of the conduct under investigation. In another case on point, *FTC v. O'Connell Assocs.*, 828 F. Supp. 165, 170-71 (E.D.N.Y. 1993), the court upheld the standard of notice as being satisfied where the FTC resolution in that case stated its purpose as being to determine whether violations of specified laws were occurring or had occurred. In *O'Connell*, the court struck down an argument virtually identical to that of Petitioner here and held that even though the Commission's resolution did not state the nature of conduct under investigation, the corresponding CIDs were legal, given the breadth of the resolution in that case. *Id.* Petitioner

concedes that the subject CIDs identify the statutes upon which the investigation is based. Pet. Mem. at 1, 34 & 34n.7. Moreover, the resolution issued in connection with File No. P944809 lists specific conduct that may constitute a violation of the ECOA or Reg. B.

Second, even if notification of the statutory bases for the Commission's investigation provides insufficient notice as to the nature of conduct under investigation, Petitioner has had more than ample notice as to the nature of that conduct, given the omnibus resolutions and CIDs; correspondence, conversations, and requests leading up to the CIDs; and broad press coverage, Congressional testimony, and private lawsuits regarding Petitioner's alleged abusive home equity lending practices. *See supra* Part I; *see also supra* note 4 ("sufficiency of notice"). Petitioner also received notice by way of a joint access letter on or about April 24, 1998 from the Commission and the Department of Justice, which requested specific information related to both mortgage and non-mortgage consumer lending. *See* Pet. Mem. at 16-25. In addition, in several meetings with Commission and Department of Justice staff,[6] Petitioner received notice as to the nature of the conduct under investigation. In a follow-up letter to one meeting, staff specifically requested information related to Petitioner's credit insurance penetration rates, among other topics. In sum, the notice provided in the compulsory process resolutions, CIDs, and other communications with Petitioner more than meets the Commission's obligation of providing notice of the conduct and the potential statutory violations under investigation.

C. Breadth of, and Burden of Compliance with, Civil Investigative Demands

Petitioner contends that the CIDs are unreasonably broad and would impose an undue burden on its operations. Petition at 1, 3; *see* Pet. Mem. at 2, 3-4, 41-44, 50. Petitioner also argues that CIDs for oral testimony target its senior executives based on their position rather than on an articulated rationale that these execitives possess the sought-after information. Petition at 3; Pet. Mem. at 4-5, 52-54 (citing Fed. R. Civ. Pro. 30(b)(6) compared with 15 U.S.C. 57b-1(c)(14)).

For its showing of undue burden, Petitioner provides statistics projecting 16,100 labor hours for compliance with all CIDs. Pet. Mem. at 2, 40. Petitioner also advances operational impact statements

[6] Two of these meetings were held on May 22, 1998 and May 27, 1998. Pet. Mem. at 20-22.

and includes estimates for compliance with certain CID specifications for documents and interrogatory-type responses. *See* Pet. Mem. at 37-39, 41-42, 44-45 (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 653 (1950)) (citing *See v. City of Seattle*, 387 U.S. 541, 544 (1967); *EEOC v. American & Efird Mills, Inc.*, 964 F.2d 300, 303 (4th Cir. 1992); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992) (quoting *FTC v. Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1977) (*en banc*)); *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1055-56 (2d Cir. 1973)).[7]

Finally, Petitioner characterizes the Commission's DFP as having acted in bad faith, asserting that DFP has been unwilling to compromise and respond to reasonable proposals by Petitioner, despite extensive voluntary cooperation by Petitioner to Commission and Department of Justice requests. *See* Petition at 2-3; Pet. Mem. at 9-24, 31-33. Petitioner points out that the Department of Justice agreed to identify former Petitioner's employees whom it had interviewed and to describe the information received during those interviews, while the Commission has refused this request by Petitioner. Pet. Mem. at 33.

All of Petitioner's arguments fail. First, Petitioner completely ignores that the burden of compliance is relative to the capacity to comply. Thus, Petitioner exaggerates its compliance burden, given its capacity to comply in light of the size of its domestic operations, *i.e.*, some 1,350 branches; its loan portfolio of more than 3 million loans valued in excess of $26 billion; and, given the limited scope of its operations encompassed in the Commission's investigation relative to Petitioner's overall corporate size and structure including 246 subsidiaries. Pet. Mem. at 6-7.

