IN THE MATTER OF

MCCOY INDUSTRIES, INC., ET AL.

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

Docket C-3211. Complaint, April 2, 1987—Decision, April 2, 1987

This consent order prohibits, among other things, the Greensboro, N.C.-based retailer of flame-retardant, pressure-treated wood from misrepresenting the flame-retardant value of its products and requires respondents to notify purchasers that some of the wood may not meet established safety standards.

Appearances

For the Commission: *Charles Peterson* and *Truett M. Honeycutt.*

For the respondents: *Richard Vandore,* Greensboro, N.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Reliance Wood Preserving, Inc., a corporation, McCoy Industries, Inc., a corporation, Reliance Treated Wood, Inc., a corporation, and Daniel Roy Dorman, individually and as an officer of Reliance Wood Preserving, Inc., ("respondents") have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. (a) Respondent Reliance Wood Preserving, Inc. (Reliance), is a Maryland corporation with its office and principal place of business located in the Federalsburg Industrial Park, P.O. Box 349, Federalsburg, Maryland 21632. Respondent Reliance manufactures, advertises, and sells fire retardant treated wood (FRTW).

(b) Respondent Daniel Roy Dorman (Dorman) resides in the State of Maryland. He is president of respondent Reliance; he directs, controls, formulates, or participates in the acts and practices of respondent Reliance.

(c) Respondent Reliance Treated Wood, Inc. (Treated Wood), is a North Carolina corporation with its office located at 300 East Wendover Avenue, Greensboro, North Carolina 27420 and its principal place of business located at Federalsburg Office Park, Federalsburg, Maryland. Respondent Treated Wood advertises and sells FRTW.

(d) Respondent McCoy Industries, Inc. (McCoy), is a North Carolina

corporation with its office and principal place of business located at 300 East Wendover Avenue, Greensboro, North Carolina 27420. McCoy owns 100% of the outstanding stock of respondent Treated Wood.

DEFINITIONS

PAR. 2. For the purposes of this complaint, the following definitions apply:

a. *"ASTM E 84"* is a test recognized in the lumber industry as a measure of the fire retardancy of wood based on the rate of flame spread.

b. An *"ASTM E 84 flame spread index'"* (flame spread index) of 25 or less is the score that most, if not all, building codes require a wood product to obtain in order to be used in certain applications where FRTW is required.

c. *"Fire Retardant Treated Wood"* or *"FRTW'"* is wood that has an ASTM flame spread index of 25 or less and is chemically treated under pressure with fire retardant chemicals.

d. *"Respondents' FRTW"* means wood that Reliance has represented or Treated Wood has advertised as being fire retardant or class "A" or having a flame spread of 25 or less.

e. A *"class 'A' rating"* means that FRTW possesses a flame spread index of 25 or less.

f. *"Flameguard"* is a brand name that respondents use for their FRTW.

g. *"Underwriters Laboratories"* (UL) is a laboratory that, among other things, tests the fire retardancy of wood and performs quality control inspections of FRTW.

h. *"The American Wood Preservers Bureau"* is an industry association concerned with the quality of wood.

i. *"Timber Products Inspection"* is a quality control agency that, among other things, attests to the fact that wood is fire retardant.

PAR. 3: The acts and practices of respondents alleged in this Complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

COUNT I

PAR. 4: The allegations contained in paragraphs one through three are incorporated herein by reference.

PAR. 5: Respondents Reliance and Dorman have placed labels on respondents' FRTW that read as follows:

a. FLAMEGUARD
ASTM-E 84 25 OR LESS
MEA 140–83 M
Exterior

b. 83 FLAMEGUARD 84
Fire Retardant Treated Wood
ASTM-E 84 25 OR LESS
Reliance Wood Preserving, Inc.,
Federalsburg, Maryland
Quality assured by Timber Products Inspection

PAR. 6: Through the use of the labels on respondents' FRTW described in paragraph five above, respondents Reliance and Dorman have made the following material representations, directly or by implication:

(1) Respondents' FRTW bearing the labels placed on it by respondents Reliance and Dorman, as described in paragraph five above, has a flame spread index of 25 or less as measured by the ASTM E 84 test.

(2) Respondents' FRTW bearing the labels placed on it by respondents Reliance and Dorman, as described in paragraph five above, is quality assured or otherwise approved by Timber Products Inspection.

PAR. 7: In truth and in fact:

(1) At least some of respondents' FRTW bearing the labels placed on it by respondents Reliance and Dorman, as described in paragraph five above, which was sold prior to April 15, 1985, does not have a flame spread index of 25 or less.

(2) At least some of respondents' FRTW bearing the labels placed on it by respondents Reliance and Dorman, as described in paragraph five above, which was sold prior to April 15, 1985, is not quality assured or otherwise approved by Timber Products Inspection. Therefore, the representations set forth in paragraph six were and are false and misleading.

COUNT II

PAR. 8: The allegations contained in paragraphs one through three are incorporated herein by reference.

PAR. 9: Respondent Treated Wood advertises FRTW through promotional flyers and brochures. In such advertisements, Treated Wood has made various statements, prior to April 15, 1985, concerning the

fire retardant properties and the quality classifications, approvals, or certifications of respondents' FRTW. Typical and illustrative of these statements, but not all-inclusive thereof, are the following from the promotional flyer attached hereto as Exhibit A:

a. "Flameguard has a low flame spread index of 25 or less";
b. "Flameguard is UL classified";
c. "All tests have been conducted and certified by the TPI Agency, Conyers, Georgia"; and
d. "All lumber and plywood to be fire-retardant treated will be pressure treated with Reliance Flameguard to comply with the requirements of a flame spread rating of 25 or less when tested for a period of not less than 30 minutes without evidence of significant progressive combustion in accordance with the standard test method for surface burning characteristics of building materials (ASTM-E 84 . . .) . . . ."

PAR. 10. Typical and illustrative of the statements made by Treated Wood, prior to April 15, 1985, concerning respondents' FRTW, but not all-inclusive thereof, are the following from the promotional flyer attached hereto as Exhibit B:

a. "Flameguard Underwriters Laboratories tested and certified";
b. "Fire retardant";
c. "Class 'A' rating";
d. A depiction of Timber Products Inspection's logo; and
e. A depiction of the American Wood Preservers Bureau's logo.

PAR. 11: Through the use of the statements contained in paragraphs nine and ten above and other statements not specifically set forth herein, Treated Wood has made the following material representations, directly or by implication:

(1) Respondents' FRTW has a flame spread index of 25 or less.
(2) Respondents' FRTW possesses a class "A" rating.
(3) UL classifies or otherwise approves respondents' FRTW.
(4) Timber Products Inspection assures the quality of or otherwise approves respondents' FRTW.
(5) American Wood Preservers Bureau approves or certifies respondents' FRTW for fire retardancy.

