In the Matter of

HERCULES INCORPORATED

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

Docket C-1794. Consent Order, Sept. 23, 1970—Modifying Order, Nov. 8, 1982

This order reopens the proceeding and modifies the Commission's order issued on Sept. 23, 1970 (77 F.T.C. 1242); *modified* April 8, 1982 (99 F.T.C. 404), by deleting Paragraphs II, V and VII from the order. The deletion of these Paragraphs allows the company to acquire stocks, share capital or assets of Columbian Rope Company without prior Commission approval, and repeals provisions requiring the company to notify the Commission of any change in the corporate respondent or furnish compliance reports upon request.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER

By petition filed June 24, 1982, respondent Hercules Incorporated ("Hercules") requests, pursuant to Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), that Paragraph II of the Commission's order issued in this matter on September 23, 1970, be modified so that Hercules no longer requires the Commission's prior approval to acquire, directly or indirectly, the whole or any part of the stock, share capital or assets of Columbian Rope Company. Hercules also sought to delete the other order provisions binding Hercules, Paragraph VII, which requires notice of changes in corporate organization and Paragraph V, which requires compliance reports when requested by the Commission.

Pursuant to Section 2.51 of the Commission's Rules of Practice and Procedure, the petition was placed on the public record for thirty days. No comments were received.

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

Therefore, upon consideration of the petition and its supporting materials the Commission, in the exercise of its discretion, finds that elimination of Paragraphs II, V, and VII is in the public interest.

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

It is further ordered, That the Paragraphs II, V, and VII shall terminate upon service of this order.

IN THE MATTER OF

DAIRYMEN, INC., ET AL.

Docket 9143. Interlocutory Order, Nov. 10, 1982

ORDER GRANTING RESPONDENT MUNFORD, INC.'S MOTION TO DISMISS

On July 31, 1980, the Commission issued a complaint against Dairymen, Inc., and Munford, Inc. The complaint alleged that Dairymen's acquisition in 1978 of Munford's wholly owned subsidiary, Farmbest Foods, Inc., may have substantially lessened competition or tended to create a monopoly in the processing and sale of fluid milk in relevant sections of the country, in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. On August 23, 1982, respondent Munford moved for an order dismissing the complaint as to it. In support of its motion, Munford offered a stipulation entered into by it and complaint counsel agreeing, *inter alia,* that Munford "is no longer needed for purposes of fashioning effective relief, if any, in this matter, or for any other purpose, as the course of discovery to date has demonstrated that Munford is not a suitable candidate for imposition of the remedy of rescission or for the re-purchase of the stock of Farmbest Foods, Inc." After hearing argument from Munford's counsel in support of the motion and argument in opposition thereto by counsel for respondent Dairymen, the ALJ on August 24 certified the motion to the Commission without any recommendation as to its disposition.[1] Respondent Dairymen filed an opposition to the motion with the Commission on September 3.

Dairymen argues that the motion should be denied because: (1) "Munford, as the seller of Farmbest, was so closely connected to the acquisition herein complained of that it has become a necessary and indispensable party" (Opposition at p. 7); (2) "neither Munford nor complaint counsel have proffered any evidence or justification to support the conclusory statement that Munford is not a suitable candidate for the remedy of rescission" (Opposition at p. 6); and (3)

[1] At the August 24 hearing, the ALJ did not take a position on the merits of Munford's motion, explaining that it was beyond his authority to grant it. He concluded that he would "sign the stipulation, sign the order and let the Commission decide * * *." (Transcript of August 24, 1982, hearing, p. 228.) However, he then issued an order prepared by Munford purporting to "grant" the motion and certify it for Commision action. In light of the limited discussion of the motion at the hearing, the lack of briefing before the ALJ, and the absence of any analysis of the issues in his order, we do not take the order to constitute a recommendation.

complaint counsel's support of Munford's motion is inconsistent with their apparent intent to oppose Munford's failing company defense [2] and with earlier statements concerning rescission as a possible remedy in the case.

Dairymen has made no argument that this case is uniquely suited to consideration of rescission as a remedy, should the Commission find that a violation occurred. Rather, it has relied simply on cases holding that a seller may properly be the subject of a rescission order by a court under Section 15 of the Clayton Act. However, it is one thing to argue from those cases that the Commission may order, in appropriate circumstances, that a transaction in violation of Section 7 and Section 5 be rescinded (a proposition with which we agree); and it is quite another to suggest that the Commission *must* retain as a respondent the seller in such alleged transactions so as to preserve rescission as a possible form of relief.

We cannot accept Dairymen's argument that it would be prejudiced by dismissal of the complaint as to Munford—or its implicit assertion that it has a right to insist that Munford be retained as a respondent. It is well within the discretion of the Commission to forego consideration of rescission as a remedy in this case and grant Munford's motion.

We would prefer to have been informed by Munford and complaint counsel as to the basis for their agreement that Munford is not a "suitable candidate" for rescission. However it is not essential to a decision on Munford's motion. It is clear that complaint counsel do not intend to establish the record necessary to support a rescission order. That being the case, it is not in the public interest to retain Munford as a party; indeed, to do so would unreasonably burden that company.

We do not agree that complaint counsel have taken "inherently inconsistent positions" in supporting Munford's motion and opposing Dairymen's failing company defense. Different legal standards apply to the two issues, and they pertain to Munford's financial condition in different time periods. We also reject Dairymen's contention that complaint counsel's support for Munford's motion confuses the issues in the proceeding and handicaps Dairymen in its defense. Although complaint counsel did state in 1980 that they wanted to preserve "the option of considering rescission as a possible sanction in this matter" (Transcript of October 24, 1980, hearing, p. 18), it is

[2] On September 8, 1982, the ALJ granted Dairymen's motion for permission to amend its answer to assert that Munford was a failing company prior to and at the time of the sale of Farmbest. Complaint counsel had opposed the motion.

understandable that their position could change after two years of discovery.

It is ordered, That the complaint is dismissed as to respondent Munford, Inc.

Chairmen Miller did not participate.

IN THE MATTER OF

TEXAS DENTAL ASSOCIATION

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

Docket 9139. Complaint, June 17, 1980—Decision, Nov. 19, 1982

This consent order requires a Texas dental association to cease, among other things, inhibiting competition by inducing its members to withhold x-rays and other diagnostic information from third-party payers and independent dental consultants for use in reviewing claims and establishing cost containment programs. The association is barred from coercing independent dental consultants and third-party payers into altering the terms and conditions of any dental health care plan, and from compelling third-party payers to select a particular independent dental consultant. Further, previous agreements entered into by the association and dental insurers which do not conform to the terms of the order are not binding upon the signatories. The association is also required to mail a copy of the order together with a letter explaining its provisions to all its members and to any person who joins the association within the next four years.

Appearances

For the Commission: *Julian V. Buenger, Steven L. Page* and *Edward C. Johnson.*

For the respondent: *Robert A. Hall* and *Roger A. Wright, Jr., Woodard, Hall & Primm,* Houston, Tex.

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 the respondent named in the caption hereof has violated the provisions of Section 5 of the Federal Trade Commission Act and 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. The following definition shall apply in this Complaint: *Third-party payer* or *payer* means any entity that provides a program of reimbursement for dental health care services to employees or members of any business organization, and any person, such as an independent claims adjuster, who provides

evaluative services in connection with any such reimbursement program.

PAR. 2. Respondent Texas Dental Association ("TDA") is a Texas corporation with its principal place of business at 420 North Interregional Highway, Austin, Texas. TDA has approximately 5500 members, all of whom are either licensed to practice dentistry in Texas, or students of dentistry. TDA charters approximately twenty-four regional component societies.

PAR. 3. Members of respondent are engaged in the business of providing dental health care services to patients for a fee and are paid for such services from the patients' personal funds and/or from funds provided under dental health care benefits programs. Except to the extent that competition has been restrained as herein alleged, members of respondent have been and are now in competition among themselves and with other dentists.

PAR. 4. In 1976, total expenditures for dental health care services in the United States were approximately $8.6 billion. Annual expenditures for dental health care services in Texas are at least $100 million.

PAR. 5. The acts and practices of respondent and its members are in or affect interstate commerce and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 6. A significant portion of the population of Texas is covered by dental health care benefits programs administered by third-party payers. Many of such programs provide for determination of benefits in advance of treatment ("predetermination"), limit coverage to the adequate, but not necessarily the most expensive, course of treatment, and require that radiographs ("X-rays") be submitted to aid in benefit determinations. The purpose of such provisions is to contain the costs of dental care. Their efficient utilization requires cooperation from treating dentists.

PAR. 7. Respondent, constituting a combination of its members, and respondent, in combination with certain of its members and others, has combined, conspired, and engaged in acts, practices and methods of competition which eliminate, prevent, or hinder competition among dentists with respect to furnishing X-rays to third-party payers, participating in alternate course of treatment and pretreatment determination programs, and cooperating with third-party payers in claims review and cost containment programs.

PAR. 8. In the course of the conduct alleged in Paragraph Seven, respondents have, among other things:

(A) Encouraged and induced members to refuse to submit X-rays to third-party payers and to refuse to provide other professional services for use by payers in benefit determination;

(B) Conducted meetings and pledge card campaigns and promulgated, adopted, published, and distributed statements of policies and practices regarding the terms and conditions upon which members are encouraged to deal with third-party payers; and

(C) Insisted that payers execute Memoranda of Understanding imposing particular procedures by which TDA members deal with payers, including requiring payers to agree to submit disputes to respondent's designated consultants and peer review committees.

PAR. 9. The actual and potential effects of the acts, practices and methods of competition alleged in Paragraphs Seven and Eight, include the following, among others:

(A) Competition among dentists in Texas has been hindered, restrained, and frustrated;

(B) Competition among third-party payers regarding claims review programs has been hindered, restrained, and frustrated;

(C) Consumers have been deprived of the benefits of third-party payers' cost-containment measures, including lower or potentially lower costs for dental health care and dental health care benefits insurance.

PAR. 10. The aforesaid acts and practices constitute unfair methods of competition and unfair acts or practices by respondent in violation of Section 5 of the Federal Trade Commission Act, and are within the scope of Section 5 of said Act.

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

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

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

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

1. Respondent Texas Dental Association is a not-for-profit 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 1946 S. Interregional Highway, in the City of Austin, State of Texas.

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

A. *TDA* means Texas Dental Association, its House of Delegates, councils, committees, officers, representatives, agents, employees, successors and assigns.

B. *Third-party payer* or *payer* means any person, corporation or other entity who or which administers or provides a risk-sharing reimbursement plan or a program of reimbursement, directly or indirectly, for all or part of any expense for dental health care services incurred by any person.

C. *Independent dental consultant* means a dentist who, acting either in an individual or corporate capacity, is employed by or contracts with a third-party payer to:

1) furnish evaluative services from a review of diagnostic information or dental claims forms; or

2) advise or deal with other dentists or third-party payers

regarding courses of dental treatment, appropriate fee reimbursements, or benefit determinations under any dental reimbursement plan or program.

D. *Evaluative services* means the review or rendering of opinions or determinations from diagnostic information or reports of attending dentists or from other sources, regarding courses of treatment, appropriate manner of reimbursement, or extent of benefit coverage, under any dental reimbursement plan or program.