Here, no undue burden exists for Petitioner where the CIDs are confined, as feasible, to four designated areas, *i.e.*, specified counties in four states ("designated areas"), particularly given Petitioner's own characterization that its operations are highly dispersed and decentralized across the United States and abroad. Pet. Mem. at 44.

[7] In addition, Petitioner asserts that its compliance with documentary CIDs would: 1) include or likely include numerous privileged documents beyond those listed in Petitioner's submitted Preliminary Schedule of Privileged Documents Pursuant to Commission Rule 2.8A, Pet. Mem. at 50; and 2) require the production of documents related to the securitization or initial public offering, which are not significantly related to Petitioner's lending practices and protected by attorney-client privilege or work product doctrine, *id.* at 50-51 (citing *In re Grand Jury Proceedings*, 601 F.2d 162, 166 (5th Cir. 1979)). To the extent that documents are legitimately privileged, Petitioner may withhold such documents, as long as it lists such documents on a privilege log.

Petitioner's estimate of some 16,100 labor hours for compliance with all CIDs and other estimates, likewise, fail to constitute any undue burden of compliance, where Petitioner employs approximately 22,600 employees and managers. Pet. Mem. at 6. Petitioner also is vague as to whether the estimate of 16,100 hours takes into account the modifications to the CIDs agreed to by FTC staff. Moreover, elsewhere in its petition, the Petitioner suggests that a search pursuant to the modified CIDs "may require as many as 400 managers and executives to search their files, and that such a search could take a day ...." Pet. Mem. at 44. The estimate would lead to a calculation of only 3,200 labor hours.

Second, Petitioner's argument ignores the Commission's agreement to modify the CIDs and so reduce Petitioner's compliance burden by excluding a national bank and its credit card operations; to narrow several specifications to cover only branches within the "designated areas" and the chains of command within those areas, thereby reducing the search burden from 1,350 branches to only 30 branches; to exclude open-end loans and two subsidiary companies from the universe of loans to be searched for certain loan data; and, contingent upon Petitioner fully complying with the CIDs, to end the continuing obligation to produce newly-generated documents. *See supra* Part I.

The Commission's issuance of CIDs or subpoenas to high-level executives such as corporate presidents and vice presidents has been upheld in a number of cases. *Cf. Carter*, 636 F.2d at 789-90 (upholding subpoenas *duces tecum* issued to corporate officers based on "strong likelihood" that their testimony would be required); *FTC v. Anderson*, 631 F.2d 741, 751 (D.C. Cir. 1979) (upholding subpoena *duces tecum* to company vice president). The executives identified in the CIDs for oral testimony likely are in a position to address investigative inquiries concerning Petitioner's corporate policies and procedures and their implementation. Nonetheless, if Petitioner believes that other corporate officials would be more knowledgeable about the issues under investigation, Petitioner should make such a proffer to the Commission staff.

Third, although Petitioner objects to several CID specifications, it has not advanced any specific proposals for modifying the CIDs. Finally, even if the CIDs could properly be characterized as "broad," breadth alone is insufficient reason to refuse their enforcement. *See*

FTC v. Texaco, 555 F.2d 862, 882 (D.C. Cir. 1977) (*en banc*). In sum, given the context of the investigations and Petitioner's far-flung and massive operations, the CIDs are properly tailored to elicit necessary information and do not impose undue compliance burdens.