PAR. 12: In truth and in fact:

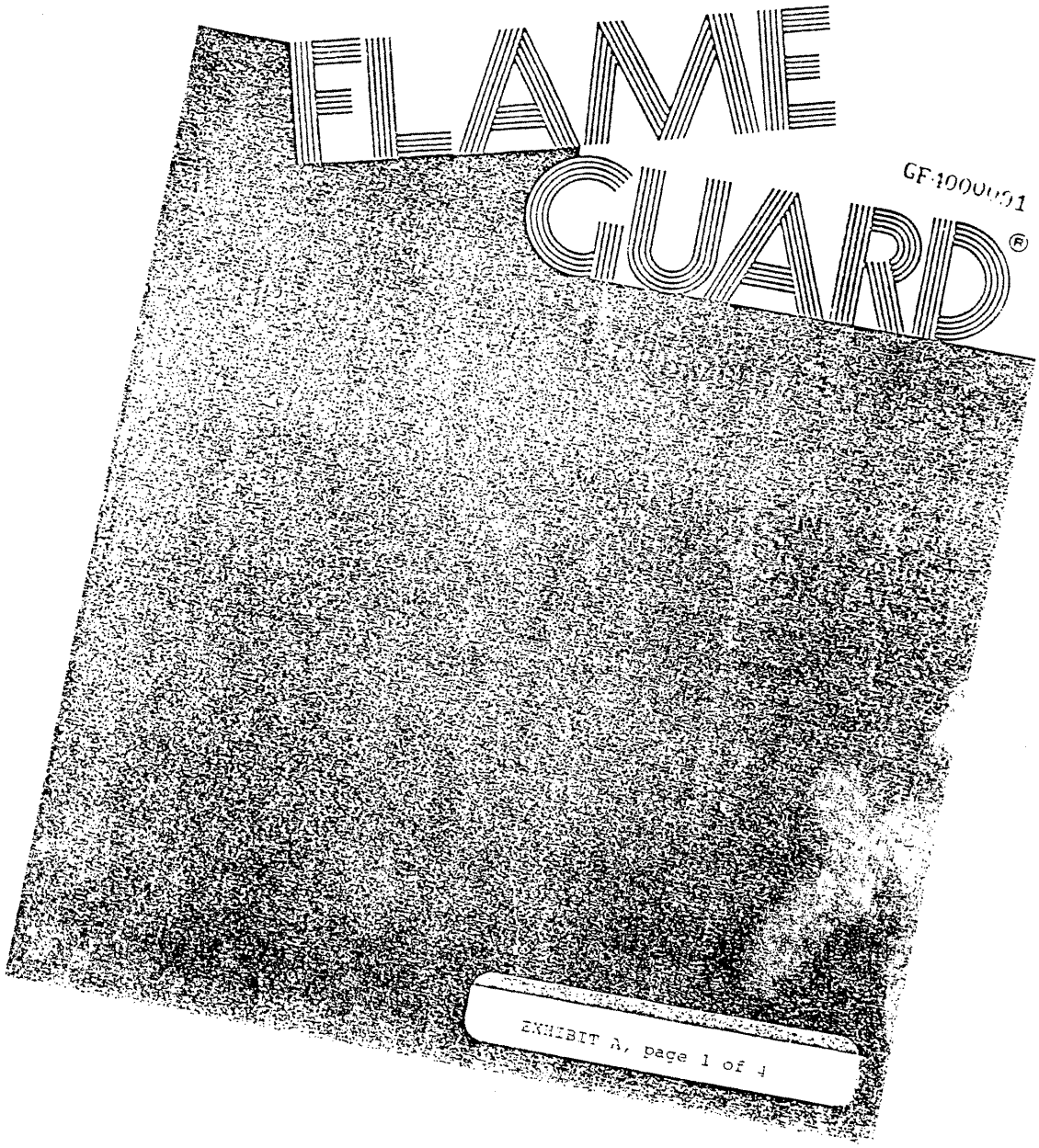
(1) At least some of respondents' FRTW, which was sold prior to April 15, 1985, has a flame spread index higher than 25.
(2) At least some of respondent's FRTW, which was sold prior to April 15, 1985, does not possess a class 'A" rating.
(3) UL has not classified or otherwise approved respondents' FRTW.

(4) At least some of respondents' FRTW, which was sold prior to April 15, 1985, is not quality assured or otherwise approved by Timber Products Inspection.

(5) American Wood Preservers Bureau has not approved or certified respondents' FRTW for fire retardancy.

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

PAR. 13: The acts or practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting interstate commerce in violation of Section 5 of the Federal Trade Commission Act.

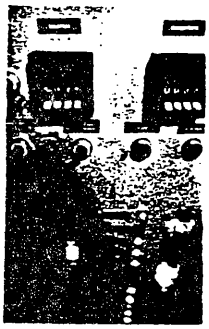

FLAME
GUARD®
EXHIBIT A, page 1 of 4

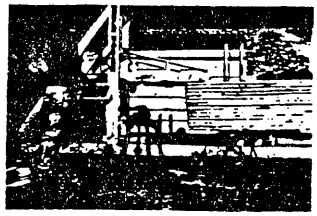
RELIANCE®

FLAMEGUARD® FIRE-RETARDANT TREATED WOOD HAS MANY USES.

FLAMEGUARD® pressure-treated wood products can be used both for interior or exterior construction where safety from fire is mandatory. Flameguard fire-retardant wood is ideal for roof and floor trusses, beams, roofdecks, trim, loadbearing and non-bearing partitions, steps, stairways, ladders, scaffolding, siding, framing, balconies, walkways and facades or any other application that requires fire-resistant and noncombustible building materials.

As Flameguard treated wood remains clear and will not develop the unsightly surface bloom common with many other fire retardant treatments, Flameguard products are particularly suited to architectural millwork, moldings, and paneling.





ADVANTAGES

FLAMEGUARD is a special formulation of fire retardant chemicals pressure impregnated for maximum wood penetration and protection.

FLAMEGUARD has a low flame spread rating of 25 or less and generates low smoke levels. Its self-extinguishing characteristic eliminates wood so treated as a source of fuel thereby limiting the spread of fire.

FLAMEGUARD fire-retardant treated wood retains its strength under fire conditions longer than untreated wood and many other building materials including steel.

FLAMEGUARD has a very low hygroscopicity and does not absorb and retain moisture even in high humidities. Use in humidities up to 95% is recommended.

FLAMEGUARD is compatible with metal fasteners. Unlike the sulphate and chloride contained in many fire-retardant treatments, the chemicals in our process are non-corrosive.

FLAMEGUARD is a clear fire-retardant treatment which causes little, if any, change in the original color of the wood. Unlike wood treated with [illegible] fire-retardant processes, Flameguard products are free of chemical deposits and have no unsightly residue to mar the surface of the wood.

GF-1000092

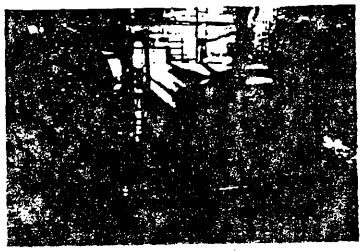
FLAMEGUARD is non-blooming even in extremely humid conditions. Like untreated wood, Flameguard treated wood will weather naturally.

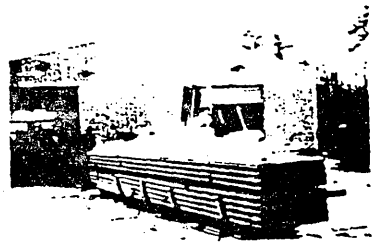
FLAMEGUARD treated wood does not require sealing. The surface of the treated wood will remain clean and can be left unfinished, stained or painted with oil based products.

FLAMEGUARD fire-retardant treated wood qualifies for lower insurance rates with major rating organizations. In many states buildings constructed with fire-retardant treated lumber is granted the same rating as masonry construction and is classified similar to noncombustible material. Shingles treated with Fireguard carry a B rating without foil being placed under them.

FLAMEGUARD is halogen free and is acceptable for construction of nuclear power plants. Free formaldehyde is not given off by Flameguard treated wood.

FLAMEGUARD treated wood, although not marketed as preservative-treated products, does give protection from decay since the wood is sealed and the chemicals are toxic to insects.





FLAMEGUARD is injected through a pressure treatment that forces the fire-retardant chemicals into wood without injuring the wood fibers. The process is operated on a time-pressure schedule that equalizes the natural differences present in lumber and plywood.

FLAMEGUARD reduces the splitting and checking characteristics of untreated wood.

FLAMEGUARD treated wood is readily available with substantial inventories of treated wood products and an abundant supply of raw materials.

SPECIFICATIONS

All lumber and plywood to be fire-retardant treated will be pressure treated with Reliance® Flameguard® to comply with the requirements of a flame spread rating of 25 or less when tested for a period of not less than 30 minutes without evidence of significant progressive combustion in accordance with the standard test method for surface burning characteristics of building materials

Each treated product will be tested and will bear the performance identification label assuring its compliance with the standards of the American Wood Preservers Association.