II

It is further ordered, That TDA, directly or through any subsidiary, division or other device, shall not engage in any act or practice which has the purpose or effect of:

A. Requiring, advocating, advising, requesting, or suggesting that any of its members: (1) submit or refuse to submit radiographs or other diagnostic information or other materials to any third-party payer or to any independent dental consultant designated by such third-party payers; or (2) refuse to deal with any third-party payer or independent dental consultant except on certain terms or under certain conditions;

B. Compelling, threatening, or coercing any third-party payer or independent dental consultant to alter any provision of, or means of administering, any dental health care coverage plan;

C. Compelling, threatening, or coercing any third-party payer or independent dental consultant to enter into agreements with TDA or others regarding the terms of any dental health care coverage plan or the methods by which any third-party payer or independent dental consultant makes determinations about dental insurance claims; or

D. Compelling, threatening, or coercing any third-party payer to select a particular independent dental consultant.

Provided, however, That nothing contained herein shall be deemed to prohibit individual members of TDA, acting individually, from dealing with third-party payers in such manner as they determine is in the best interest of their patients.

III

It is further ordered, That any "Memorandum of Understanding" or agreement between TDA or its members and any third-party payer providing for the circumstances under which radiographs or

other diagnostic information is to be furnished to third-party payers or independent dental consultants or providing in any manner for the way in which determinations about dental insurance claims are to be made is non-binding on TDA, its members and third-party payers.

IV

It is further ordered, That within thirty (30) days after this order becomes final, TDA shall mail to each of its members a copy of the Commission's complaint and order in this matter, as well as a letter in the form shown as "Attachment A" to this order. In addition to the foregoing, TDA shall mail a copy of the aforementioned complaint, order, and letter to every person who joins TDA within four (4) years of the date of service of this order. Such mailing shall occur within thirty (30) days after a person becomes a member of TDA.

V

It is further ordered, That within sixty (60) days after service of this order and again one (1) year thereafter, TDA shall file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied and intends to comply with this order.

VI

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

ATTACHMENT A

(Respondent's Letterhead)

Dear Doctor:

As you may be aware, the Federal Trade Commission (FTC) has issued a complaint against the Texas Dental Association (TDA). TDA has denied the allegations of the complaint and continues to deny that it has engaged in any unlawful conduct. Nevertheless, TDA has voluntarily entered into an agreement with the FTC which has resulted in the entry of a consent order on ________which requires, in essence,

that TDA not engage in certain activities that are concerned with dental health care benefits programs. This order also requires that you be sent a copy of the complaint and order and this letter.

In accordance with the terms of the FTC's order, you are hereby notified that TDA shall not engage in any act or practice which has the purpose or effect of: (1) requiring, advocating, advising, requesting, or suggesting that any of its members submit or refuse to submit radiographic or other diagnostic information or other materials to any third-party payer or independent dental consultant or refuse to deal with any third-party payer or independent dental consultant except on certain terms or under certain conditions; (2) compelling, threatening, or coercing any third-party payer or independent dental consultant to alter any provision of, or means of administering, any dental health care coverage plan; (3) compelling, threatening, or coercing any third-party payer or independent dental consultant to enter into agreements with TDA or others regarding the terms of any dental health care coverage plan or the methods by which any third-party payer or independent dental consultant makes determinations about dental insurance claims; or (4) compelling, threatening, or coercing any third-party payer to select a particular dental consultant.

Additionally, the order also provides that Memoranda of Understanding or other agreements between TDA or its members and any third-party payer providing for the circumstances under which radiographic or other diagnostic information is to be furnished to third-party payers or providing in any manner for the way in which determinations about dental insurance claims are to be made are non-binding on TDA, its members and third-party payers. The order does not prohibit the use of the guidelines contained in such Memoranda of Understanding for the resolution of a dispute concerning dental insurance claims if the individual parties to a dispute in the future voluntarily wish to use them.

TDA adheres to the view that the primary goal of its members is to render to the public the best dental service of which they are capable. Nothing in this order changes or affects that goal. You remain free to deal individually with third-party payers and programs in such manner as you decide individually is best for your patients.

Copies of the FTC's complaint and order are enclosed. This letter has attempted to summarize the important parts of the order but you should read it carefully in its entirety.

Very truly yours,

/s/ O.V. Cartwright

IN THE MATTER OF

GERMAINE MONTEIL COSMETIQUES CORPORATION

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

Docket C-3098. Complaint, Nov. 19, 1982—Decision, Nov. 19, 1982

This consent order requires a New York City cosmetic manufacturer and seller to cease, among other things, attempting to fix and maintain the resale prices at which its products are advertised or sold, through coercion or otherwise. The firm is also prohibited from withholding any earned advertising credit or benefit from recalcitrant dealers; restricting the lawful use of its trademarks or brandnames; and seeking the identity of dealers who deviate from suggested resale prices. Additionally, for a two year period, the order precludes the dissemination of suggested resale prices unless accompanied by a statement advising that such prices are merely suggested; and requires the firm to mail a letter describing the provisions of the order to all present and future accounts.

Appearances

For the Commission: *Jeffrey Klurfeld* and *Ralph Stone.*

For the respondent: *Stuart L. Friedel, Davis & Gilbert,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Germaine Monteil Cosmetiques Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

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

A. *Product*

Product is defined as any item of cosmetic, fragrance or soap, any accessory containing any item of cosmetic, fragrance or soap, or any related accessory, including but not limited to, any applicator or brush, which is manufactured, offered for sale or sold by respondent. In addition to the foregoing, *product* is defined to include any item

which is manufactured, offered for sale or sold by respondent for resale to consumers together with any *product* as defined hereinabove.

B. *Dealer*

Dealer is defined as any person, partnership, corporation or firm which sells any product in the course of its business.

C. *Resale Price*

Resale Price is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any suggested, established or customary resale price as well as the retail price in effect at any dealer.

PARAGRAPH 1. Respondent Germaine Monteil Cosmetiques Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 40 West 57th Street, New York, New York.

PAR. 2. Respondent is now, and for some time last past, has been engaged in the manufacture, advertising, offering for sale, sale and distribution of cosmetics, fragrances, soaps and related accessories.

PAR. 3. Respondent maintains, and has maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. Respondent sells and distributes its products directly to retail dealers located throughout the United States who resell respondent's products to the general public.

PAR. 5. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the manufacture, advertising, offering for sale, sale or distribution of merchandise of the same general kind and nature as merchandise manufactured, advertised, offered for sale, sold or distributed by respondent.

PAR. 6. In the course and conduct of its business as above described, respondent has for some time last past effectuated and pursued a policy throughout the United States to establish and maintain the resale prices at which certain of its dealers advertise, offer for sale and sell its products.

PAR. 7. By various means and methods, respondent, in combination, agreement and understanding with certain of its dealers, and

with the acquiescence of other of its dealers, has established, maintained and pursued a planned course of action to establish and maintain certain specified uniform prices at which said products will be resold.

PAR. 8. The aforesaid acts and practices of respondent have been and are now having the effect of hampering and restraining competition in the resale and distribution of said products, and, thus, are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent as herein alleged, are continuing and will continue in the absence of the relief herein requested.

Commissioner Bailey dissented.

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 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 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 Germaine Monteil Cosmetiques Corporation is a corporation organized, existing and doing business under and by

virtue of the laws of the State of Delaware, with its office and principal place of business located at 40 West 57th Street, in the City of New York, State of New York.

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

ORDER

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

A. *Product*

Product is defined as any item of cosmetic, fragrance or soap, any accessory containing any item of cosmetic, fragrance or soap, or any related accessory, including but not limited to any applicator or brush, which is manufactured, offered for sale or sold by respondent.

In addition to the foregoing, *product* is defined to include any item which is manufactured, offered for sale or sold by respondent for resale to consumers together with any *product* as defined hereinabove.

B. *Dealer*

Dealer is defined as any person, partnership, corporation or firm which sells any product in the course of its business.

C. *Resale Price*

Resale Price is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any suggested, established or customary resale price as well as the retail price in effect at any dealer.

D. *Order Coverage*

Paragraphs IB and II of this Order shall not apply to any product, as hereinabove defined, which is manufactured, offered for sale or sold under any brand of Tuvache, Inc. or Sonia Rykiel.

I.

It is ordered, That respondent Germaine Monteil Cosmetiques Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for

sale, sale or distribution of products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A.

1. Fixing, establishing, controlling or maintaining, directly or indirectly, the resale price at which any dealer may advertise, promote, offer for sale or sell any product.

2. Requesting, requiring or coercing, directly or indirectly, any dealer to maintain, adopt or adhere to any resale price.

3. Requesting or requiring, directly or indirectly, any dealer to report the identity of any other dealer who deviates from any resale price; or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating said dealer.

4. Requesting or requiring that any dealer refrain from or discontinue selling or advertising any product at any resale price.

5. Hindering or precluding the lawful use by any dealer of any brand name, trade name or trademark of respondent in connection with the sale or advertising of any product at any resale price.

6. Conducting any surveillance program to determine whether any dealer is advertising, offering for sale or selling any product at any resale price, where such surveillance program is conducted to fix, maintain, control or enforce the resale price at which any product is sold or advertised.

7. Terminating or taking any other action to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product.

8. Threatening to withhold or withholding earned cooperative advertising credits or allowances from any dealer, or limiting or restricting the right of any dealer to participate in any cooperative advertising program for which it would otherwise qualify, because of the resale price at which said dealer advertises or sells any product, or proposes to sell or advertise any product.

9. Making any payment or granting any other consideration or benefit to any dealer because of the resale price at which any other dealer has sold or advertised any product.

B.

1. For a period of two (2) years from the service of this Order, orally suggesting or recommending any resale price to any dealer.

2. For a period of two (2) years from the service of this Order,

suggesting or recommending in writing any resale price to any dealer; *provided, however,* that after said two (2) year period, respondent shall not suggest or recommend to any dealer any resale price on any list or order form, or in any catalogue or stock control book, unless it is clearly and conspicuously stated on each page thereof where any suggested or recommended resale price appears, the following:

THE RETAIL PRICES QUOTED HEREIN ARE SUGGESTED ONLY. YOU ARE COMPLETELY FREE TO DETERMINE YOUR OWN RETAIL PRICES.

II.

1. Nothing contained in this Order shall preclude respondent from publishing or printing any resale price which is specified by any dealer for use or inclusion in any advertising, mailer or promotional material which said dealer intends to disseminate to consumers; *provided, however,* that for a period of two (2) years from the service of this Order, in connection with each advertising, mailer or promotional material which any dealer intends to disseminate to consumers, respondent shall make a written request to said dealer to specify its resale price(s), and shall disclose therein in a clear and conspicuous manner the following:

[GERMAINE MONTEIL OR ROCHAS PARIS] DEALERS ARE COMPLETELY FREE TO SPECIFY RETAIL PRICES OF THEIR OWN CHOOSING FOR INCLUSION IN THIS [ADVERTISING, MAILER OR PROMOTIONAL MATERIAL] PLEASE INSERT THOSE RETAIL PRICES YOU WISH TO BE PRINTED ON THIS [ADVERTISING, MAILER OR PROMOTIONAL MATERIAL].