D. Time Period Permitted for Compliance with Civil Investigative Demands

Petitioner complains that the CIDs provide an unreasonable short time period to comply with the amount of information requested. Petitioner also suggests that the time period should not be considered reasonable because it has produces at least some documents voluntarily and that its voluntary cooperation should be considered in reviewing its petition. Petition at 3; Pet. Mem. at 9-16, 51-52. Further, Petitioner contends that the time period is unbounded as to the continuing compliance obligation, *i.e.*, until "the date of full and complete compliance." Pet. Mem. at 47-49 (quoting CIDs Instruction 3); *id.* at 48-49 & 48n.16 (acknowledging that a continuing obligation to FTC can be imposed if limited to a reasonable, defined time period) (quoting *United States v. Powell*, 379 U.S. 48, 57 (1964) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950)) (citing *Invention Submission Corp.*, File No. 882 3060, Trade Reg. Rep. (CCH) ¶ 23,068 (Oct. 4, 1991); *In re Subpoena to Testify Before Grand Jury Numbers S286-4-7*, 630 F. Supp. 235, 236 (N.D. Ind. 1986); *In re Heuwetter*, 584 F. Supp. 119, 124-25 (S.D.N.Y. 1984)).

Petitioner's arguments are unpersuasive for the following reasons. First, the CIDs, in fact, specify a finite date and time for compliance. Second, the use of the phrase "full and complete compliance" is customary Commission language to communicate that the compliance obligation does not terminate until all responsive information is produced.

Third, although Petitioner points to numerous exhibits filed with its petition as being related to its voluntary cooperation, these exhibits relate to an investigation (referred to by Petitioner as the "Detroit investigation") that is separate and apart from the investigation at issue in connection with these CIDs. *See* Pet. Mem. at 9-16.[8] While

[8] Petitioner is well aware that these are separate investigations, having received notice of this investigation through a 1997 Commission letter that provided reference to the nature of the conduct under investigation by stating that the Commission was conducting an investigation to determine whether Petitioner's lending practices violate or have violated the ECOA or Regulation B, the TILA, as amended by the HOEPA, or Regulation Z, Section 5, or other laws enforced by the Commission. Interestingly, Petitioner failed to include this letter among its 54 exhibits in support of its Petition.

Petitioner states that it cooperated voluntarily with the Commission in the Detroit investigation, Petitioner ceased all voluntary cooperation in that investigation at the same time it did in the investigation that is the subject of this Petition. Further, voluntarily producing *some* requested documents does not excuse the Petitioner from producing *all* documents responsive to Commission issued CIDs.

Fourth, Petitioner has had virtually identical document and information requests in its possession since its receipt of the April 24, 1998 joint Commission and Department of Justice access letter and has precipitated by its own actions and undue delay the Commission's issuance of the CIDs. Thus, the time-frame set forth in the CIDs as originally issued was not unreasonable under the circumstances of this investigation.

E. Request for Four-Part Order

Petitioner requests that, in the event the Commission elects to limit, rather than quash, the CIDs, the Commission issue a four-part order to preserve the confidentiality of this non-public investigation. First, Petitioner renews a previously denied request that DFP intervene in *Stewart v. Associates Consumer Discount Company*, in which Petitioner, pursuant to a federal court order, must produce to class-action plaintiffs' counsel the government's CIDs and must identify all documents produced in response to the CIDs. Petitioner claims that DFP's failure to intervene in the *Stewart* case is prejudicial to its interests in that case. Petition at 4 (citing *Stewart*, No. 97-CV-4678 (E.D. Pa.)); Pet. Mem. at 27-31 (citing Exs. 35-39) (quoting FTC Operating Manual 16.9.3.4); *see id.* at 57 (asserting that DFP did not advise the *Stewart* court as to the need for maintaining confidentiality of the investigation). Petitioner also requests that the Commission issue an order prohibiting the company from providing to any third party any documents received from or provided to DFP in this investigation. Petition at 3; Pet. Mem. at 57-58.

Petitioner's repeated request for the Commission's intervention in *Stewart* is denied. The Commission has an interest in protecting its investigations from public disclosure, and our Rules of Practice and Statutes restrict the disclosure by the agency of confidential information received during and investigation. However, no statutory or regulatory basis exists for Commission intervention in private lawsuits to shield an FTC investigatory target from discovery requests

for government-issued CIDs and documents produced pursuant thereto. If a protective order is warranted, it should be requested from the court hearing the private case, rather than involving this agency in discovery matters concerning other cases. *See FTC v. Anderson*, 442 F. Supp. 1118, 1124 (D.D.C. 1977), *aff'd*, 631 F.2d 741 (D.C. Cir. 1979). Moreover, there is no basis for the Commission to issue an order contravening the express order of a federal district court, and, in any event, the Commission declines to do so here.