Shingles and shakes will be fire-retardant pressure treated to meet the requirements for a Class B or Class C covering in accordance with the Standard Test, ASTM E-108 Test for Roof Covering Materials.

STANDARDS AND APPROVALS

Flameguard® meets the requirements of the following specifying agencies: Federal Specification MIL-L-19140C; Building Officials and Code Administrators International; International Conference of Building Officials; Southern Building Code Congress International, Inc.; National Fire Protection Association, Inc.; American Wood Preservers Association; National Building Code, Insurance Services Office, Nuclear Energy Liability Property Insurance Association and many other local, county and state building codes, insurance underwriters and rating bureaus.

All tests have been conducted and certified by The T.P.I. Agency, Conyers, Georgia.

Flameguard is U.L. Classified (U.L. 723).

Flameguard® treated lumber and plywood is a product of Reliance® Treated Wood. For additional information or to place orders contact one of our offices:

RELIANCE®
TREATED WOOD

P.O. Box 22101
Greensboro, NC 27420
919/379-0801
Outside North Carolina 800/334-9113

P.O. Box 400
Federalsburg, MD 21632
301/754-5711

P.O. Box 203
Newtown Square, PA 19073
215/353-6466

GF-100009-1

EXHIBIT A, page 4 of 4

EXHIBIT B

RELIANCE TREATED WOOD

POST OFFICE BOX 205 • NEWTOWN SQUARE, PA 19073 • TELEPHONE (215) 356-0455

PRODUCERS OF C.C.A. PRESSURE TREATED LUMBER & PLYWOOD, INTERIOR & EXTERIOR FIRE RETARDENT LUMBER & PLYWOOD OFFER THE FOLLOWING:

SHOW STOPPER SPECIAL

2 X 4 - 1 pkg./12', 1 pkg./16'

2 X 6 - 1 pkg./14'

2 X 8 - 1 pkg./12', 1 pkg./16'

4 X 4 - 1 pkg./8'

1 X 4 - 1 pkg./12'

AND YOUR CHOICE OF EITHER

3 X 5 - 1 pkg./8' OR 6 X 6 - 1 pkg./8'

THIS TRUCKLOAD OF C.C.A. 40 G'S #2 SOUTHERN YELLOW PINE CAN PUT YOU IN THE PRESSURE TREATED LUMBER BUSINESS FOR ONLY $4,500.00 AND A SMALL DELIVERY CHARGE TO YOUR YARD.

FLAMEGUARD

UNDERWRITERS LABORATORIES TESTED

AND CERTIFIED

Fire Retardant

EXTERIOR CLASS "A" RATING INTERIOR

CLAUDE SHANNON JIM BRADY RITCH BENNER

EXHIBIT B BOOTH 16

TIMBER PRODUCTS INSPECTION GC2000010

A W P B

Decision and Order

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

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

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

1. Respondents McCoy Industries, Inc., and Reliance Treated Wood, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of North Carolina., with their offices and principal places of business located at 300 East Wendover Avenue, in the City of Greensboro, State of North Carolina.

Respondent McCoy Industries, Inc. (McCoy), owns 100% of the outstanding stock of respondent Reliance Treated Wood, Inc. (Treated Wood).

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

Order

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

A. *"ASTM E 84""* is a test recognized in the lumber industry as a

measure of the fire retardancy of wood based on the rate of flame spread.

B. An *"ASTM E 84 flame spread index"* (flame spread index) of 25 or less is the score that most, if not all, building codes require a wood product to obtain in order to be used in certain applications where FRTW is required.

C. *"Fire Retardant Treated Wood"* or *"FRTW"* is wood chemically treated under pressure with fire retardant chemicals and has an ASTM flame spread index of 25 or less.

D. *"Treated Wood's FRTW"* is wood that Treated Wood has represented as being fire retardant or Class "A" or having a flame spread of 25 or less.

E. A *"class 'A' rating"* means that FRTW possesses a flame spread index of 25 or less.

F. *"Flameguard"* is a brand name that respondent Treated Wood uses for its FRTW.

G. *"Underwriters Laboratories"* (UL) is a laboratory that, among other things, tests the fire retardancy of wood and performs quality control inspections of FRTW.

H. *"The American Wood Preservers Bureau"* is an industry association concerned with the quality of wood.

I. *"Timber Products Inspection"* is a quality control agency that, among other things, attests to the fact that wood is fire retardant.

I.

It is ordered, That Reliance Treated Wood, Inc., and McCoy Industries, Inc., directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertisement, offering for sale, sale, or distribution of Treated Wood's FRTW, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in any manner, directly or by implication, that:

A. Treated Wood's FRTW is fire retardant, unless such is the fact;

B. Treated Wood's FRTW possesses a flame spread index of 25 or less, unless such is the fact;

C. Treated Wood's FRTW possesses a class "A" rating, unless such is the fact;

D. Treated Wood's FRTW has specified fire retardant properties, unless such is the fact;

E. Treated Wood's FRTW is classified or otherwise approved by UL, unless such is the fact;

F. Treated Wood's FRTW is quality assured or otherwise approved by Timber Products Inspection, unless such is the fact;

G. Treated Wood's FRTW is certified or otherwise approved by the American Wood Preservers Bureau, unless such is the fact; and

H. Treated Wood's FRTW is certified or otherwise approved by any organization, individual, or governmental agency, unless such is the fact.

For at least three years from the last dissemination of any such representation, respondents shall maintain records to be made available upon reasonable request for review by the Federal Trade Commission substantiating representations referred to in this section of the order. Substantiation for representations in Sections I.A. through I.D. shall consist of certifications or tests made in accordance with customary industry standards by an inspection service for fire retardant wood recognized by one of the following bodies: Building Officials and Code Administrators International, Inc.; International Conference of Building Officials; or the Southern Building Code Congress International, Inc.

II.

It is further ordered, That, within fifteen (15) days after the date of service of this order, respondents shall furnish to Reliance Wood Preserving, Inc., Federalsburg, Maryland, the name and last known address of each purchaser of Treated Wood's FRTW that purchased such FRTW prior to April 15, 1985, as reflected in respondents' business records.

III.

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

IV.

It is further ordered, That:

A. Within fifteen (15) days after service of this order, respondent Reliance Treated Wood, Inc., shall provide a copy of this order and of the complaint in this proceeding to each current officer and director

of Reliance Treated Wood, Inc., and, for a period of three (3) years after that date, shall provide a copy of such order and complaint to each new officer and director of Reliance Treated Wood, Inc., within fifteen (15) days after each new officer or director is appointed or elected, and shall secure from each current and future officer and director a signed statement acknowledging receipt of such copy.

B. Within fifteen (15) days after service of this order, respondent McCoy Industries, Inc., shall provide a copy of this order and of the complaint in this proceeding to each current officer and director of McCoy Industries, Inc., and, for a period of three (3) years after that date, shall provide a copy of such order and complaint to each new officer and director of McCoy Industries, Inc., within fifteen (15) days after each new officer or director is appointed or elected and shall secure from each current and future officer and director a signed statement acknowledging receipt of such copy.

V.

It is further ordered, That:

A. Within sixty (60) days after the date of service of this order, each respondent shall file or cause to be filed with the Commission a written report setting forth in detail the manner and from in which it has complied with this order.

B. In addition to the report required by V(A), each respondent shall file or cause to be filed, within sixty days after service of this order, copies of the most recent ASTM E 84 tests conducted to obtain certification that each species of Treated Wood's FRTW is fire retardant together with reports from the follow-up service utilized regarding its two most recent follow-up inspections.

C. In addition to the report required by V(A) and test results required by V(B), each respondent shall file or cause to be filed, one (1) year after the date of service of this order and at such times as the Commission or its staff by written notice require, a written report setting forth in detail the manner and form in which it has complied and is complying with this form.