2. After said two (2) year period, respondent shall not suggest any resale price to any dealer for use or inclusion in any advertising, mailer or promotional material which said dealer intends to disseminate to consumers, unless respondent, in connection with each advertising, mailer or promotional material, makes a written request to said dealer to review said advertising, mailer or promotional material for its resale price(s), and discloses therein in a clear and conspicuous manner the following:

[GERMAINE MONTEIL OR ROCHAS PARIS] DEALERS ARE COMPLETELY FREE TO SPECIFY RETAIL PRICES OF THEIR OWN CHOOSING FOR INCLUSION IN THIS [ADVERTISING, MAILER OR PROMOTIONAL MATERIAL]. YOU MAY CHANGE ANY PRICE WE HAVE SUGGESTED.

III.

It is further ordered, That respondent shall:

1. Within sixty (60) days after service of this Order, mail under separate cover a copy of the enclosure set forth in the attached Exhibit A to each of its present dealers who sell Germaine Monteil brand products or Rochas Paris brand products. An affidavit shall be sworn to by an official of respondent verifying that the attached Exhibit A was so mailed.

2. Mail under serparate cover a copy of the enclosure set forth in the attached Exhibit A to any person, partnership, corporation or firm that becomes a new dealer selling Germaine Monteil brand products or Rochas Paris brand products within two (2) years after service of this Order.

3. For a period of two (2) years from the date of service of this Order, mail annually under separate cover a copy of the enclosure set forth in the attached Exhibit B to each of respondent's then present dealers who sell Germaine Monteil brand products or Rochas Paris brand products.

4. Within sixty (60) days after service of this Order, distribute a copy of the enclosure set forth in the attached Exhibit C to each of its present dealers who sell Tuvache brand products or Sonia Rykiel brand products. An affidavit shall be sworn to by an official of respondent verifying that the attached Exhibit C was so distributed.

IV.

It is further ordered, That respondent shall forthwith distribute a copy of this Order to all operating divisions of said corporation; to all personnel, agents or representatives having sales, advertising or policy responsibilities with respect to the subject matter of this Order, and that respondent secure from each such person a signed statement acknowledging receipt of said Order; and, for a period of three years from the date of service of this Order, to all new personnel, agents, or representatives having sales, advertising or policy responsibilities with respect to the subject matter of this Order, and that respondent secure from each such person a signed statement acknowledging receipt of said Order.

V.

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

VI.

It is further ordered, That respondent shall within seventy-five (75) days after service upon it of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

Commissioner Bailey dissented.

EXHIBIT A

Dear Retailer:

This letter is being sent to all [Germaine Monteil or Rochas Paris] accounts. On [date], Germaine Monteil Cosmetiques Corporation agreed to the entry of a Consent Order with the Federal Trade Commission concerning certain distribution practices. This Consent Order was entered into for settlement purposes only and does not constitute an admission that Germaine Monteil violated the law. As part of that Consent Order, we are obligated to send you this letter.

Germaine Monteil wants its [Germaine Monteil or Rochas Paris] accounts to know and understand the following:

1. You can advertise and sell [Germaine Monteil or Rochas Paris] products at any price you choose.

2. Germaine Monteil will not take any action against you, including termination, because of the price at which you advertise or sell [Germaine Monteil or Rochas Paris products].

3. Germaine Monteil will not suggest retail prices for any product until [2 years from the date of service of the Order].

4. The price at which you sell or advertise [Germaine Monteil or Rochas Paris] products will not affect your right to lawfully use [Germaine Monteil or Rochas Paris] trademarks or other identification in your sale or advertising of products bearing [Germaine Monteil or Rochas Paris] trademarks or identification.

5. You are free to participate in any cooperative advertising program sponsored by Germaine Monteil for which you would otherwise qualify, and to receive any advertising credit or allowance allowed thereunder regardless of the price at which you advertise a [Germaine Monteil or Rochas Paris] product.

6. Germaine Monteil will continue to publish or print mailers, advertising and other promotional materials which you intend to disseminate to consumers containing retail prices which you specify. Until [2 years from the date of service of this Order], in connection with each advertising, mailer or promotional material we will publish for you to disseminate to consumers, we will be requesting in writing that you specify the retail prices you wish to be printed on these materials.

After [2 years from the date of service of this Order], we will send you materials for your review which may contain our suggested retail prices. You are completely free, however, to change these prices, and we will then print the materials with the retail prices which you have specified.

7. The price at which a store sells or advertises a [Germaine Monteil or Rochas Paris] product is its own business. Germaine Monteil does not want to be informed by a [Germaine Monteil or Rochas Paris] account of the price at which any other store sells or advertises any [Germaine Monteil or Rochas Paris] product.

If you have any questions regarding the Consent Order or this letter, please call ___________.

____

for [Germaine Monteil
Cosmetiques Corporation or
Rochas Paris]

EXHIBIT B

Dear Retailer:

We wish to remind you of the following:

1. You can advertise and sell [Germaine Monteil or Rochas Paris] products at any price you choose.

2. Germaine Monteil will not take any action against you, including termination, because of the price at which you advertise or sell [Germaine Monteil or Rochas Paris products].

3. Germaine Monteil will not suggest retail prices for any product until [2 years from the date of service of the Order].

4. The price at which you sell or advertise [Germaine Monteil or Rochas Paris] products will not affect your right to lawfully use [Germaine Monteil or Rochas Paris] trademarks or other identification in your sale or advertising of products bearing [Germaine Monteil or Rochas Paris] trademarks or identification.

5. You are free to participate in any cooperative advertising program sponsored by Germaine Monteil for which you would otherwise qualify, and to receive any advertising credit or allowance allowed thereunder regardless of the price at which you advertise a [Germaine Monteil or Rochas Paris] product.

6. Germaine Monteil will continue to publish or print mailers, advertising and other promotional materials which you intend to disseminate to consumers containing retail prices which you specify. Until [2 years from the date of service of this Order], in connection with each advertising, mailer or promotional material we will publish for you to disseminate to consumers, we will be requesting in writing that you specify the retail prices you wish to be printed on these materials.

After [2 years from the date of service of this Order], we will send you materials for your review which may contain our suggested retail prices. You are completely free, however, to change these prices, and we will then print the materials with the retail prices which you have specified.

7. The price at which a store sells or advertises a [Germaine Monteil or Rochas Paris] product is its own business. Germaine Monteil does not want to be informed by a [Germaine Monteil or Rochas Paris] account of the price at which any other store sells or advertises any [Germaine Monteil or Rochas Paris] product.

If you have any questions please call ___________.

____
for [Germaine Monteil
Cosmetiques Corporation or
Rochas Paris]

EXHIBIT C

Dear Retailer:

This letter is being sent to all [Tuvache or Sonia Rykiel] accounts. On [date], Germaine Monteil Cosmetiques Corporation agreed to the entry of a Consent Order with the Federal Trade Commission concerning certain distribution practices. This Consent Order was entered into for settlement purposes only and does not constitute an admission that Germaine Monteil violated the law. As part of that Consent Order, we are obligated to send you this letter.

Germaine Monteil wants its [Tuvache or Sonia Rykiel] accounts to know and understand the following:

1. You can advertise and sell [Tuvache or Sonia Rykiel] products at any price you choose.

2. Germaine Monteil will not take any action against you, including termination, because of the price at which you advertise or sell [Tuvache or Sonia Rykiel] products.

3. The price at which you sell or advertise [Tuvache or Sonia Rykiel] products will not affect your right to lawfully use [Tuvache or Sonia Rykiel] trademarks or other identification in your sale or advertising of products bearing [Tuvache or Sonia Rykiel] trademarks or identification.

4. You are free to participate in any cooperative advertising program sponsored by Germaine Monteil for which you would otherwise qualify, and to receive any advertising credit or allowance allowed thereunder regardless of the price at which you advertise a [Tuvache or Sonia Rykiel] product.

5. The price at which a store sells or advertises a [Tuvache or Sonia Rykiel] product is its own business. Germaine Monteil does not want to be informed by a [Tuvache or Sonia Rykiel] account of the price at which any other store sells or advertises any [Tuvache or Sonia Rykiel] product.

If you have any questions regarding the Consent Order or this letter, please call ___________.

____
for [Tuvache, Inc. or
Sonia Rykiel]

IN THE MATTER OF

BATUS INC.

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

Docket C-3099. Complaint, Dec. 6, 1982—Decision, Dec. 6, 1982

This consent order requires, among other things, that a Louisville, Kentucky management and holding company timely divest 200,000 square feet of its retail floor space, and reduce the volume of its retail sales by $20 million of 1981 sales. Further, the company is barred from making certain acquisitions in prescribed areas without prior Commission approval.

Appearances

For the Commission: *Daniel P. Ducore.*

For the respondent: *Ronald S. Rolfe, Cravath, Swaine & Moore,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, subject to the jurisdiction of the Commission, has acquired the stock or assets of Marshall Field & Company, 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 that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. Definitions

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

a. *Respondent* means BATUS Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with headquarters address at 2000 Citizens Plaza, Louisville, Kentucky, as well as its officers, directors, employees, agents, parents, divisions, subsidiaries, affiliates, successors, assigns, and the officers, directors, employees or agents of BATUS' parents, divisions, subsidiaries, affiliates, successors or assigns.

b. *Marshall Field* means Marshall Field & Company, a corpora-

tion organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with principal offices at 25 East Washington St., Chicago, Illinois, as well as its officers, directors, employees, agents, its parents, divisions, subsidiaries, affiliates, successors and assigns, and the officers, directors, employees or agents of its parents, divisions, subsidiaries, affiliates, successors or assigns.

c. *SMSA* means a Standard Metropolitan Statistical Area as defined by the Office of Management and Budget, Statistical Policy Division, 1975 Edition, as amended.

d. *Department stores,* as used herein, corresponds with Bureau of Census Standard Industrial Classification No. 531, 1977 Census of Retail Trade. It refers to retail stores normally employing 25 or more people and engaged in selling some items of each of the following groups of merchandise:

(i) Furniture, home furnishings, appliances, and radio and TV sets; and

(ii) A general line of apparel for the family; and

(iii) Household linens and dry goods.

e. *Discount department store* means a department store distinguished from other types of department stores by certain characteristics of location, physical structure, services provided, products offered for sale, general pricing and merchandise strategies, or other factors.

f. *Traditional department store* means a department store of any type other than a discount department store.

g. *GMAF stores,* as used herein, refers to all retail establishments included in the following Bureau of Census Major Industry Groups and Standard Industrial Classifications as used in the 1977 Census of Retail Trade:

Census Number	Descriptions
Classification No. 531	Department stores
Major Industry Group No. 56	Other stores primarily engaged in the sale of apparel
Classification No. 533	Limited price variety stores
Classification No. 539	Miscellaneous general merchandise stores

Census Number	Descriptions
Major Industry Group No. 57	Furniture, home furnishings and equipment stores.

II. Respondent

2. BATUS is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with headquarters address at 2000 Citizens Plaza, Louisville, Kentucky.

3. Respondent was formed in January 1980 as both the holding and management company for the United States major business interests of its parent, B.A.T. Industries, p.l.c., of London, England.

4. Respondent is responsible for a substantial group of companies in the tobacco, retail and paper industries, including: Brown & Williamson Tobacco Corporation, Saks & Company, Gimbel Brothers, Inc., The Kohl Corporation, Thimbles Specialty Stores, Inc., and Appleton Papers, Inc.