Second, Petitioner requests a copy of any certificate filed by the Department of Justice ("DOJ") and an opportunity to challenge such a DOJ request prior to disclosure of any information in the Commission's possession to the DOJ. Pet. Mem. at 55-56 (asserting certification procedure inadequate) (citing Commission Rule 4.11(c), contending that such an order is necessary to protect transfer of any provided confidential information to DOJ, where such information is beyond DOJ's jurisdiction, Petition at 4 (citing ECOA and Reg. B); Pet. Mem. at 54-56 (citing 16 CFR 4.11(c) (1998); 15 U.S.C. 46(f), 57b-2(b)(6) (1997)), and time-barred, *id.* at 55 (noting without citing ECOA's two-year statute of limitations).

Again, Petitioner's request is denied. Indeed, the Commission's procedures for disclosing information to other law enforcement agencies specifically prohibit the Commission from disclosing the request for such information to the owner of the information if the other law enforcement agency requests that the owner not be notified. 16 CFR 4.11(c) (1998). The Commission has refused a request for such an order under similar circumstances. *See Brana Publishing, Inc.* 115 FTC 1297, 1305 (1992) (Petition to Limit or Quash CID, File No. 872-3209). It is within the Commission's discretion to determine what information may be provided lawfully by one law enforcement agency to another. As the federal courts have stated, "'agencies are entitled to a presumption of administrative regularity and good faith,' and '[w]ith no indication that the Commission will act cavalierly or in bad faith,' its assertions with respect to the treatment of subpoenaed material should be accepted at face value." *FTC v. Invention Submission Corp.*, 965 F.2d at 1091 (quoting *FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 975 (D.C. Cir. 1980)).

Third, Petitioner alleges that DFP's pattern of investigatory conduct violates the Commission's statutes and regulations governing the confidentiality of a nonpublic investigation and the information

obtained during such an investigation. Petitioner alleges that staff has engaged in at least three courses of conduct that violate Commission confidentiality restrictions: 1) staff aired a network television segment involving the company's alleged practices in connection with training seminars; 2) staff may have revealed the existence of the Commission's investigation to a private plaintiffs' attorney involved in litigation with one of the Petitioner's subsidiaries; and 3) staff sent letters to state attorneys general seeking consumer complaints about Petitioner without explicitly requesting that this information be kept confidential. *See* Pet. Mem. at 29-30. As a result of these allegedly improper disclosures, Petitioner requests that DFP staff be ordered to comply with such rules and regulations. Petition at 5; Pet. Mem. at 58-59. There is no evidence to suggest that Commission staff has violated the FTC statutes and rules governing confidentiality.

As the alleged violative conduct of DFP, staff routinely conducts seminars and training sessions to alert businesses, consumers, and state authorities to various industry practices that may be injurious to consumers. In connection with some seminars, the staff did use a video of a *Primetime Live* television story (ABC News television broadcast, Apr. 23, 1997), as well as other videos and oral presentations, to illustrate some of the abusive practices allegedly occurring in the home equity lending industry. Although the *Primetime Live* tape discussed Petitioner's business practices, staff conducting the seminars did not mention Petitioner or indicate that the Commission was investigating the company. In fact, the *Primetime Live* program had been publicly broadcast prior to the seminars, and was thus public knowledge.

Similarly, although staff did contact the private plaintiffs' attorney to seek information about the private lawsuit, staff did not reveal the existence of the Commission's investigation. In conducting nonpublic investigations, it is standard practice for Commission staff to contact third parties for information. The disclosure of limited information in the context of such an investigatory inquiry does not violate the statutes or rules governing the confidentiality of Commission investigations. Moreover, to the extent that the Commission staff does obtain information from third parties during the course of an investigation, such information and the sources thereof are protected by a number of privileges, including the work product doctrine and, depending upon circumstances, the informant's privilege. *See, e.g.*, 15 U.S.C. 57b-2(f); 16 CFR 4.10(a)(8).