DISSENTING STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

I would reject the agreement for the reasons specified at length in my earlier dissent from the Commission action of December 29, 1986 accepting the consent agreement, subject to final approval. In my view, both the danger to public safety from the misrepresentations

existence and extent of injury indicate that monetary redress should be included in the settlement.

In the absence of any such monetary redress, I respectfully dissent from the Commission's action granting final approval to this consent agreement.

IN THE MATTER OF

FORD MOTOR COMPANY, INC., ET AL.

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

Docket 9073. Consent Order, March 29, 1979—Modifying Order, April 3, 1987

The Federal Trade Commission has modified a 1979 consent order with Ford Motor Co. and Ford Motor Credit Co. (93 F.T.C. 402) by replacing procedures for the sale of repossessed cars and light trucks. The modified order has replaced the repossession accounting procedure with a "repossession guide" which respondents must provide its dealers to give them guidance in handling repossessions in various states. Additionally, the modified order eliminates specific limitations on deductions dealers were allowed to take when calculating surpluses and substitutes a provision permitting them to deduct costs allowed under state law.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On November 12, 1986, Ford Motor Company and Ford Motor Credit Company ("Ford") filed a request pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 C.F.R. 2.51, to reopen the proceeding and vacate or modify the cease and desist order entered against Ford on March 29, 1979, in Docket No. 9073, 93 F.T.C. 402.

This matter arose out of allegations that certain franchised Ford dealerships and certain dealerships owned in whole or in part by Ford were failing to account for and pay to defaulting customers surpluses generated by the sale of repossessed motor [2] vehicles.[1] A complaint was issued against Ford and Francis Ford, Inc., a franchised Ford dealer, on February 10, 1976. Subsequently, the matter was withdrawn from litigation with respect to Ford, who consented to the order at issue here.

One of the principal features of the Ford order is a repossession accounting procedure that Ford was required to make a part of the Ford Manual of Dealer Accounting Procedure, which is binding on its dealers through various sales and service agreements. The repossession accounting procedure was intended to bring about the uniform calculation of surpluses by Ford dealers. The order limits deductible

[1] The obligation of the secured creditor or his guarantor to account for and pay surpluses arises out of Article Nine of the Uniform Commercial Code (UCC), which has been adopted by 49 states and the District of Columbia. Under the UCC, a secured party, after repossession and disposition of the collateral, is required to account to the defaulting buyer for any surplus of proceeds from the sale or disposition of the collateral in excess of the amount needed to satisfy all secured indebtedness, reasonable expenses of retaking, holding, preparing for sale, selling,

expenses to specified direct out-of-pocket expenses under the repossession accounting procedure.

The complaint against Francis Ford was tried administratively and led to an order that limited the deductible expenses in accounting for repossessions to the same specified expenses that were allowable under the repossession accounting procedure featured in the order against Ford. Francis Ford appealed the Commission's decision and order to the Ninth Circuit Court of Appeals. That court vacated the order against Francis [3] Ford in *Ford Motor Co. v. FTC,* 673 F.2d 1008 (9th Cir. 1981), *certd. denied sub nom. FTC v. Francis Ford, Inc.,* 459 U.S. 999 (1982), ruling that the Commission should have proceeded by rulemaking rather than adjudication.

Ford's petition asks the Commission to reopen the proceeding and either vacate or modify the order. Ford offers several arguments in support of its request. First, Ford argues that the order competitively disadvantages Ford dealers compared to dealers of motor vehicles manufactured by companies not under similar orders (referred to as foreign dealers), since the repossession accounting procedure forces Ford dealers to absorb costs that other dealers can recoup under applicable state law. Second, it is argued that the *Francis Ford* decision precludes enforcement of the Commission's repossession policy against dealers, so that the Commission should not continue to enforce it against manufacturers. Third, it is argued that the *Francis Ford* decision triggers the provisions of the "most favored company" clause since it represents a less restrictive adjudicated order that requires deletion of Parts II and VI of the order. Fourth, it is argued that the *Francis Ford* decision raises questions about the Commission's jurisdiction over the matter. Fifth, it is argued that the Commission's 1980 Unfairness Policy Statement represents a changed condition of law that requires vacation or modification of the order.

The National Automobile Dealers Association (NADA), a national trade association representing approximately 19,000 franchised new car and truck dealers, filed comments supporting [4] the Ford respondents' request in response to the Commission's request for public comment published on December 4, 1986, 51 *Fed. Reg.* 43746. NADA's comments track the Ford respondents' arguments and put forward one additional argument: that the failure to include repossession accounting provisions in the Commission's Credit Practices Trade Regulation Rule resulted in less restrictive standards that trigger provisions of the "most favored company" clause.

Section 5(b) of the Federal Trade Commission Act provides that the Commission shall reopen and consider modification of an existing order upon a satisfactory showing by the party subject to the order that changed conditions of law or fact require modification. The stat-

ute also provides that the Commission may reopen and modify or set aside an order "if the public interest shall so require." *See* 15 U.S.C. 45(b) (1982); 16 C.F.R. 2.51, 3.72 (1986). The Commission has decided to grant in part the Ford petition on the ground that, although the petition does not make a showing of changed circumstances of law or fact sufficient to warrant this action, the action is justified in the public interest.

Most of the arguments advanced by the Ford respondents were also made by General Motors (GM) in a similar request that the Commission denied on November 28, 1984, in Docket No. 9074. With respect to GM's argument that the GM order placed its dealers at a competitive disadvantage compared to foreign car dealers, the Commission noted that GM had presented no evidence that the order's provisions imposed significant financial burdens on GM [5] dealers that were not also borne by foreign dealers who comply with their obligation under state law to account for and pay surpluses.

In contrast, Ford's petition contains concrete evidence of competitive disadvantage. Ford submitted the results of a survey of 100 dealers whose repossession practices were audited under the order. The survey identifies five categories of costs that Ford dealers are required to absorb in whole or in part, but that dealers operating under state law standards generally are able to recoup. The petition then estimates the cost disadvantage this places on the universe of Ford dealers who handle repossessions. Although Ford's methodology probably overstates the actual cost disadvantage to Ford dealers because most repossession sales result in deficiencies rather than surpluses and because most deficiencies are not recovered, the Commission finds that the cost disadvantage is nevertheless real and substantial and that modifications to the order are therefore warranted in the public interest.[2] The Commission therefore will make appropriate modifications to the order to remove the competitive disadvantage Ford dealers suffer under the existing accounting procedure.

The remaining arguments made in Ford's petition and in the NADA comments do not justify vacating or further modifying the [6] order. Ford argues the Commission should not continue to enforce its orders against manufacturers since it cannot proceed against dealers after the decision in *Francis Ford.* That is not our reading of *Francis Ford,* but in any event the modifications to the order that are being made to remove the competitive disadvantage to Ford dealers will result in dealers and manufacturers alike being subject to the same

[2] In addition, as the NADA comments noted, the order may have the unintended effect of raising financing costs to a number of purchasers of Ford vehicles because of the tendency of a number of Ford dealers to minimize their compliance burden and attendant costs by assigning retail installment contracts on a non-recourse basis, which are generally more costly than recourse assignments.

requirement to account for and pay surpluses in accordance with state law.

Ford next argues that the "most favored company" clause in Part VII.B. of the order is triggered by the decision in *Francis Ford* and requires deletion of Parts II throught VI of the order. The "most favored company" clause states that the Commission will modify the Ford order to match any adjudicated or consent order in three related proceedings that prescribes less restrictive standards for disposing of repossessed vehicles or determining surpluses or redemption rights. The clause on its face limits its coverage to *order-prescribed* standards. Because the *Francis Ford* decision failed to prescribe less restrictive standards, the "most favored company" clause is not triggered. Nor does the decision in the Credit Practices Rule, where the Commission declined to impose standards to account for deficiencies in repossession sales, trigger a similar "most favored treatment" clause referring to the rule, as NADA argues. [7]

Ford also suggests that the order should be vacated or modified because the Commission lacks jurisdiction after *Francis Ford* and because the order does not meet the requirements of the Commission's 1980 Unfairness Policy Statement. The *Francis Ford* decision attacked the procedure by which the Commission chose to proceed but not its jurisdiction. Thus there has been no change in the Commission's jurisdiction over dealers who fail to pay surpluses to consumers. Similarly, the Commission's Unfairness Policy Statement does not change the law and does not support vacation of the order.