5. In fiscal year 1980, respondent had sales of $4,161 million and operating income of $432 million.

6. In fiscal year 1981, respondent received retail revenues in the Milwaukee, Wisconsin SMSA in excess of $217,500,000 including approximately $130,400,000 from its eight Gimbels traditional department stores and $87,100,000 from its 14 Kohl's Department Stores.

7. In 1981 respondent was the largest department store retailer in the Milwaukee, Wisconsin SMSA.

8. In 1981 respondent, through its Gimbels stores, was the largest traditional department store retailer in the Milwaukee, Wisconsin SMSA.

9. In 1981 respondent was the largest retailer of certain merchandise categories in the Milwaukee, Wisconsin SMSA.

10. At all times relevant herein, respondent has been and is now 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. Marshall Field

11. Marshall Field is a corporation organized, existing, and doing business under and by virture of the laws of the State of Delaware, with principal offices at 25 East Washington Street, Chicago, Illinois.

12. Through various retail divisions, Marshall Field operates

department stores and GMAF stores in various sections of the United States, including: the Chicago division (Marshall Field stores), Breuners, Frederick & Nelson, The Crescent, and J.B. Ivey & Company.

13. In fiscal year 1980, Marshall Field had net sales of approximately $1,013 million and net income of approximately $21 million.

14. In fiscal year 1981, Marshall Field received retail revenues in excess of $27 million from its one traditional department store in the Milwaukee, Wisconsin SMSA.

15. In 1981 Marshall Field was the eighth largest department store retailer in the Milwaukee, Wisconsin SMSA.

16. In 1981 Marshall Field was the fifth largest traditional department store retailer in the Milwaukee, Wisconsin SMSA.

17. In 1981 Marshall Field ranked among the top ten retailers of certain merchandise categories in the Milwaukee, Wisconsin SMSA.

18. At all times relevant herein, Marshall Field has been and is now 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.

IV. The Acquisition

19. Respondent, a wholly owned subsidiary of respondent and Marshall Field entered into a Stock Purchase Agreement dated as of March 15, 1982, providing for the issuance and sale by Marshall Field to BATUS' subsidiary of 2,000,000 shares of Marshall Field common stock, at $25.50 per share (the "Stock Purchase Agreement").

20. On or about March 17, 1982, a direct wholly owned subsidiary of respondent commenced a tender offer for a majority of the shares of Marshall Field, with the intention of acquiring the balance of the Marshall Field stock pursuant to a merger between Marshall Field and an indirect wholly-owned subsidiary of respondent (the acquisition of Marshall Field shares pursuant to such tender offer and merger or any other business combination with Marshall Field, together with the purchase of Marshall Field shares pursuant to the Stock Purchase Agreement, is hereinafter called the "Acquisition"). Under the terms of the acquisition as amended, the offering price was $30 per Common share. The acquisition was substantially completed on or about April 20, 1982. The total acquisition price,

including the shares to be acquired by merger, was approximately $365 million.

V. Trade and Commerce

21. One relevant line of commerce in which to evaluate the effects of respondent's acquisition of Marshall Field is retail sales by department stores.

22. Within the department store line of commerce, a relevant line of commerce in which to evaluate the effects of respondent's acquisition of Marshall Field is retail sales by traditional department stores.

23. Other relevant lines of commerce in which to evaluate the effects of respondent's acquisition of Marshall Field are retail sales of certain merchandise, including, but not limited to:

a. men's apparel;
b. women's apparel;
c. children's apparel.

24. The relevant section of the country is the Milwaukee, Wisconsin SMSA.

25. The department store market in the Milwaukee, Wisconsin SMSA is concentrated.

26. The traditional department store and certain apparel markets in the Milwaukee, Wisconsin SMSA are highly concentrated. Since 1977 only six firms have maintained a traditional department store presence in Milwaukee, with the top four firms accounting for over 75 percent of sales. In those years as well, four firms have controlled in excess of 65 percent of retail sales in certain apparel markets.

27. Barriers to entry into department store retailing in the Milwaukee, Wisconsin SMSA are substantial.

28. Prior to the acquisition here in question, respondent and Marshall Field were and had been actual competitors of each other in department store and traditional department store retailing and in the retail sale of other merchandise, and had been actual competitors of others engaged in similar retail activities in the Milwaukee, Wisconsin SMSA.

VI. Effects

29. The effect of respondent's acquisition of Marshall Field may be substantially to lessen competition or tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act,

as amended, 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. actual competition between Marshall Field and respondent in department store and traditional department store retailing and the retail sale of other merchandise in the Milwaukee, Wisconsin SMSA has been eliminated;

b. actual competition between competitors generally in department store and traditional department store retailing and in the retail sale of other mechandise in the Milwaukee, Wisconsin SMSA may be lessened;

c. concentration in department store and traditional department store retailing and in the retail sale of other merchndise in the Milwaukee, Wisconsin SMSA has been increased; and

d. the likelihood of eventual deconcentration may be lessened.

VII. Violation Charged

30. The acquisition by respondent of the stock and assets of Marshall Field constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Decision and Order

The Federal Trade Commission having initiated and 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 Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and the Clayton Act; and

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

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

charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent BATUS, 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 located at 2000 Citizens Plaza, in the City of Louisville, State of Kentucky.

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 for purposes of this order the following definitions shall apply:

1. *BATUS* means BATUS Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with headquarters address at 2000 Citizens Plaza, Louisville, Kentucky, as well as its officers, directors, employees, agents, parents, divisions, subsidiaries, affiliates, successors, assigns, and the officers, directors, employees or agents of BATUS' parents, divisions, subsidiaries, affiliates, successors or assigns.

2. *Marshall Field* means Marshall Field & Company, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with principle offices at 25 East Washington St., Chicago, Illinois, as well as its officers, directors, employees, agents, its parents, divisions, subsidiaries, affiliates, successors and assigns, and the officers, directors, employees or agents of its parents, divisions, subsidiaries, affiliates, successors or assigns.

3. *SMSA* means a Standard Metropolitan Statistical Area as defined by the Office of Management and Budget, Statistical Policy Division, 1975 Edition, as amended.

4. *Department stores*, as used herein, corresponds with Bureau of the Census Standard Industrial Classification No. 531, 1977 Census of Retail Trade. It refers to retail stores normally employing 25 or

more people and engaged in selling some items of each of the following groups of merchandise:

(a) Furniture, home furnishings, appliances, and radio and TV sets; and

(b) A general line of apparel for the family; and

(c) Household linens and dry goods.

5. *GMAF stores,* as used herein, refers to all retail establishments included in the following Bureau of Census Major Industry Group and Standard Industrial Classifications as used in the 1977 Census of Retail Trade:

Census Number	Descriptions
Classification No. 531	Department stores
Major Industry Group No. 56	Other stores primarily engaged in the sale of apparel
Classification No. 533	Limited price variety stores
Classification No. 539	Miscellaneous general merchandise stores
Major Industry Group No. 57	Furniture, home furnishings and equipment stores.

II.

It is further ordered, That BATUS shall, within two (2) years from the date upon which this order becomes final, divest absolutely and in good faith such of its department stores in the Milwaukee, Wisconsin SMSA as will reduce the floor space of its department stores in that SMSA by an amount not less than 200,000 square feet and reduce its annual sales volume in that SMSA in an amount not less than $20 million as measured by fiscal 1981 sales.

A. Divestiture of any store under the terms of this order shall be made only to an acquiror approved in advance by the Federal Trade Commission.

B. Such divestiture shall include all leases, stock space and inventories but not the trade name or other proprietary names associated with the store.

C. Should BATUS divest the Marshall Field department store in Mayfair Mall it shall within two (2) years from the date of such divestiture open or begin construction of another Marshall Field retail establishment consisting of not less than 120,000 square feet of floor space in the Milwaukee SMSA. BATUS shall complete construction within three years from the time construction is begun. BATUS shall ensure that the store is a viable competitive retail

establishment for not less than five (5) years from the date of its opening.

III.

It is further ordered, That:

A. For a period of ten (10) years from the date upon which this order becomes final, BATUS shall not, directly or indirectly, through acquisition of stock, share capital, equity or any other interest in any equity, corporate or noncorporate, acquire any department store or GMAF store located within the Milwaukee, Wisconsin SMSA without the prior approval of the Federal Trade Commission; nor shall BATUS acquire any assets of any entity, corporate or noncorporate, operating any department store or GMAF store located within the Milwaukee, Wisconsin SMSA without the prior approval of the Federal Trade Commission.

B. For a period of two (2) years from the date upon which this order becomes final, BATUS shall not, directly or indirectly, through acquisition of stock, share capital, equity or any other interest in any equity, corporate or noncorporate, acquire any department store or GMAF store located in any SMSA in which BATUS then operates a department store or GMAF store without the prior approval of the Federal Trade Commission; nor shall BATUS acquire any assets of any entity, corporate or noncorporate, operating any department store or GMAF store located in any SMSA in which BATUS then operates a department store or GMAF store without the prior approval of the Federal Trade Commission.

C. For a period of three (3) years, beginning two (2) years from the date upon which this order becomes final, BATUS shall not, directly or indirectly, through acquisition of stock, share capital, equity or any other interest in any equity, corporate or noncorporate, acquire any department store or GMAF store located in any SMSA in which BATUS then operates a department store or GMAF store without the prior approval of the Federal Trade Commission; nor shall BATUS acquire any assets of any entity, corporate or noncorporate, operating any department store or GMAF store located in any SMSA in which BATUS then operates a department store or GMAF store without the prior approval of the Federal Trade Commission. Provided that this provision (III. C.) shall not be deemed to require prior approval of the Federal Trade Commission of acquisitions (1) of store sites, leases or inventories if the store property has not been operated as a department store or GMAF store for a period of ninety (90) consecutive days immediately prior to its

acquisition, or (2) of stock, share capital, equity or any other interest in any equity, corporate or noncorporate, or assets for a purchase price or other consideration less than $15 million.

IV.

It is further ordered, That BATUS shall submit within sixty (60) days after the date upon which this order becomes final, and every ninety (90) days thereafter, until such time that divestiture as required by paragraph II of this order has been accomplished, a report setting forth in detail the manner and form in which BATUS intends to comply, is complying, and has complied with the terms of this order and such additional information relating thereto as may from time to time be required. All such reports shall include a summary of contacts or negotiations with anyone for the specified assets, the identity of all such persons, and copies of all written communications to and from such persons.

V.

It is furthered ordered, That for a period of ten (10) years from the date upon which this order becomes final, BATUS shall notify the Federal Trade Commission at least thirty (30) days prior to any change in BATUS which may affect compliance with the obligations arising out of this consent order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation.

VI.

It is further ordered, That each year, for a period of ten (10) years from the date upon which divestiture as required by paragraph II of this order is accomplished, BATUS shall submit a report setting forth in detail the manner and form in which BATUS intends to comply, is complying or has complied with paragraph III of this order.

IN THE MATTER OF

CANADA CEMENT LAFARGE LTD., ET AL.