Finally, it is routine for staff to contact state attorneys general for consumer complaints. The Commission's statutes and rules contemplate that the Commission will work closely with the states on matters of mutual concern. The states are aware that the Commission's investigations are almost always nonpublic, and staff's letter soliciting complaints specifically stated that the investigation is nonpublic.

The Commission takes the confidentiality of its investigations very seriously. However, in the absence of any evidence that the staff has failed to abide by the Commission's policies and procedures, an order commanding staff to follow such procedures is unjustified. *See Michael DiMattina*, FTC Letter Ruling Re: Petition to Limit or Quash Civil Investigative Demands, 118 FTC 1248, 1254 (Oct. 21, 1994) ("it is the Commission's policy that staff should take care to avoid undue harm to a company's legitimate business interests; absent specific evidence to the contrary, it is assumed that staff will act in a manner consistent with this policy"); *see also HTI/ORHS South Seminole Joint Venture*, Re: Petition to Quash or Limit Civil Investigative Demand, 118 FTC 1229, 1234 (Aug. 12, 1994) ("The Commission must, however, balance the potential that its investigation may cause injury against the potential that its investigation may enable the Commission to uncover and remedy what are alleged to have been very serious violations of Section 5 of the Federal Trade Commission Act").

F. Request for a Copy of Staff's Response to Associates' Petition and Oral Argument

Finally, Petitioner requests a copy of DFP's response to its Petition and the right to file a reply to any DFP response to the Petition, as well as a hearing on the matter. Petitioner argues that these opportunities would afford it due process. Petition at 5-6. These requests are denied. First, under Commission's rules, staff is permitted to communicate on a nonpublic basis with Commissioners during Part II investigations and the disclosure of such communications may undermine the deliberative privilege afforded government agencies. *See* 16 CFR 4.7(f). Moreover, such information is exempt from disclosure under Rule 4.10(a) of the Commission's Rules of Practice. 16 CFR 4.10(a) (1998). Given the exhaustive nature of the Associates' Petition, Memorandum, and Exhibits, Commissioner Anthony has determined that due process does not require either the

release of an otherwise nonpublic staff memorandum or a hearing on the merits of the Associates' Petition to Quash or Limit the CIDs.

III. CONCLUSION

This is a proper and statutorily authorized investigation. The CIDs seek information that is plainly relevant to that investigation and have been crafted and modified by Commission staff to avoid placing an undue burden on Petitioner.

For the foregoing reasons, the Petition is denied, and pursuant to Rule 2.7(e), 16 CFR 2.7(e) (1998), Petitioner is directed to comply with the Civil Investigative Demands for written interrogatories and documentary material on or before Tuesday, January 26, 1999, and to comply with the oral CIDs as rescheduled above.

Re: Associates First Capital Corporation, Request for Full Review and Stay of Civil Investigative Demands Return Date –- File Nos. 982-3506 and P944809

February 11, 1999

Dear Messrs. Sandler and Klubes and Ms. Steptoe:

The Commission has considered: (1) the Petition and supporting documentation filed on behalf of Associates First Capital Corporation ("Petitioner") to quash the pending Civil Investigative Demands ("CIDs") for documents and oral testimony; (2) the Request for Full Commission Review and Stay of CID Return Date ("Review Request") filed on behalf of Petitioner on January 20, 1999,[1] (3) Petitioner's Supplemental Memorandum of Points and Authorities in Support of Petition to Quash or Limit Civil Investigative Demands and for an Order Establishing Safeguards for the Handling of Confidential Information ("Supplemental Memorandum") filed with the Review Request; (4) the January 12, 1999 ruling by Compulsory Process Commissioner Sheila F. Anthony, denying in full Petitioner's Petition to Quash or Limit Civil Investigative Demands and to Establish Order Safeguarding Handling of Confidential Information ("Petition"), and establishing new deadlines for full and complete compliance with the subject CIDs ("January 12th Ruling"); and (5) the specifications of the CIDs.

Upon review of the materials noted above, the Commission has determined that the Review Request raises no issues that were not fully considered and discussed in the January 12th Ruling. Accordingly, the Commission concurs in and adopts the January 12th Ruling.