It is therefore ordered, That the proceeding be reopened and that the final order issued March 29, 1979, in Docket No. 9073 be, and it hereby is modified to read as follows:

I.

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

A. *"Ford respondents"* means Ford Motor Company ("Ford") and Ford Motor Credit Company ("Ford Credit"), corporations. References to either or both of the Ford respondents shall include their successors, assignees, officers, agents, representatives and employees, as well as any corporations, subsidiaries, divisions or devices through which they act in the United States. *Provided,* [8] *however,* that references to Ford shall not include Ford Credit and references to either or both of the Ford respondents shall not include dealerships.

B. *"Vehicle"* means a passenger car or a truck with a gross vehicle weight less than 26,000 pounds (11,794 kilograms).

C. *"Dealership"* or *"dealer"* means a corporation, partnership or proprietorship that is a Ford, Lincoln or Mercury vehicle dealership but excludes truck dealerships whose principal business is the sale of trucks with a gross vehicle weight more than 8,000 pounds (3,629 kilograms).

D. *"Retail sale"* means the installment credit sale of a vehicle, other than for purposes of resale *(e.g.,* sale to dealers or wholesalers), lease or rental, to a purchaser who is not a fleet purchaser.

E. *"Repurchase financing"* means the financing of a retail sale subject to an agreement between a financing institution and a dealership (generally called a *"repurchase," "recourse,"* or *"guaranty"* agreement) which provides that the dealership is obligated to pay off the [9] outstanding obligation to the financing institution after receiving a transfer of the repossessed vehicle.

F. *"Repurchase dealership"* or *"repurchase dealer"* means a dealership that engages more than occasionally in repurchase financing transactions.

G. *"Equity dealership"* means a dealership in which Ford has a controlling equity interest, holds 50 percent or more of the voting stock, or is entitled to elect 50 percent or more of the board of directors.

H. *"Liquidating dealership"* means an equity dealership that has ceased or is in the process of ceasing normal operation of a dealership and whose business has been or is being wound up by Ford or under Ford's supervision. It shall not mean a dealership not previously an equity dealership whose assets come into the possession or control of either of the Ford respondents by virtue of default on or compromise of a debt obligation.

I. *"Financing customer"* means a purchaser of a vehicle from a dealership by means of a retail installment contract. [10]

J. *"Disposition"* or *"dispose"* refers to a dealership's sale or lease of a repossessed vehicle previously sold by that dealership and returned to it by or for a financing institution pursuant to a repurchase agreement. Such sale or lease includes only transactions with an independent third party; *i.e.,* it does not include a sale or lease to the financing institution, the dealership or their representatives, or to a person or firm liable under a guaranty, endorsement, or repurchase agreement covering the repossessed vehicle. Disposition or dispose shall not refer to the repurchase of a repossessed vehicle by a dealership pursuant to a repurchase agreement, or refer to a sale subsequent to a judicial sale in Louisiana.

K. *"Proceeds"* means whatever is received upon disposition of the repossessed vehicle, but exclusive of sales taxes, service contracts or separately priced warranties.

L. *"Allowable expenses"* means commercially reasonable expenses allowable under applicable state law. The expenses must be reasonable and directly resulting from the repossessing, holding, preparing for sale and [11] reselling of the vehicle, and not otherwise reimbursed to the dealership.

M. *"Contract balance"* means (1) the unpaid balance as of the date of repossession less applicable finance charge and insurance premium rebates deducted by the financing institution, plus (2) other charges authorized by contract or law and actually assessed prior to repossession.

N. *"Surplus"* means the excess of (1) the proceeds plus applicable insurance or warranty reimbursements received by the dealership or financing institution plus any other applicable rebates or credits not deducted by the financing institution, over (2) the contract balance, allowable expenses, and amounts paid to discharge any security interest provided for by law.

O. *"Pay"* or *"paid,"* in reference to payment of a surplus, means a commercially reasonable attempt to pay.

II.

It is further ordered, That Ford shall provide to all dealers within 60 days of the effective date of this modified order, and to each new dealer within 30 days of entering into a sales and [12] service agreement, a "repossession guide." The repossession guide shall be made part of the Ford Manual of Dealer Accounting Procedures and shall state that:

1. Each surplus should be determined according to Paragraphs I.J through I.N of this order and paid to the repurchase financing customer within a reasonable period of time;

2. Expenses other than allowable expenses should not be deducted in calculating surpluses and deficiencies sought;

3. Dispositions should be commercially reasonable, which in practice means that the dealer should make the same efforts to obtain the best available price for a repossessed vehicle as would be made for a comparable used vehicle except that a dealer is not required to offer a warranty without extra charge even though such warranties are provided on other used vehicles;

4. If any rebate owing to the repurchase financing customer's account has not been received at the time the Ford accounting form is completed, such rebate should be applied for promptly; [13]

5. If any rebate is received after completion of the Ford accounting form, any surplus or deficiency should be redetermined and any re-

maining surplus paid within a reasonable time of disposition or within a reasonable time of receiving the rebate, whichever is later;

6. An accounting form should be prepared by the dealer for each disposition of a repossessed vehicle and:

a. should set forth the calculation of each surplus, and of each deficiency upon which collection is attempted;

b. should be signed by a person authorized to sign retail installment contracts on behalf of the dealership;

c. a copy of the form should be sent with the surplus payment to each repurchase financing customer to whom a surplus is paid and to each repurchase financing customer from whom a deficiency is sought; and [14]

d. should be retained by the dealer, together with all relevant underlying documentation, for at least two years from the date of disposition;

7. Dealers should not obtain waivers of surplus or redemption rights from repurchase financing customers except as allowable under applicable state law.

8. Failure to account for and pay surpluses to customers may expose the dealer to legal action.

III.

It is further ordered, That Ford shall require each Ford employee who is a director of an equity dealership to:

1. Provide the repossession guide described in Part II of this order to each such dealership; and

2. Vote for resolutions so that each such dealership handles repossessions in accordance with applicable state law. [15]

IV.

It is further ordered, That Ford Credit:

A. Shall incorporate provisions to the following effect into the "Retail Plan" Section of its "Automotive Finance Plans for Ford Motor Company Dealers," and into any subsequent edition of that document or any comparable successor document:

1. dealers are to permit redemption by the customer whose vehicle has been repossessed, at any time until there is a binding agreement for disposition;

2. dealers are to permit redemption in accordance with the post-repossession notice sent by Ford Credit to the customer;

3. dealers are to determine whether a surplus exists on a repurchase financing repossession according to the repossession guide described in Part II of this order;

4. in determining surpluses and deficiencies, dealers are not to deduct expenses other than allowable expenses; [16]

5. dealers are to account for and pay each surplus within a reasonable period of time of disposition.

B. Shall develop and distribute to all dealers who use Ford Credit's form of retail installment contract, revised Ford Credit retail installment contract forms that include a clear, concise statement in lay language that, in the event of repossession:

1. no expenses other than commercially reasonable expenses incurred as a direct result of repossessing (including, where permitted, attorney's fees and court costs), holding, preparing for sale and selling the vehicle may be deducted from the proceeds in determining a surplus or deficiency; and

2. any surplus realized on the resale or other disposition of the vehicle is to be paid to the customer.