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

Docket C-3100. Complaint, Dec. 21, 1982—Decision, Dec. 21, 1982

This consent order requires a Montreal, Canada producer of cement, among other things, to fully divest itself of a Chattanooga, Tenn. cement manufacturing plant and specified terminals associated with it within eighteen (18) months of the date the order becomes final to a Commission-approved purchaser. For five years, the respondent must offer to sell to the purchaser of the plant and terminals, twenty thousand tons of cement annually. Further, respondent must offer technical assistance for operation of the plant and terminals. Respondent is required to offer specific tonnages of clinker and cement to independent buyers on an annual basis for five years. Should respondent fail to divest itself of the Tennessee plant within the specified time period, it must then sell an Alabama plant and associated terminals within a twelve (12) month period.

Appearances

For the Commission: *Jerry A. Philpott, Jeffrey Behm, Martha Oppenheim, Allen Hickey* and *Franklin M. Lee.*

For the respondents: *R. Bruce MacWhorter* and *Edward H. Tuck, Shearman & Sterling,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that Canada Cement Lafarge Ltd. ("Canada Cement Lafarge"), a corporation subject to the jurisdiction of the Commission, intends to acquire all of the outstanding common stock of General Portland Inc. ("General Portland"), 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 that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(b), stating its charges as follows:

I. Definitions

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

a. *Cement* means portland cement Types I through V, as specified by the American Society for Testing and Materials.

b. *Clinker* means the intermediate product in the cement manufacturing process produced by crushing raw materials (primarily limestone, shale, clay, slate, silica, sand or iron ore) and then burning the mixture in high temperature rotary kilns.

c. *Relevant Markets* means the *Inland Market* and the *Florida Market,* as defined herein.

1. *Inland Market* means northern and eastern Alabama, Georgia, southeastern Tennessee and northern Florida.

2. *Florida Market* means the peninsular region of the State of Florida.

II. Canada Cement LaFarge

2. Canada Cement Lafarge is an approximately 54 percent-owned subsidiary of Lafarge Coppee S.A. Canada Cement Lafarge is engaged primarily in the production and sale of cement, including sales to purchasers in the Florida Market.

3. Lafarge Coppee S.A. is a French corporation with its principal executive offices at 28, rue Emile-Menier, 75116 Paris, France. LaFarge Coppee S.A. is the third largest manufacturer and seller of cement in the world. In 1980, Lafarge Coppee S.A. sold approximately 250,000 tons of clinker to purchasers in the Florida Market.

4. In 1980, Canada Cement Lafarge had total sales of approximately $711,100,000 (Canadian) and total assets in 1980 of approximately $853,700,000 (Canadian).

5. Citadel Cement Corporation is a wholly-owned subsidiary of Canada Cement Lafarge. Citadel Cement Corporation (a corporation organized and existing under the laws of Maryland) has its principal place of business at 2700 Cumberland Parkway, Atlanta, Georgia.

6. Citadel Cement Corporation owns a cement plant in the U.S. located at Demopolis, Alabama and sells cement in the Inland Market.

III. General Portland

7. General Portland is a corporation organized and existing under the laws of the State of Delaware, with its principal office at 12700 Park Central Place, Dallas, Texas.

8. General Portland is primarily engaged in the production and sale of cement.

9. In 1980, General Portland had cement sales of approximately $281,100,000 and total assets in 1980 of $320,800,000.

10. General Portland has cement plants located in Texas, Florida, Tennessee, California, Ohio, Kansas, and Pennsylvania. General Portland's Tennessee plant sells cement in the Inland Market. General Portland's Florida plants sell cement in the Florida market.

IV. Jurisdiction

11. At all times relevant herein General Portland and Canada Cement Lafarge have been engaged in the production and sale of cement in interstate commerce and General Portland and Canada Cement Lafarge are engaged in commerce as "commerce" is defined in the Clayton Act, as amended, 15 U.S.C. 12, *et seq.*, and each is a corporation whose business is in or affects commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*

V. The Acquisition

12. On or about October 2, 1981, Canada Cement Lafarge made a cash tender offer to acquire any or all of the outstanding common stock of General Portland at $47.00 (U.S.) per share for a total price of approximately $326 million (U.S.).

VI. Trade and Commerce

13. The relevant lines of commerce are the manufacture and sale of cement.

14. The relevant sections of the country are the Inland Market and the Florida Market.

VII. Actual Competition

15. General Portland and Canada Cement Lafarge are actual competitors in the relevant lines of commerce in the relevant sections of the country.

VIII. Effects

16. The effects of the proposed acquisition may be to substantially lessen competition or to tend to create a monopoly in the relevant lines of commerce in the Relevant Markets in violation of Section 7

of the Clayton Act, as amended, 15 U.S.C. 18, and the acquisition constitutes an unfair method of competition and unfair act or practice within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) actual competition between General Portland and Canada Cement Lafarge in the manufacture and sale of cement in the Relevant Markets may be eliminated;
(b) actual competition among competitors generally in the manufacture and sale of cement in the Relevant Markets may be lessened;
(c) concentration in the manufacture and sale of cement in the Relevant Markets may be increased and the possibilities for eventual deconcentration may be diminished;
(d) mergers or acquisitions between other cement producers in the Relevant Markets may be fostered, thus causing a further substantial lessening of competition or tendency toward monopoly in the manufacture and sale of cement; and
(e) barriers to entry into the manufacture and sale of cement in the Relevant Markets may be increased.

Violations Charged

17. By reason of the foregoing, the proposed acquisition by Canada Cement Lafarge of the outstanding common stock of General Portland would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Decision and Order

The Federal Trade Commission having initiated an investigation of the proposed acquisition of the common stock of General Portland Inc. ("GP") by Canada Cement Lafarge Ltd. ("CCL"), and CCL and its parent, Lafarge Coppee S.A. ("Lafarge") 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 CCL and Lafarge with violations of the Federal Trade Commission Act and the Clayton Act; and

CCL, Lafarge, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by CCL and Lafarge 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 CCL and Lafarge 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 CCL and Lafarge 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 comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Canada Cement Lafarge Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of Canada, with its office and principal place of business located at 606 Cathcart, Montreal, Quebec, Canada H3B 1L7.

2. Lafarge Coppee S.A. is a French corporation with its principal executive offices at 28, rue Emile-Menier, 75116 Paris, France. Lafarge Coppee S.A. owns approximately 54% of the voting capital stock of Canada Cement Lafarge Ltd.

3. General Portland Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its principal executive offices located at 12700 Park Central Place, Dallas, Texas.

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

ORDER

For the purpose of this Order:

a. *Respondents* means Canada Cement Lafarge Ltd., a corporation organized, existing and doing business under the laws of Canada with its office and principal place of business located at 606 Cathcart, Montreal, Quebec, Canada H3B 1L7; Lafarge Coppee S.A., a French corporation with its principal executive offices located at 28, rue Emile-Menier, 75116 Paris, France; and their subsidiaries and the successors and assigns of their businesses.

b. *Subsidiary* means any corporation in which Respondents own,

either directly or indirectly, more than fifty percent (50%) of the outstanding shares of a class of securities having voting power to elect a majority of the Board of Directors of the corporation (whether or not any other class of security has or might have voting powers by reason of the happening of a contingency).

c. *Chattanooga Plant* means the cement manufacturing plant located at Chattanooga, Tennessee, presently owned or leased by General Portland Inc., and all assets associated with the plant as may be necessary for the plant to operate as a going concern and a viable competitor in the production and sale of cement. It does not include the Specified Terminals defined in (e) below.

d. *Demopolis Plant* means the cement manufacturing plant presently owned or leased by Respondents at Demopolis, Alabama, (and divestiture of the Demopolis plant shall include the granting of option(s) to acquire any or all of the associated distribution terminals at Birmingham, Alabama; Mobile, Alabama; Doraville, Georgia; Atlanta, Georgia; Bainbridge, Georgia; and New Orleans, Lousiana) and all other assets associated with the plant as may be necessary for the plant to operate as a going concern and a viable competitor in the production and sale of cement.

e. *Specified Terminals* means the distribution terminals in Knoxville, Tennessee; Atlanta, Georgia; Columbus, Georgia; and Tallahassee, Florida, all presently owned or leased by General Portland Inc., and the distribution terminal in Birmingham, Alabama, presently owned or leased by Respondents.

f. *Cement* means portland cement Types I through V, as specified by the American Society for Testing and Materials.

g. *Clinker* means the intermediate product in the cement manufacturing process produced by crushing raw materials (primarily limestone, shale, clay, slate, silica, sand or iron ore) and then burning the mixture in high temperature rotary kilns.

h. *Plant Area* means each area in the United States within a 300 mile radius of any cement plant owned or leased by Respondents in either the United States or Canada. For any acquisition(s) of assets subject to Paragraph VIII of this Order, *Plant Area* shall be determined as of the date of such acquisition(s).

i. *Independent Buyer* means any cement manufacturer other than Respondents.

I

It is ordered, That Respondents, their officers, directors, agents, representatives, and employees, within eighteen months from the

date on which this Order becomes final, shall divest themselves, absolutely, in good faith, of all right, title and interest in the Chattanooga Plant together with all additions and improvements thereto. If, at the expiration of eighteen months from the date on which this Order becomes final, Respondents have not divested the Chattanooga Plant, and no application for approval by the Commission of the divestiture of the Chattanooga Plant is pending, then Respondents shall either (1) divest the Chattanooga Plant within three months; or (2) divest the Demopolis Plant within twelve months; *provided, however,* that if at the expiration of eighteen months from the date on which this Order becomes final, an application for divestiture of the Chattanooga Plant is pending, the additional time that Respondents have to divest the Chattanooga Plant (three months) or the Demopolis Plant (twelve months) shall not begin to run, and an obligation to sell the Demopolis Plant shall not accrue, until and unless the pending application is finally disapproved by the Commission. Divestiture shall be made to an acquirer approved by the Commission.

II

It is further ordered, That as part of any divestiture of the Chattanooga Plant, Respondents shall offer to the proposed acquirer option(s) to acquire Respondents' rights, title and interest in the Specified Terminals and all of their right, title and interest to the surface and mineral rights to, and all improvements upon, the approximately 3,000 acres of land located in McMinn County near Calhoun, Tennessee, on the Hiawassee River and presently owned or leased by General Portland Inc.

III

It is further ordered, That for a period of five years from the date of their divestiture of the Chattanooga Plant, Respondents shall offer to sell at commercially reasonable wholesale prices, terms and conditions 20,000 tons of cement annually to the acquirer of the Chattanooga Plant.

IV

It is further ordered, That for a period of five years from the date of their divestiture of the Chattanooga Plant, Respondents shall offer to provide technical assistance to the acquirer of that plant at commercially reasonable prices, terms and conditions. If an acquirer

of the Chattanooga Plant requests technical assistance within a three year period from the date of his acquisition of the Chattanooga Plant for a modernization or replacement project extending beyond the five year period, and agrees to commercially reasonable prices, terms and conditions, Respondents shall provide that technical assistance for a reasonable time to complete the project.

V

It is further ordered, That for a period of five years from the date that this Order becomes final, Respondents shall offer to sell, or sell, including sales pursuant to contracts in force at the time this Order becomes final, to Independent Buyers with a cement manufacturing or grinding plant or distribution terminal in Florida for shipments to or delivery in Florida at commercially reasonable wholesale prices, terms and conditions: (1) at least 250,000 tons of cement annually; and (2) at least 250,000 tons of clinker annually.