Petitioner's arguments in its Review Request and Supplemental Memorandum merely recast the assertions previously raised in its Petition. In doing so, Petitioner mischaracterizes the legal precedent in *FTC v. Carter*, 636 F.2d 781 (D.C. Cir. 1980) and *FTC v. O'Connell Assocs.*, 828 F. Supp. 165 (E.D.N.Y. 1993). Thus, the Commission agrees with the January 12th Ruling that sufficient notice was provided through recitation of the statutory bases, as well as through the omnibus resolutions, CIDs, and correspondence, conversations, and requests leading up to the CIDs. Furthermore, the

[1] The Commission served Petitioner with its January 12th Ruling on January 14, 1999 and received the Review Request on January 20, 1999, or within 3 working days (6 calendar days) of date of service of the Ruling. *See* 16 CFR 2.7(f) (1998).

Commission rejects Petitioner's argument that the January 12th Ruling as to burden of CID compliance is contrary to the record. The Commission believes that such burden is not undue in light of the nature and extent of the investigation and the expansive nature of Petitioner's business operations. Finally, Petitioner's argument that certain organizations may be impacted more than others belies its contention that the Commission's CIDs are merely a "fishing expedition."

By letter dated January 25, 1999, the Commission granted Petitioner's request to briefly stay its compliance obligations pending a ruling by the full Commission. That stay is hereby terminated. The Commission hereby directs that on or before February 26, 1999, Petitioner comply with the CIDs for written interrogatories and documentary material. As to compliance with the CIDs for oral testimony, the Commissioner hereby directs that such compliance be carried out according to the following schedule: Michael J. Gade - March 15, 1999; Gil Schielbalhut - March 16, 1999; Gavin P. Goss - March 17, 1999; Owen P. Davis - March 18, 1999; Ken Mize - March 22, 1999; H.J. Fullen - March 24, 1999; Timothy W. Bellows - March 29, 1999; Stephanie C. Rumph - March 30, 1999; and Mary Kinsey - March 31, 1999. As previously scheduled, each hearing for oral testimony will begin at 9:30 a.m. (CST) and take place at the Commission's Dallas Regional Office.

Re: Wal-Mart Stores, Inc.'s Petition to Quash Civil Investigative Demand and Subpoena Ad Testificandum -- File No. 991-0024

March 1, 1999

Dear Messrs. Coston and Saad:

This letter advises you of the Federal Trade Commission's ruling on the above-referenced Petition to Quash ("Petition").[1] The Petition is denied for the reasons set forth in the attached memorandum. The new deadline for Wal-Mart Stores, Inc. ("Petitioner"), to respond to the Civil Investigative Demand is Monday, March 8, 1999, and to appear and give testimony as required by the Subpoena *Ad Testificandum* is Thursday, March 11, 1999 at 9:00 a.m. Eastern time. Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.[2] The filing of a request for review by the full Commission does not stay or otherwise affect the new return dates unless the Commission rules otherwise. *See* 16 CFR 2.7(f).

MEMORANDUM

Pursuant to its authority under Sections 6, 9, and 20 of the Federal Trade Commission Act (the "Act"), 15 U.S.C. 46, 49, 57b-1, the Federal Trade Commission ("FTC" or "Commission") is conducting a non-public investigation of a proposed acquisition. In furtherance of this investigation, the Commission has sought certain information required for it to ensure that full and fair competition markets exist in places where consumers and, indeed Wal-Mart Stores, Inc. ("Wal-Mart" or "Petitioner"), can benefit. On December 18, 1998, the Commission issued a resolution authorizing the use of compulsory process to obtain information necessary to evaluate the proposed transaction. Pursuant to the resolution, on February 5, 1999, the Commission issued a civil investigative demand, returnable on February 17, 1999, (the "CID") and a subpoena *ad testificandum*, returnable on February 23, 1999, (the "Subpoena") to Wal-Mart, a

[1] The decision was made by Commissioner Mozelle W. Thompson, acting as the Commission's delegate. *See* 16 CFR 2.7(d)(4).