C. Shall include the following information in clear lay language in at least one notice sent prior to repossession to every Ford Credit repurchase financing [17] customer to whom a notice of intent to repossess is sent:

1. the total amount past due at the time the notice is mailed;

2. in transactions where the customer is entitled to reinstatement of the contract, the customer will have an absolute right to such reinstatement and to regain possession of the vehicle by paying all past due installments and by paying such other amounts and fulfilling such other conditions as provided by law;

3. that the customer will have an absolute right to redeem the vehicle at any time prior to a binding agreement for its disposition, and that this right can be exercised by paying the contract balance plus all expenses incurred as a direct result of repossessing, holding and preparing the vehicle for sale;

4. the date or interval of time prior to which the vehicle will not be sold; [18]

5. that if the vehicle is not redeemed or the contract reinstated, the customer will be entitled to a refund of any surplus within a reasonable period of time;

6. that failure to account for and refund a surplus will give the customer a right to sue for the amount of the surplus and, except in California and Louisiana, for statutory penalties as provided by state law.

D. Shall establish and follow a procedure for uniformly sending a

written notice ("post-repossession notice") to Ford Credit financing customers as soon as practicable after repossession. Ford Credit shall periodically examine its branches' files, in accordance with its usual monitoring procedures, to determine whether the post-repossession notices have been and are being sent, and shall institute appropriate actions to assure that this procedure is adhered to. The post-repossession notice shall specify in clear, lay language:

1. the name, address and telephone number of the dealership to which the vehicle has been or will be returned for disposition, if applicable, and the [19] address and telephone number of the Ford Credit branch office to be contacted;

2. the date or interval of time within which the customer may reinstate the contract in states where the creditor is required to permit reinstatement of the contract;

3. the net amount necessary to redeem the vehicle, and, in transactions where the customer is entitled to reinstatement, the amount necessary to reinstate the contract, at the time the notice is sent;

4. the date or interval of time prior to which the vehicle will not be sold;

5. that the vehicle can be redeemed at any time prior to a binding agreement for its disposition;

6. that additional expenses incurred as a direct result of holding and preparing the vehicle for sale may increase the amount necessary to redeem the vehicle if redemption is delayed; [20]

7. that Ford Credit should be contacted to reinstate the contract in states where the customer is entitled to reinstatement;

8. that Ford Credit should be contacted for further information about redemption, including the procedure for redeeming the vehicle;

9. that, where the vehicle has been returned to the dealer and is not redeemed or the contract is not reinstated, any surplus must be paid to the customer within a reasonable period of time after disposition (the notice also may state that a contract between the dealer and Ford Credit provides that the dealer is to pay any surplus);

10. that failure to account for and refund a surplus will give the customer a right to sue for the amount of the surplus and, except in California and Louisiana, for statutory penalties as provided by state law;

11. that the customer may be liable for a deficiency or that state law prohibits Ford Credit and the dealer [21] from collecting any deficiency (the notice is to include the applicable language only);

12. that the customer has the right to direct the dealer to apply for a rebate of any unearned premiums payable by any insurance carrier

or agent from whom the dealer has, on behalf of the customer, obtained a credit life, accident and health or collision insurance policy.

E. Shall obtain no waivers of redemption or surplus rights from financing customers, except as allowable under applicable state law.

F. Shall, commencing three months and to be completed no later than twelve months after the effective date of this order, revise all pertinent Ford Credit forms, form letters, notices and internal written procedures to be consistent with the provisions of this order.

V.

It is further ordered, That:

A. In the event the Federal Trade Commission issues a final Trade Regulation Rule establishing standards less restrictive on automobile manufacturers, financing [22] companies or vehicle dealerships than a corresponding provision or provisions of this order relative to (1) the disposition of repossessed vehicles, (2) the determination, calculation or communication of the existence of or the amount of surpluses, or the time or manner of paying or accounting for surpluses, or (3) the determination or communication of reinstatement or redemption rights (including their duration and/or the amount necessary to reinstate or redeem), then such less restrictive standards shall, on the effective date of the Rule, supersede and replace the corresponding provision(s) of this order. The enumeration of subject matter contained in clauses (1), (2) and (3) of this paragraph is exclusive. *Provided, however,* that the Ford respondents shall advise the Commission of their intention to rely upon any provision of a Trade Regulation Rule as having superseded any provision of this order 30 days in advance of reliance thereon. *Provided further* that this paragraph shall not be construed as exempting the Ford respondents from any Trade Regulation Rule, or as limiting in any way their legal right or standing to challenge or otherwise contest any Trade Regulation Rule. [23]

B. In the event any of the proceedings presently bearing Docket Nos. 9072, 9073, or 9074 results in a final adjudicated or consent order prescribing standards less restrictive than a corresponding provision or provisions of this order relative to (1) the disposition of repossessed vehicles, (2) the determination, calculation or communication of the existence of or the amount of surpluses, or the time or manner of paying or accounting for surpluses, or (3) the determination or communication of reinstatement or redemption rights (including their duration and/or the amount necessary to reinstate or redeem), then the Commission shall, within 120 days of a Ford respondent's petition

pursuant to Section 3.72 of the Commission's Rules of Practice, reopen this proceeding and order modifications of this order or other relief as necessary and appropriate to conform this order to such less restrictive standards prescribed in the other order(s). The enumeration of subject matter contained in clauses (1), (2) and (3) of this paragraph is exclusive.

C. In the event a Ford respondent is of the opinion that changed conditions of law require that this order be altered or modified, the Ford respondent may, pursuant to Section 3.72(b)(2) of the Commission's Rules of [24] Practice, file a petition requesting a reopening of this proceeding for that purpose.

VI.

It is further ordered, That:

A. The Ford respondents shall maintain complete business records relative to the manner and form of their continuing compliance with this order, including but not limited to copies of notices sent to financing customers pursuant to Paragraphs IV.C and D above. The Ford respondents shall retain all such records for at least three years and shall, upon reasonable notice, make them available for inspection and photocopying by authorized representatives of the Federal Trade Commission.

B. Ford shall forthwith distribute a copy of this order to its Ford, Lincoln-Mercury and Parts and Services divisions, and to the Dealer Development activity, and Ford Credit shall forthwith distribute a copy of this order to each of its regions.

C. Each of the Ford respondents shall notify the Commission at least thirty days prior to any proposed corporate change such as dissolution, assignment or sale resulting in the emergence of a successor corporation or [25] corporations, the creation or dissolution of subsidiaries, the discontinuance of Ford's present program for investing in equity dealerships, or any other change which may affect compliance obligations arising out of this order.

IN THE MATTER OF

FOREMOST-McKESSON, INC.

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

Docket C-2427. Consent Order, July 26, 1973—Modifying Order, April 16, 1987

The Federal Trade Commission has modified a 1973 consent order (38 FR 22468) by setting aside the second paragraph, of the consent order, prohibiting material inducements to customers to attend respondent's trade shows.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

Respondent McKesson Corporation ("McKesson")[1] filed a Petition to Reopen Proceeding and Set Aside Order ("Petition") on November 26, 1986, pursuant to Subsection 5(b) of the FTC Act, 15 U.S.C. 45(b). The Commission's order to cease and desist relates to McKesson's practices surrounding trade shows that it conducts for its retail drug store customers. McKesson is the largest wholesale distributor of drugs and druggists' sundries in the country.

McKesson requests the Commission to reopen the proceeding to set aside the two principal parts of the order on the basis of changed conditions of law and fact and the public interest. The Commission issued its order in this matter on July 26, 1973, with the consent of McKesson. 83 F.T.C. 228. The complaint and order were based upon alleged violations of Section 5 of the FTC Act. 15 U.S.C. 45. The first ordering paragraph prohibits McKesson from inducing promotional allowances and services from its suppliers in connection with trade shows when McKesson knows or has reason to know that such allowances and services are not available to its competitors on proportionally equal terms. The second part prohibits McKesson from providing material inducements to customers to attend McKesson's trade shows when the receipt is dependent on the volume of the customer's purchases.