VI

It is further ordered, That Respondents shall not be required to divest the Demopolis Plant in the event that, as a result of events beyond the control of Respondents, the said Chattanooga Plant has ceased to exist physically or to be operable as a plant for the production of cement.

VII

It is further ordered, That pending divestiture of the properties required by Paragraph I of this Order, or that may be divested under Paragraph II of this Order, Respondents shall not cause or permit the wasting or deterioration of such properties, in any manner which may impair the marketability or viability of any such properties, except for normal wear and tear or in the ordinary course of operation.

VIII

It is further ordered, That for a period of ten years Respondents shall not acquire, without the prior approval of the Commission, any cement manufacturing or grinding plant or distribution terminal in South Carolina, Georgia, Alabama, Tennessee and Florida or in any Plant Areas in which Respondents, at the time of the acquisition, are then engaged in the manufacture of cement.

IX

It is further ordered, That within one hundred and twenty days from the date on which this Order becomes final, and every one hundred and twenty days thereafter until they have fully complied with Paragraphs I and II of this Order, Respondents shall submit in writing to the Commission a verified report setting forth in such detail as the Commission staff shall request the manner and form in which they intend to comply, are complying or have complied therewith.

X

It is further ordered, That within sixty days from the date on which this Order becomes final, and annually thereafter upon each anniversary of the date on which this Order becomes final until the expiration of the prohibitions in Paragraph VIII of this Order, Respondents shall submit in writing to the Commission verified reports listing all acquisitions of any equity interest in, and mergers with, any business entity, corporate or noncorporate, engaged in the production of cement in the United States, the date of each such acquisition or merger, and such additional information relating thereto as may from time to time be requested.

XI

It is further ordered, That with respect to Paragraphs III and V of this Order, Respondents shall maintain adequate records to be furnished upon request of the staff of the Commission, which evidence compliance with the provisions of this Order, including, but not limited to records showing: the amount of cement or clinker sold pursuant to Paragraphs III or V of this Order, the identity of the purchasing persons and the prices, terms and conditions of the sale of such cement or clinker.

XII

It is further ordered, That Respondents shall notify the Commission at least thirty days prior to any proposed corporate changes which may affect compliance obligations arising out of this Order, such as dissolution, assignment or sale resulting in the emergence of successor corporations.

IN THE MATTER OF

AMERICAN MEDICAL ASSOCIATION

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

Docket 9064. Final Order, Oct. 12, 1979—Modifying Order, Dec. 22, 1982

This order reopens the proceeding and modifies Paragraph IV(A) of the Commission's order issued on Oct. 12, 1979 (94 F.T.C. 701), *modified* May 19, 1982 (99 F.T.C. 440). The modification eliminates the requirement that the AMA utilize first class mail to send a copy of the order to its members.

MODIFICATION OF DECISION AND ORDER

The American Medical Association ("AMA") has requested that the Commission modify its Order in Docket No. 9064 to relieve AMA of its obligation under Paragraph IV(A) of the Order to send by first-class mail a copy of a letter, Appendix A to the Order, to each of its present members.

After duly considering AMA's petition, the Commission on December 22, 1982 determined that public interest considerations warrant reopening of the order, and that Paragraph IV(A) should be modified to relieve AMA of the obligation to send the required letter by first-class mail. Accordingly,

It is ordered, That the proceeding be, and it hereby is, reopened.

It is ordered, That the Order be, and it hereby is, modified by substituting for Paragraph IV(A) of the Order, the following:

IV

It is further ordered, That respondent American Medical Association:

A. Send by mail under separate cover a copy of a letter in the form shown in Appendix A to this Order to each of its present members and to each constituent and component organization of respondent, within sixty (60) days after this Order becomes final.

IN THE MATTER OF

THE KROGER COMPANY

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

Docket 9102. Final Order, Sept. 25, 1981—Modifying Order, Dec. 29, 1982

As agreed to by the FTC and The Kroger Company, this Order modifies the Commission's Final Order issued on September 25, 1981 (98 F.T.C. 639). The Modified Final Order prohibits Kroger from advertising survey-based food price comparisons that refer to a particular city, metropolitan area or competitor, unless: (1) employees responsible for pricing Kroger's products do not know which items have been selected for the survey prior to its completion; and (2) the claim does not generalize the results of the survey to a product category that has been systematically excluded from the survey, unless such generalization clearly and conspicuously discloses that the product category has been excluded from the survey. The Order, which will remain in effect until December 31, 1984, dismisses the allegations contained in Paragraphs Six B and D, and Seven B and D of the complaint.

MODIFIED FINAL ORDER

The Kroger Company having filed in the United States Court of Appeals for the Eleventh Circuit a petition for review of the order to cease and desist issued herein on September 25, 1981; and the Commission and the Kroger Company having subsequently agreed upon the provisions of a final order modifying the order of September 25; and the Commssion having the authority to modify its order by virtue of the fact that the record in the proceeding has not been filed with the court of appeals (*see* 15 U.S.C. 45(b) and Commission rule 3.72(a)); accordingly,

It is ordered That the order of September 25, 1981, be, and it hereby is, modified in accordance with the parties' agreement to read as follows:

ORDER

I.

A. *Respondent* means the Kroger Company, a corporation, its successors and assigns, and its officers, representatives, agents and employees, acting directly or indirectly through any corporation, subsidiary or other device in the sale of food, household items and other merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

b. *Survey-based food price comparison* means an advertised claim

that refers to a survey of respondent's and any competitor's food prices and that projects the result obtained from the survey sample to items not included in the survey.

II.

It is ordered, That respondent cease and desist from advertising any survey-based food price comparison that refers, directly or indirectly, to a particular city, metropolitan area or competitor (or competitors) by name or other designation unless:

A. Employees responsible for pricing respondent's merchandise do not know which items have been selected for the survey prior to its completion, and

B. The claim does not generalize the results of the survey to a product category that has been systematically excluded therefrom; *provided, however,* that no such generalizaton will be deemed to extend to any product category whose systematic exclusion is disclosed clearly and conspicuously in respondent's advertisements.

III.

It is further ordered, That respondent shall, within sixty (60) days after service of this order upon it, file with the Commission a written report setting forth in detail the manner and form in which it has complied, or intends to comply, with this order.

IV.

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

V.

It is further ordered, That the provisions of this order shall remain in effect until December 31, 1984.

VI.

It is further ordered, That the allegations contained in Paragraphs

Six B and D, and Seven B and D, of the Complaint be, and they hereby are, dismissed.

Commissioner Pertschuk dissented.

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK

I view the willingness of a majority of the Commission to accept what is essentially an illusory order as a product of the sustained ideologically-based attack on this case by the Chairman and the Director of the Bureau of Consumer Protection in connection with their proposals for weakening the Commission's deception and advertising substantiation standards.

Before I explain the inadequacies of the modified final order agreed to by Kroger and the Commission, I believe it is useful to review briefly the basic facts of the case to remind the Commission that its initial finding of liability and accompanying order were quite reasonable.

Kroger ran a lengthy and remarkably successful advertising campaign relying on its own price survey, comparing it to competitors. As those familiar with the history of *advertised* supermarket price surveys know, there is a powerful tendency to structure such surveys to produce results favorable to the advertiser. In Kroger's case, this incentive resulted in a number of survey characteristics. First, its comparison was limited to "dry groceries"—that is, fresh meat and produce were excluded though the record showed Kroger tended to be higher in those categories; second, the person in each marketing area who set prices for the items, the "grocery merchandiser," was responsible for selecting the items to be placed in the survey; third, in some cities, the grocery merchandiser systematically put items in the survey that Kroger was buying from manufacturers on special promotion and in turn temporarily reducing at retail.

Kroger almost always "won" its own survey and emphasized in weekly newspaper ads that it had again been shown to have the lowest prices in each metropolitan area. There is something of an abstract debate in the Commission's opinion about whether Kroger claimed to have *more* lower prices, or the *most* lower prices, compared to its competitors, but the key claims found by the Commission were that it was cheaper overall to shop at Kroger and that Kroger had a survey which backed up that claim. 98 F.T.C. 639, 736 (1981).

At the same time Kroger was conducting its advertised survey, it was regularly conducting two internal surveys for its own management. One of these was a market basket survey—that is, a survey

which showed the cost of a typical "market basket" of food, purchased on a weekly basis for a household, compared with Kroger's competitors. The record evidence indicates that this market basket had all the earmarks of a reliable survey. The persons who chose the items did some rough and ready—but reasonable—weighing of the items and changed the items over time. Most importantly, they had no incentive to manipulate the items because the results were for internal use only.

The record in the case shows how Kroger's *internal* survey stacked up with its *advertised* survey. In general, Kroger did relatively well in the grocery category, and not so well in meat and produce. For example, of all the market basket checks conducted by Kroger in Ft. Wayne, Indiana, it was lowest on grocery items five out of nine times but lowest on produce two out of nine times and lowest on meat one out of nine times. The patterns in the other cities are similar. 98 F.T.C. at 683-86. Yet virtually every week, Kroger's advertised survey proclaimed it to be the chain with the lowest prices. The record contains numerous examples where both of Kroger's internal surveys—the market basket comparison and a comparison of the number of items on which Kroger was lower—showed Kroger to be higher than others at the same time the advertised survey showed Kroger to be lowest. (*See* CX 813)

In response to these practices the Commission issued an order covering any future advertised survey upon which Kroger bases a claim comparing its prices to those of its competitors in a particular area. That order, in its key parts, said that if Kroger advertised such a survey, it would have to: 1) make sure the items were selected in a representative way and that employees responsible for pricing products did not know the items on the survey; and 2) make sure claims based on the survey fairly represented the results of the survey (for example, if major categories of food were left out, the claim would have to make that clear). There is little doubt that Kroger's own internal survey could have met those requirements. It is inconceivable to me that those standards are unreasonable and that American consumers would not feel misled if they were violated.

Yet most of the modest but fundamental standards contained in the final order have been jettisoned by the Commission in the settlement with Kroger, apparently on some theory that meeting them would disrupt the flow of "useful" information. It is a highly dubious proposition that advertisements of surveys in which items aren't chosen representatively or which draw conclusions which do not fairly represent the actual survey are particularly useful for

anything. Apparently believing that elimination of these requirements did not weaken the order enough, the Commission also finally gave in to Kroger's central demand for an automatic "sunsetting" of the order after a short period of time.

Neither the record, the reasonable exercise of our remedial discretion, nor considerations of competitive equity compel these major concessions and modifications to the final order that was once deemed by the Commission to be a reasonable and restrained resolution of this case. The majority opinion authored by Commissioner Clanton set forth clear justification for the prescribed sampling methods and survey misrepresentation provisions that are deleted from the modified order. Nothing has persuaded me since that time that these provisions are now either unnecessary or unwarranted. As explained in some detail in the opinion, the prescribed sampling methods provided reasonable flexibility and specificity to Kroger on suitable means of sampling for its price surveys. Also, the general fencing-in prohibition on survey misrepresentations was reasonably related to the core deception in Kroger's price patrol, *e.g.*, overall price claims which were misleading because they failed to disclose the systematic exclusion of large product categories from the survey.