[2] This ruling is being delivered by both facsimile and express mail. The facsimile copy is being provided only as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you receive the original by express mail.

non-party, seeking, among other things, information regarding Wal-Mart's future business plans in certain geographic areas. The Commission staff contends this information is needed to evaluate the potential effects of the proposed acquisition. However, Wal-Mart objected, refused to provide the information, and, on February 16, 1999, filed a petition to quash the Subpoena and CID (the "Petition").

In support of its Petition, Wal-Mart essentially argues that the information sought by the Commission is extremely sensitive, proprietary information, and Wal-Mart does not trust the Commission to protect its confidentiality. While Wal-Mart suggests it might reveal the information sought if the Commission makes an "additional showing of need" and provides "additional guarantees of confidentiality," Petition at 1, Wal-Mart adds: "If the FTC persists in seeking this information, Wal-Mart will have no choice but to litigate every process it receives until a cooperative protocol is developed." Petition at 5.

After reviewing the Subpoena, CID, Petition, and FTC Staff's recommendation in this matter, I find that none of Petitioner's arguments provide sufficient basis for quashing the process.

I. DISCUSSION

A. Confidentiality

Section 21 of the Act, entitled "Confidentiality," 15 U.S.C. 57b-2, sets forth detailed procedures for protecting sensitive information. The statute requires the Commission to designate an agent to act as the custodian for information obtained through compulsory process and provides that none of the information provided "shall be available for examination by any individual other than a duly authorized officer or employee of the Commission without the consent of the person who produced the material ...."[3] 15 U.S.C. 57b-2(b). Information received in the course of an investigation is also exempt from disclosure under the Freedom of Information Act. 15 U.S.C. 57b-2(f). However, the Commission may use such information "as may be required for official use by any duly authorized officer or employee of the Commission under regulations which shall be promulgated by the Commission." 15 U.S.C. 57b-2(b)(3)(B).

Rule 4.10 of the Commission's Rules of Practice, 16 CFR 4.10, also restricts disclosure of information received in response to

[3] Subject to certain notice and certification requirements, the Commission may also share the information with the Congress and with other law enforcement agencies. 15 U.S.C. 57b-2(b).

compulsory process to those outside the Commission without the prior consent of the person who produced the material. 16 CFR 4.10(d). If the Commission intends to disclose confidential information to persons other than the submitter in connection with the taking of oral testimony, the Commission must provide "10 days' notice of the intended disclosure" or afford "an opportunity to seek an appropriate protective order." 16 CFR 4.10(f). The Commission may disclose confidential information obtained through compulsory process, or voluntarily in lieu thereof, "in Commission administrative or court proceedings subject to Commission or court protective or *in camera* orders as appropriate. Prior to disclosure of such material in a proceeding, the submitter will be afforded an opportunity to seek an appropriate protective or *in camera* order." 16 CFR 4.10(g). These statutory and regulatory requirements are further backed by criminal sanctions.[4]

In this case, Wal-Mart claims that it seeks to avoid compliance with the Subpoena and CID because due to past experience, it does not have sufficient confidence in the Commission's ability to protect sensitive business data. While there is reason to be concerned about claims regarding an alleged past failure of Commission Staff to take reasonable care to protect sensitive business information, the appropriate response to subsequent process is *not* self-help by the recipient. As outlined above, the FTC Act and the Commission's rules provide a sufficient protocol for dealing with the confidential information the Commission has requested from Wal-Mart.

As the court in *FTC v. Invention Submission Corp.*, so succinctly explained:

> Congress, in authorizing the Commission's investigatory power, did not condition the right to subpoena information on the sensitivity of the information sought. So long as the subpoena meets the requirements of the FTC Act, is properly authorized, and within the bounds of relevance and reasonableness, the confidential information is properly requested and must be complied with.

1991-1 Trade Cas. (CCH) ¶ 69,338 at 65,353 (D.D.C. 1991), *aff'd*, 965 F.2d 1086 (D.C. Cir. 1992), *cert. denied* 507 U.S. 910 (1993). Wal-Mart is neither entitled to nor merits special treatment.