The commission filed on January 10, 1979, a civil penalty action against respondent for violations of the order in this matter in *FTC v. Foremost-McKesson, Inc.*, No. 79 Civ. 0162 (PNL) (S.D.N.Y.). The civil penalty action focused upon national trade shows held by McKesson in 1976, 1977, and 1978 and attended by McKesson's retail customers. A Final Judgment and Permanent Injunction was entered on

[1] Respondent was formerly Foremost-McKesson, Inc. It changed its name to McKesson Corporation in 1983.

November 23, 1983, with the consent of the parties. Under the judgment, McKesson paid civil penalties and was prohibited for ten years from inducing any promotional allowances that were not available to its competitors on proportionally equal terms. This paragraph in the court's injunction parallels the prohibition in the Commission's order against inducing disproportionate promotional allowances.

A. STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

Subsection 5(b) of the Federal Trade Commission Act provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. The burden is on the petitioner to make the satisfactory showing of changed conditions required by the statute. This burden is not a light one in view of the public interest in repose and the finality of the Commission's orders. *See Federated Department Stores, Inc. v. Moitie,* 425 U.S. 394 (1981) (strong public interest considerations support repose and finality). If the Commission determines that the petitioner has satisfied this requirement, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of the modification. Subsection 5(b) does not require that the Commission modify any order. S.Rep. No. 96-500, 96th Cong., 2d Sess. 10 (1979). *See* Order Modifying Consent Order Issued September 28, 1977, in *Union Carbide Corp.,* Docket No. C-2902 on November 14, 1986.

Subsection 5(b) also provides that the Commission may reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. To obtain review on this ground, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. If respondent satisfies this threshold requirement, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. *See* Order Modifying Consent Order Issued September 28, 1977, in *Union Carbide Corp.,* Docket No. C–2902 on November 14, 1986.

B. THE PROHIBITION AGAINST THE KNOWING INDUCEMENT OF DISCRIMINATORY PROMOTIONAL ALLOWANCES AND SERVICES

Respondent first seeks to have the prohibition against the knowing inducement of discriminatory promotional allowances and services set aside because the Commission's recent decision in *General Motors Corp.*, 103 F.T.C. 641 (1984) *("G.M.")*, is a changed condition of law. In *G.M.*, the Commission restricted use of Section 5 of the FTC Act to expand the "spirit" of *per se* liability of Subsection 2(d) of the Robinson-Patman Act, 15 U.S.C. 13(d), to conduct not otherwise covered by the "letter" of the Robinson-Patman Act. The Commission chose to limit the "spirit" theory to conduct that was actually anticompetitive. According to McKesson, the first paragraph in its order does not prohibit conduct that is either anticompetitive or unlawful under the Robinson-Patman Act.

The Commission has long prohibited, pursuant to Section 5 of the FTC Act, a buyer from inducing promotional allowances and services that it knows or has reason to know are not available to its competitors on proportionally equal terms. *See, e.g., Grand Union Co. v. FTC*, 300 F.2d 92, 99 (2d Cir. 1962). This prohibition is also embodied in the Commission's Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. 240.14. The prohibition arises from Subsections 2(d) and 2(e) of the Robinson-Patman Act, 15 U.S.C. 13(d) and 13(e), which prohibit sellers from providing promotional allowances and services to any firm in connection with the resale of that supplier's products unless such allowances or services are available to the firm's competitors on proportionally equal terms. Discriminatory promotional allowances and services are *per se* unlawful, that is, unlawful without a demonstration of an injury to competition. *See FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959).

Although the Robinson-Patman Act does not itself prohibit the inducement of such allowances and services, the Commission has employed Section 5 of the FTC Act to prohibit such buyer inducements. The omission of buyer liability under the Robinson-Patman Act was deemed by the court of appeals in *Grand Union* to be "more 'inadvertent' than 'studious.' " 300 F.2d at 96 (footnote omitted). The court observed that "[s]ince * * * there can be no unlawful preference made by a seller unless it was received by a buyer, it is clear that Congress did not intend to sanction buyers to continue to engage in the unlawful activity." *Id.* at 97 (footnote omitted).

The Commission's decision in *G.M.* did not change this precedent surrounding buyer liability for knowingly inducing discriminatory promotional allowances nor the Commission's underlying enforcement policy. In *G.M.*, the Commission declined to extend the *per se*

liability of Subsections 2(d) and 2(e) of the Robinson-Patman Act to a transaction not otherwise prohibited by those subsections. The concept of buyer liability under Section 5 of the FTC Act, however, as explained in *Grand Union,* only imposes liability upon a party to a transaction that is already unlawful under those subsections of the Robinson-Patman Act. That is, *Grand Union* stands for the proposition that both parties to an unlawful transaction may be held liable. In *G.M.,* the Commission merely declined to broaden the class of unlawful transactions.

The Commission also acknowledged the continued applicability of the *Grand Union* line of cases in *G.M.* 103 F.T.C. at 700-01. In the accompanying footnote, the Commission noted that proof of injury is not required in a Section 5 buyer inducement case. *Id.* at 701 n.3.

In view of the Commission's position respecting buyer inducements in *G.M.,* McKesson has not established a changed condition of law that requires reopening the order.

Apparently as a changed condition of fact, McKesson also asserts that this first prohibition of the order is no longer needed because the prohibition is now embodied in a court decree as a result of the civil penalty action. McKesson contends that the Commission is, thus, well-equipped to proceed against future conduct. However, the fact that a federal court has entered a decree to enforce a portion of the Commission's own order is not the type of changed condition of fact that requires reopening the order. Rather, the previous alleged violations leading to the entry of the decree suggest that continuation of the order is appropriate to ensure that McKesson continues to conform its conduct to the law.

McKesson also urges the Commission in the public interest to set aside the prohibition against inducing discriminatory promotional allowances and services because the prohibition places it at a competitive disadvantage. According to McKesson, none of its competitors are subject to such prohibitions, save one. *See Bergen Brunswig Corp.,* Docket No. C–2463, 83 F.T.C. 687 (1973). However, this order provision only prohibits McKesson from violating the law. The order provision does not prohibit any conduct that is currently lawful and McKesson has not demonstrated any other injury flowing from the prohibition. McKesson has not established that it is placed at a competitive disadvantage by an order that requires it to obey the law. *See* Order Modifying Cease and Desist Order Issued July 19, 1951, in *Atlas Supply Co.,* Docket No. 5794, 106 F.T.C. 334, 335 (1985).

In view of this, and because of the continued viability of the *Grand Union* line of cases, the Commission does not believe that setting aside this part of the order would be in the public interest.

C. THE PROHIBITION AGAINST PROVIDING CUSTOMERS MATERIAL INDUCEMENTS TO ATTEND TRADE SHOWS

McKesson also requests the Commission to set aside the prohibition against providing material inducements to customers to attend its trade shows when the amount is dependent upon the customers' volume of purchases. McKesson claims that the paragraph prohibits competitive conduct and, therefore, is contrary to the public interest.

This provision no longer appears to be necessary. Setting aside this paragraph may be warranted because the prohibited conduct has never been *per se* unlawful under Section 5 and is a competitively reasonable method for a wholesale distributor to employ in attracting retailers to attend a trade show. Additionally, there is evidence that the prohibition against material inducements may place McKesson at a competitive disadvantage because its competitors are not bound by a similar prohibition. Of course, Subsection 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), prohibits any price discrimination that injures competition among wholesale distributors.

The Commission has denied that part of McKesson's petition that seeks to reopen on the basis of changed conditions. McKesson has failed to make any showing of changed conditions of law or fact of the type to require such reopening. Likewise, the public interest does not warrant any modification to the prohibition of the knowing inducement of promotional allowances because the paragraph only requires compliance with established case law. However, in the public interest, the Commission has determined to reopen the order and set aside the second paragraph prohibiting material inducements to customers to attend respondent's trade shows.

Accordingly, it is hereby ordered that the proceeding be, and it hereby is, reopened and the following paragraph be set aside as of the date of this order:

It is further ordered, That respondent shall cease and desist from offering or providing to its customers, directly or indirectly, any material inducement, monetary or otherwise, to attend its trade shows whenever such customers' receipt of the inducement depends upon their purchases or volume of purchases of merchandise from respondent.