With respect to the two-year sunset provision, there are better ways of responding to any legitimate concerns of potential competitive inequity that Kroger may have from being "singled out" by the Commission. These could include serving the order on Kroger's competitors under the Commission's Section 205 authority, and reconsidering the order in the future should the Commission demonstrate a refusal to hold Kroger's competitors to the same standards. These alternatives would strike a much better balance between the agency's interest in preserving the integrity of its record findings and enforcement credibility in this case, with Kroger's interest in avoiding unfair competitive injury. With the inclusion of the short-term sunset provision, the order loses all credibility in the industry, assuring that no Kroger competitor will feel obliged to obey it, even if placed on notice of its requirements by the Commission. Further, and even more damaging to the Commission's enforcement interests, such an automatic sunset provision (which to my knowledge is virtually unprecedented in consumer protection cases) would create an irresistible temptation for other respondents to demand similar sunset relief on competitive equity or other grounds, particularly in this era of deregulation and decreased enforcement activity. If the basis of the Commission's concession to Kroger's demand for automatic sunset protection is that a majority of the

Commission no longer believes in its own findings of liability or its ability to defend them on appeal, then it would be more straightforward simply to admit mistake and dismiss the case. At the very least, that would avoid the dangerous precedent that will be set for our consumer protection mission by acceptance of this sunset provision.

As my colleagues know, I was not adverse to settlement of this case on justifiable grounds. But I am not so anxious to settle that I would acquiesce to settlement on these terms. Yet it seems to me that it is precisely such an overwhelming urge to settle this case at all costs that has driven the Commission toward acceptance of this modified order.

Because I am not prepared to pay such a price, I am dissenting from the Commission's agreement with Kroger.

Sale of cement manufacturing plant would be in compliance with divestiture pursuant to proposed Consent Order. [*811 0158, Canada Cement Lafarge Ltd.*]

August 18, 1982

Dear Mr. Munin:

This is in response to your request of [May 18, 1982], on behalf of Canada Cement Lafarge Ltd. (CCL), for an advisory opinion pursuant to Sections 1.1-1.4 of the Federal Trade Commission's Rules of Practice and Procedure, 16 C.F.R. 1.1-1.4 (1982). The Commission has carefully reviewed your application and has concluded that, should the Agreement Containing Consent Order (File No. 811-0158, In the Matter of Canada Cement Lafarge Ltd.) ultimately be accepted, sale by General Portland (GP) of the Chattanooga Plant to RC Cement (RC) (or to the newly-formed affiliate described in your Application) would be in compliance with Paragraphs I through IV of the Order.

Rule 1.1(a) (2) provides that an advisory opinion may be issued on a proposed corporate acquisition so long as it is not the subject of a current proceeding (Section 1.1(b) (1)). Your proposed sale to RC falls within Rule 1.1, since that sale is not currently under investigation. But, inasmuch as the sale is intended as a divestiture pursuant to a consent order, your application has presented an unusual procedural issue. You request prompt approval of the sale; however, the consent agreement is still before the Commission, pending the sixty days' public comment period required by Section 2.32 of the Rules of Practice following its provisional acceptance by the Commission. On the other hand, the thirty days' public comment period required by Section 2.41(f) of the Rules of Practice for applications for approval of proposed divestitures cannot commence in the absence of an outstanding order.

Nevertheless, your application presents persuasive reasons for Commission approval of the purchaser before the end of the public comment period applicable to the provisionally accepted order. The Commission has determined that issuance of an advisory opinion concerning the acceptability of RC as a purchaser, subject to eventual approval of the consent order itself, is appropriate at this junction. Publication of CCL's application and the attendant press release on May 28, 1982, have provided the thirty days' public comment that would have been required by Rule 2.41(f). This Advisory Opinion, however, in no way commits the Commission to finally accept the consent order, nor does it address the legality of the sale to RC under any order, rule or law other than the consent order.

The Commission's conclusion that the sale of the Chattanooga plant to RC would conform to the requirements of Paragraphs I-IV of the consent order is based in part on data supplied by CCL in support of the application and in part on data obtained by the Commission's staff in the investigation of CCL's acquisition of GP and other recent acquisitions in the cement industry. In November 1981, following an investigation of CCL's proposed acquisition of GP, CCL and attorneys of the Bureau of Competition entered into an Agreement Containing Consent Order whereby CCL would be required to sell either GP's Chattanooga, Tennessee, plant within eighteen months of the date on which the Order becomes final, or CCL's Demopolis, Alabama, plant within an additional twelve months.* The Commission has provisionally accepted this Agreement, and the consent order it contained has been placed on the public record for comment. In the interim, CCL has negotiated an agreement with RC to purchase the Chattanooga plant along with certain of its raw material sources and distribution terminals in Atlanta and Columbus, Georgia and Knoxville, Tennessee. The letter of intent signed by GP and RC on May 4, 1982, provides that if the sale is not consummated by a certain date, RC may withdraw from its agreement to purchase the assets in question. RC is currently the only potential purchaser contacted by GP who is pursuing purchase of the Chattanooga plant.

RC is a St. Louis-based holding company which owns 100% of the stock of River Cement Company (River). River produces cement in Missouri and ships it to distribution terminals along the Ohio and Mississippi Rivers. River does not appear to compete directly with the Chattanooga plant of GP. Although both firms sell cement in Tennessee, River's sales from its terminal in Memphis, are concentrated in western Tennessee and the Chattanooga plant sells in the eastern part of the state. Based on available data, the Commission finds that the sale of GP's Chattanooga plant to RC would probably not have a substantial anticompetitive effect in any relevant market.

River is an experienced cement producer that may be expected to become a strong competitor of CCL's Demopolis plant in the area served by the Chattanooga plant.

As noted above, your application requesting this Advisory Opinion has been placed on the Commission's public record in accordance with Section 1.4 of the Commission's Rules, 16 C.F.R. 1.4 (1982). Your separate request, pursuant to Rule 1.4, for continuing confidential treatment of the information listed on pages 6 and 7 of the nonpublic version of your application, has been considered by the

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* The Bureau of Competition investigation had shown that GP's plant at Chattanooga and that of CCL at Demopolis are direct competitors in the sale of portland cement in southeastern Tennessee, Alabama, Georgia, and the northern Florida panhandle.

Commission. The Commission will not disclose the above described information without giving CCL ten days advance notice of intended disclosure, as required by Section 6(f) and Section 21(c) of the Federal Trade Commission Act as amended, 15 U.S.C. 46(f), 57-b-2(c).

By direction of the Commission.

Application for Advisory Opinion

May 18, 1982

General Portland Inc. ("GP"), an indirectly wholly-owned subsidiary of Canada Cement Lafarge Ltd. ("CCL"), respectfully applies to the Federal Trade Commission (the "Commission") for an advisory opinion pursuant to Section 1.1(a) (2) of the Rules of Practice and Procedure issued by the Commission (the "Rules"), relating to a course of conduct which GP currently proposes to pursue. Moreover, for the reasons stated herein, GP requests that this application be given EXPEDITED TREATMENT in being placed on the public record for a 30-day public comment period and in being acted upon by the Commission following the end of that public comment period.

A. *Background.*

On October 2, 1981, CCL (through a subsidiary) made a cash tender offer for any or all of the outstanding common stock of GP. On November 13, 1981, CCL announced that it had purchased 4,870,245 shares of GP stock and by November 20, 1981, CCL held 93.1% of such stock.

Prior to the acquisition of the GP stock, the staff of the Commission initiated an investigation of the proposed acquisition of GP by CCL. CCL, Lafarge Coppee S.A. (the 54% parent of CCL) and the Commission staff signed an agreement containing a consent order (the "Consent Order") settling the investigation on November 11, 1981. The Consent Order will be binding on CCL, Lafarge Coppee and their subsidiaries, including GP.

The Consent Order still has not been provisionally accepted by the Commission or placed on the public record for comments, more than six months after it was signed. In light of the 60-day public comment period required for proposed consent orders under the Rules, the length of time for the Commission to complete its internal processes of reviewing the Consent Order, responding to any public comments and finally acting upon the Consent Order, and any delays that may be inherent in the Commission's summer schedule, it appears unlikely to GP that the Consent Order will be issued in final form before September, even if the Consent Order is placed on the public record by June 1 (only two weeks from now).

Since the Consent Order was signed, GP has been actively searching for potential buyers for the Chattanooga cement plant of GP (the "Chattanooga Plant"), so as to be able to divest the Chattanooga Plant in compliance with Articles I through IV of the proposed Consent Order. Such a buyer has been found and a letter of intent signed by it and GP on May 4, 1982: RC Cement Company ("RC Cement"). GP believes that the Commission will find RC Cement to be a highly acceptable buyer for the Chattanooga Plant.[1]

However, GP believes that it is extremely important to obtain a Commission determination prior to June 30, 1982 that *if* the Commission ultimately issues the Consent Order, RC Cement would be an approved buyer for the Chattanooga Plant under the Consent Order, and that the prior sale of the Chattanooga Plant to RC Cement or its newly-formed affiliate would be in compliance with Articles I through IV of the Consent Order, so that a sale may be made to RC Cement by June 30.

A delay in obtaining such a Commission determination until the Consent Order itself becomes final—a delay of at least two or three months after June 30—will significantly increase the risks of long-term harm to the Chattanooga Plant's competitive health and that unexpected developments in the U.S. economy or the U.S. cement industry might result in the loss of this highly desirable buyer. Therefore, for the reasons stated in more detail below, GP respectfully requests an advisory opinion from the Commission answering the following question:

> If the Federal Trade Commission ultimately issues a consent order containing Articles I through IV, inclusive, of the Consent Order signed on November 11, 1981 by Canada Cement Lafarge Ltd., Lafarge Coppee S.A. and the Commission staff, then will the prior sale described in Exhibit 1 hereto to RC Cement or its affiliate be to "an acquirer approved by the Commission" within the meaning of such Article I and in compliance with the requirements of such Articles I through IV, inclusive?

B. *Basis on Which Advisory Opinion is Sought.*

Under Section 1.1(a) (2) of the Rules, GP may request advice from the Commission with respect to a course of action that it intends to pursue, where the matter involves a proposed corporate acquisition (such as RC Cement's proposed acquisition of GP's Chattanooga Plant).[2]

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[1] In addition to making this application for an advisory opinion from the Commission, GP filed an application on May 11, 1982 with the Commission seeking approval under the Consent Order—if and when the Consent Order is issued in final form—of RC Cement or a newly-formed affiliate thereof as a buyer of the Chattanooga Plant. A copy of this May 11 application is attached as Exhibit 1. [Not reproduced herein.]

[2] Section 1.2(b) and Section 2.41(f) of the Rules do not apply to GP's request for an advisory opinion here, since these two provisions in the Commission's Rules apply only where there is an "*outstanding*" order to cease and desist issued by the Commission that might be violated by the proposed course of conduct. In GP's case, there is no outstanding order applicable to it, nor will there be such an order prior to September. Moreover, an advisory

(footnote continued)

C. *Facts and Arguments Relevant to Issuance of an Advisory Opinion.*

In its efforts to comply with the requirements of Articles I through IV of the proposed Consent Order, GP has—even prior to the effectiveness of the Consent Order—actively searched for a buyer for the Chattanooga Plant which would prove acceptable to the Commission. In that search, GP has looked aggressively for a buyer which had no competitive overlaps with the Chattanooga Plant, which did not have a major share of the U.S. cement industry, and which possesses the skills and resources to enable it to use the Chattanooga Plant to compete vigorously after the divestiture.