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[4] Under Section 10 of the FTC Act and Section 4.10(c) of the Commission's regulations, "Any officer or employee of the Commission who shall make public any information obtained by the Commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court." 15 U.S.C. 50; 16 CFR 4.10(c).

B. Alleged Past Breach of Confidentiality

In an attempt to avoid compliance with the Subpoena and CID issued in this investigation, Wal-Mart cites an incident that allegedly took place during the Commission's suit to block the Staples/Office Depot merger. Wal-Mart claims that at that time it provided an employee affidavit to the Commission with the understanding that the Commission would "keep it confidential unless Wal-Mart consented to its release." Petition at 4. Wal-Mart further contends that without Wal-Mart's consent, "the affidavit ended up in publicly filed court papers." *Id.*

These claims, if true, would warrant concern. However, Commission staff gives a very different account of the alleged incident. Even assuming Wal-Mart's version of events is correct, the incident would have no bearing on Wal-Mart's current obligation to comply with the Subpoena and CID at issue here. As detailed above, the FTC Act and the Commission's rules spell out the rights and obligations of both the Commission and those served with compulsory process by the Commission.[5] If Wal-Mart believed that the Commission's actions during the Staples/Office Depot matter violated the law, Wal-Mart should have sought remedial action at that time. But, it did not. Consequently, it is not appropriate for Wal-Mart, or any other compulsory process recipient, to unilaterally refuse to comply with its legal obligations based on its own perception of its past treatment at the hands of the Commission.

C. Unfair Burden

As an additional defense to non-compliance with its Subpoena and CID obligations, Wal-Mart complains that due to the "breadth of goods it sells" and its nationwide presence, Wal-Mart receives numerous requests for information from the FTC each year. Petition at 3. Wal-Mart continues that it "cannot be expected to disclose highly confidential information and expend large amounts of time and resources each time the agency reviews a merger relating in some way to Wal-Mart's business." *Id.* While the Commission is willing to hear any claim of undue burden, there is no evidence of such burden here.

[5] We would reemphasize that the Commission is permitted to disclose information designated confidential in court proceedings so long as it affords the submitter an opportunity to seek or avail itself of an appropriate protective or *in camera* order. 16 CFR 4.10(g). Wal-Mart does not contend that it was denied such an opportunity in connection with the Staples/Office Depot proceedings.

For example, there is no evidence that the Commission has repeatedly directed compulsory process requests to Wal-Mart on a whim. Rather, the actions of third-parties in proposing transactions and the facts of geography and the products Wal-Mart sells have apparently required that the FTC collect information from Wal-Mart. Thus, the Commission has previously sought precisely the information required for it to ensure that full and fair competition markets exist in places where consumers and indeed, Wal-Mart can benefit.

D. Claim of Compromise

Wal-Mart argues that it has sought to compromise with the FTC by providing some general information such as "the number of stores to be opened in Arizona over the next three years and has confirmed that it has no plans to construct stores in certain cities." Petition at 4. Commission Staff claims this "general information" is insufficient, and the Commission needs substantially more detail in order to evaluate the potential effects of the proposed transaction. I find Staff's argument more persuasive.

E. Threat of Future Resistance

As set forth above, I have seen nothing in the record to justify Wal-Mart's refusal to comply with its legal obligation. But, Wal-Mart closes its Petition by stating: "if the FTC persists in seeking this information, Wal-Mart will have no choice but to litigate every process it receives until a cooperative protocol is developed." Petition at 5. I am concerned when anyone, including Wal-Mart, threatens to take unilateral action to resist legal obligations without regard to judicial economy or, for that matter, the very real need that the Commission has for this information in order to fulfill its obligation to protect the public interest. While the Commission will be disappointed if Wal-Mart were to resist all process in the future, apparently regardless of merit, its threats do not provide a basis for according Wal-Mart special treatment.

III. CONCLUSION

In light of the foregoing, it is evident that: (1) the FTC is conducting a proper and statutorily authorized investigation, and (2) the information sought by the Commission is relevant to that investigation. Wal-Mart's justification for not producing the requested information are either meritless or irrelevant to this case.