1. *Description of the Buyer.*

GP believes it has found such a desirable buyer in RC Cement. RC Cement is a holding company based in St. Louis, Mo., which owns 100% of River Cement Company ("River"). River owns one cement plant in Festus, Mo., and a grinding facility in Orange, Tex. capable of grinding clinker into cement. River's Festus cement plant has a cement capacity of 1,150,000 tons annually and it supplies cement to five terminals along the Ohio and Mississippi Rivers (at St. Louis, Mo., Cincinnati, Oh., Memphis, Tenn., Natchez, Miss., and Burnside, La.). The Orange, Tex. grinding plant has a capacity to grind clinker into cement at a rate of 400,000 tons annually. The Orange plant has no terminals.

GP understands that River's facilities do not sell any cement at all in any county in which GP's Chattanooga Plant sells cement. For example, the Chattanooga Plant sells no cement in western Tennessee or northern Mississippi (that is, in areas served by River's Memphis terminal) or in Kentucky (that is, in areas served by River's Cincinnati terminal). River, in turn, has no terminals or distribution facilities in central or eastern Tennessee, northeastern Alabama or northwestern Georgia (that is, in areas served by the Chattanooga Plant).

GP further understands that RC Cement is affiliated with another small U.S. cement producer based in the Lehigh Valley of Penn-

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(footnote continued from previous page)

opinion may be granted here, since (a) the question raised is not hypothetical in nature, (b) the course of conduct raised by GP's application (that is, GP's sale of the Chattanooga Plant to RC Cement) is not the same or substantially the same as the course of conduct under investigation or the subject of a current proceeding involving the Commission (that is, CCL's recent acquisition of GP), and (c) an informed opinion may be formed by the Commission without extensive investigation, clinical study, testing or collateral inquiry. As a result, prior to the final issuance of the Consent Order, GP has no recourse to Commission advice concerning GP's planned sale of the Chattanooga Plant to RC Cement other than by seeking an advisory opinion pursuant to Section 1.1(a) of the Rules.

sylvania: Hercules Cement Co. A 40% shareholder in RC Cement is IFINT S.A. (formerly IFI International S.A.), a publicly-held Luxembourg-based investment company in which Istituto Finanziario Industriale S.p.A. ("IFI"), an Italian company, owns a 24.6% interest (through two 100% subsidiaries).

IFI also owns approximately 51% of Unicem S.p.A., a publicly-held Italian cement company which owns an additional 20% of RC Cement. (As a result, IFINT and IFI together own 60% of RC Cement.) The remaining 40% of RC Cement is owned (through a 100% subsidiary) by . . . an Italian entity independent of both IFI and IFINT which has cement operations in Italy and Brazil.

GP understands that IFINT is the largest shareholder in U.S. Cement Co. ("U.S. Cement"), which owns 100% of Hercules Cement Co. IFINT owns 46.7% of U.S. Cement stock. Unicem and . . . (an independent company with cement operations in the U.K. and Australia) own the remaining interests in U.S. Cement, with 20% and 33.3%, respectively. (As a result, through IFI's controlling interest in Unicem, IFI and IFINT together own 66.7% of the stock of U.S. Cement.)

Hercules has a single cement plant, located in Stockerton, Pa., with a capacity of 700,000 tons. It operates a single terminal, located in Fort Meade, Maryland. CCL understands that Hercules sells no cement in any county in which the Chattanooga Plant sells cement.

Under the May 4 letter of intent with RC Cement, the buyer of the Chattanooga Plant may be RC Cement itself or a newly-formed affiliate thereof. Such an affiliate would involve only the existing shareholders owning interests in RC Cement and U.S. Cement, although both . . . and . . . are believed to be still considering whether or not to be shareholders in any newly-formed company acquiring the Chattanooga Plant. Regardless of whether these two companies choose to participate, however, IFI and IFINT will control a majority of the buyer's stock[3] As a result, IFI and IFINT will together own a controlling interest in the Chattanooga Plant, just as they together hold majority interests in RC Cement and U.S. Cement.

GP believes that RC Cement or its new affiliate will very well fit the requirements of the Commission relating to the divestiture of the Chattanooga Plant, if the Consent Order is issued in final form.

The affiliated U.S. cement companies River and Hercules do not compete at all with the Chattanooga Plant. They are owned by European companies which have slowly been building up a presence in the U.S. cement industry and are seeking to expand into new areas of the

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[3] At present, GP understands the affiliate would be owned as follows: . . . would own 33.3% of the new affiliate and a second newly-formed company ("Newco-2") would own 66.7%. Newco-2 would in turn be owned 40% by IFINT (through two 100% subsidiaries), 20% by IFI (through its 51%-owned Unicem) and 40% by . . .. Therefore, IFI and IFINT would together own a majority interest in the majority shareholder (Newco-2) of the actual acquiring affiliate.

U.S. by this acquisition. The combined cement capacities of River and Hercules of 2,250,000 tons represent only 2.3% of 1980 U.S. cement capacity (based on Portland Cement Association data), ranking the affiliated companies as 17th in combined size among U.S. cement producers. Even while comparatively small, however, RC Cement and its affiliate Hercules clearly possess the skill and resources to compete successfully using the Chattanooga Plant.

2. *Basis for GP's Request for an Expedited Advisory Opinion.*

However desirable RC Cement or its new affiliate may be as a buyer, it will be of little avail if GP loses RC Cement as the buyer of the Chattanooga Plant. It is certainly not in the public interest to delay the sale of the Chattanooga Plant to an acceptable buyer. GP believes that there are imperative reasons for obtaining approval of RC Cement or its newly-formed affiliate (conditioned on the possible issuance of the Consent Order) from the Commission so that GP can sell the Chattanooga Plant to this buyer by the planned closing date of June 30, 1982.

Delays in obtaining Commission approval or in consummating the sale entail considerable risks of losing RC Cement. If lost, GP does not know how long it will take to find a new buyer or whether one will be found at all within the time periods imposed by the Consent Order.

First, GP must emphasize that GP and RC Cement have only signed a non-binding letter of intent. Both parties seek to close the transaction as soon as possible, with a projected closing date of June 30. If the parties have not consummated the transaction by June 30, RC Cement will be free to walk away from the purchase.

Second, the greater the delay before GP can sell the Chattanooga Plant, the greater the risk of unforeseeable adverse events occurring in the U.S. economy or the U.S. cement industry that would endanger or frustrate the proposed sale. For example, a major U.S. cement company could at any time choose to announce an intention to sell a cement plant somewhere in the U.S. that RC Cement finds to be a more desirable investment commercially than it finds the Chattanooga Plant. The occurrence of this or some other unforeseeable event prior to the sale of the Chattanooga Plant could lead RC Cement to back out of the acquisition or prevent GP from finding other buyers within the 18-month time period in the Consent Order. Moreover, even if alternative buyers can be found at all within this time period, there can be no assurance that the buyers would be as acceptable to the Commission or as likely to be a pro-competitive force in the Chattanooga Plant's market as will be RC Cement.

Third, the greater the delay before GP can sell the Chattanooga Plant, the greater the risk that competitors of the Chattanooga Plant

may be able to persuade members of GP's excellent sales and supervisory team at this facility to leave GP and go to work for them. To date, GP has been able to keep its sales and marketing team at the Chattanooga Plant together, despite their natural concern and uncertainties over their future. These personnel—the key to competitive success of any cement plant—have known that their plant was going to be sold to a new buyer for over six months now. GP does not know how long it will be able to continue to hold its team together successfully.

The importance of the sales and marketing team to RC Cement is unmistakably clear, as seen in Paragraph 10 of the letter of intent which provides in part:

> It must be exphasized that any key sales and supervisory personnel who might be contemplating leaving GP's employ will not give GP any warning of their intention. At any time, GP may simply receive notice from such personnel that they will be leaving. The longer the delays, the more possible the loss of key sales and supervisory personnel who are uncertain and worried about their personal futures.

Fourth, the greater the delays, the greater the risk that major clients may be lost, with as little warning as a loss of key personnel. The cement industry is founded to a considerable degree on personal relationships and GP understands that its competitors are soliciting its customers on the basis of the uncertainty of the future of the Chattanooga Plant, who will ultimately own it, how reliable a source of supply it will be, and similar doubts.

GP must emphasize that if any of these risks actually occur, it may severely harm the competitive ability of the Chattanooga Plant, as well as GP's ability to find a buyer acceptable to the Commission. Once harmed, restoring the competitive health of the Chattanooga Plant may be both difficult and time consuming.

GP also wishes to point out that it has been doing precisely what it knows the Commission staff wants here and what GP believes the Commission will want: find a desirable, viable buyer for the Chattanooga Plant quickly and in a manner which protects the Chattanooga Plant's competitive abilities. Losing this sale to RC Cement may well engender loss of all or most of the Consent Order's 18-month period in which GP must find another buyer, indeed even if such a buyer can be found at all. Moreover, it may develop that the only buyers interested in the Chattanooga Plant would not be as acceptable to the Commission or be as pro-competitive a force in the Chattanooga Plant's market as would be RC Cement.

D. *Conclusion.*

In making this application, GP is not asking the Commission to predetermine whether or not it will ultimately issue the Consent

Order. It is not asking that the Commission staff or the Commission itself cut short their analysis of the desirability of RC Cement or its newly-formed affiliate as a desirable buyer for the Chattanooga Plant. Finally, it is not seeking to truncate or frustrate the ability of the public to consider the sale of the Chattanooga Plant or to comment on it, within a 30-day public comment period.

GP is simply asking the Commission to give it an advisory opinion to the effect that *if* the Commission ultimately issues a consent order containing Articles I through IV of the Consent Order, then RC Cement or its newly-formed affiliate will be an approved buyer thereunder and the prior sale of the Chattanooga Plant to them will satisfy the provisions of Articles I through IV of the Consent Order. GP is simply asking the Commission staff and the Commission to conclude its analysis of the sale on an expeditious basis and to render its advice prior to June 30. Finally, GP is willing to have the proposed sale of the Chattanooga Plant put on the public record for a 30-day public comment period (even though the Rules dealing with requests for advisory opinions do not require this) in order to give the public time to consider and comment on the sale.

In the event that the Commission renders a positive advisory opinion, GP will be in a position to sell the Chattanooga Plant to RC Cement or its newly-formed affiliate, accepting the risk that the Commission might ultimately reject the Consent Order. In such a case, GP might find that it has sold the Chattanooga Plant unnecessarily. Nevertheless, the risk of this would be one acceptable to GP, especially when compared to the risks inherent in delaying the sale by several additional months by awaiting final action on the Consent Order.

E. *Confidentiality.*

GP respectfully requests that the confidential material included in Exhibit 1 and the names of the possible minority European shareholders in the newly-formed RC Cement affiliate described herein be accorded confidential treatment under the FTC Improvements Act of 1980 and the Commission's Rules, for the reasons set forth in Exhibit 1.

Respectfully submitted,

/s/ Louis Munin

Senior Vice President and
Chief Financial Officer
General Portland Inc.

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