By direction of the Commission. Chairman Oliver concurred in part and dissented in part. Commissioner Azcuenaga was recused.

SEPARATE STATEMENT OF CHAIRMAN DANIEL OLIVER

Foremost-McKesson (McKesson), a drug and sundries wholesaler, has petitioned the Commission to vacate a 1973 order that regulates McKesson's conduct in administering druggists' sundries trade shows. The order regulates both McKesson's acceptance of promotional fees, services, and facilities from suppliers who set up booths at the shows, and McKesson's reimbursement of travel and other expenses to retailers who attend the shows.

The Commission concludes, and I agree, that the order should be vacated to the extent it regulates McKesson's reimbursement of retailer travel and other expenses, because continued regulation is not in the public interest. However, the Commission has chosen not to vacate the order's provisions regulating McKesson's acceptance of promotional fees, services, and facilities from suppliers of druggists' sundries. I strongly dissent from this portion of the Commission's decision.

The order's provisions that the Commission refuses to vacate prohibit McKesson from receiving promotional services or facilities from suppliers, or from receiving compensation from suppliers for providing promotional services or facilities, if McKesson knows or has reason to know that similar allowances and services are not available to its competitors on proportionally equal terms. These restrictions are the "buyer side" analogs of Robinson-Patman Act subsections 2(d) and 2(e), which prohibit sellers from offering nonproportional promotional allowances and services to buyers.

As is well known, there is little economic justification for regulating either the offers of services and allowances by sellers (as in subsections 2(d) and 2(e)), or the inducements for services and allowances by buyers (as in the present matter), when neither sellers nor buyers possess substantial market power. Under competitive conditions, sellers face incentives sufficient to ensure that no buyer will face systematic discrimination, or "proportionally unequal" treatment, in any meaningful sense.

Subsections 2(d) and 2(e) of the Robinson-Patman Act would not be quite as troublesome if they incorporated a competitive injury standard requirement.[1] Unfortunately, they do not. As a result, the subsections often increase the costs of doing business, and ultimately force consumers to pay higher prices for goods and services, by making illegal *per se* practices that, in most instances, pose no threat to competition. Even more unfortunately, the Commission has in the

[1] Notably, the American Bar Association has recently suggested that subsections 2(d) and 2(e) be subjected to the competitive injury standard embodied in subsection 2(a). *ABA Favors Competitive Injury Test for Advertising and Promotional Allowances*, 52 Antitrust and Trade Reg. Rep. 357 (Feb. 26, 1987).

past (in the *Grand Union* line of cases) compounded the anti-consumer effects of subsections 2(d) and 2(e) (which regulate conduct of sellers) by using Section 5 to reach an even broader class of cases (conduct of buyers), making it *per se* unlawful for a buyer to induce, or receive allowances and services with knowledge that competing buyers were treated nonproportionally.[2]

The Commission recently provided a persuasive basis for overturning the use of Section 5 to extend the scope of subsections 2(d) and 2(e). In its decision in *General Motors Corp.* ("GM"), the Commission determined that activities not prohibited by the Sherman and Clayton acts should be prohibited under Section 5 only if (1) they have anticompetitive effects very similar to the effects of conduct barred by the pro-competitive portions of those Acts; and (2) if their prohibition is not inconsistent with any other legislative goal reflected in the pro-competitive portions of those Acts.[3]

Thus, the Commission should no longer use Section 5 to extend the Robinson-Patman Act, if the Commission does not consider the Act itself to be pro-competitive. And the Commission clearly does not view the Robinson-Patman Act as pro-competitive; it has characterized the Act as a "protectionist non-efficiency oriented" statute whose objectives conflict rather than coincide with the protection of competition.[4] This condemnation applies most strongly to subsections 2(d) and 2(e) because they do not require any demonstration of competitive injury.

Moreover, in the present matter, there is no evidence or analysis to indicate an exercise of market power, and hence no evidence of an ability to discriminate. Therefore the prohibitions imposed by the order on McKesson are likely only to inhibit McKesson's ability to compete. Clearly, this is inconsistent with the pro-competitive purposes of the Sherman and Clayton Acts.

The Commission was created as an expert body capable of determining when a practice injures competition and when it does not. The Commission did not exercise that expertise in the *Grand Union* line of cases. Instead, it simply extended an inappropriate standard of illegality to an additional class of businesses. The Commission has clear authority to overturn the *Grand Union* line of reasoning. I am unaware of any court decision ordering the Commission to hold as illegal *per se* an inducement by a buyer of what we cast as nonproportional services and allowances. The courts merely have indicated that the Commission may, in its discretion, take that step. But, as a gener-

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[2] *See, e.g., Grand Union Co. v. FTC*, 300 F.2d 92, 99 (2d Cir. 1962); *Giant Food Inc. v. FTC*, 307 F.2d 184, 186 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963).

[3] *General Motors Corp.*, 103 F.T.C. 641, 700–701 (1984); *accord. Ethyl Corp.*, 101 F.T.C. 425, 597 (1983), *rev'd on other grounds sub nom. DuPont v. FTC*, 729 F.2d 1288 (2d Cir. 1984).

[4] *General Motors Corp.*, 103 F.T.C. 641, 695–696 (1984), *citing Jefferson County Pharmaceutical Association v. Abbott Laboratories*, 460 U.S. 150, 171 n. 39 (1983).

al matter, the Commission has both the primary responsibility and wide discretion to interpret Section 5. Moreover, the Supreme Court has concluded that "as a general rule the Robinson-Patman Act should be construed so as to insure its coherence with ' the broader antitrust policies that have been laid down by Congress.' "[5]

The Commission has elected not to modify the order's buyer inducement provisions. The Commission has thus, to the detriment of American consumers, foregone an opportunity to alter a precedent in an instance where it has the authority to do so. How can the Commission take this action and at the same time claim to serve the interest of American consumers?[6]

Accordingly, although I concur with so much of the Commission's decision as vacates the "seller side" provision, I dissent from the Commission's decision not to vacate the order in its entirety.

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[5] *United States v. United States Gypsum Co.* 438 U.S. 458–459 (1978), *quoting Automatic Canteen Co. v. FTC,* 346 U.S. 61, 74 (1953).

[6] Hint: How can you square a circle?

IN THE MATTER OF

AMERCO, ET AL.

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

Docket 9193. Complaint, June 24, 1985—Decision, May 18, 1987

This consent order requires, among other things, a Phoenix, Ariz.-based respondent, U-Haul International, Inc., the nation's largest renter of trucks and trailers, and its Las Vegas, Nev.-based parent company, AMERCO, from initiating or participating in any judicial or administrative proceeding in which their main purpose is to harass or injure any competitor or potential competitor. Additionally, respondents are required for ten years: (1) to give the FTC prior notice before participating in any bankruptcy proceeding of a competitor; (2) to obtain FTC approval before filing a plan of reorganization to acquire a competitor in bankruptcy; (3) to provide the FTC with a copy of any lawsuit filed against a competitor; and (4) to obtain FTC approval before acquiring any competitor worth $5 million or more.

Appearances

For the Commission: *Gerald T. Gregory.*

For the respondents: *Allen Ward, Baker & Hostetler,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that AMERCO, a corporation, and U-Haul International, Inc., a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

DEFINITION

1. For the purpose of this complaint, the term *"moving equipment"* shall include trucks, trailers, and/or equipment such as tow bars, hand trucks, hitches, and furniture pads.

RESPONDENTS

2. Respondent AMERCO is a corporation, existing and doing business under the laws of Nevada. Its principal place of business is 3111 Bel Air, Las Vegas, Nevada.

3. For the fiscal year ending March 31, 1984, AMERCO had operating revenues of approximately $626.2 million; profits after taxes of approximately $41.7 million; and assets of approximately $947.3 million.

4. Respondent U-Haul International, Inc. ("UHI") is a corporation, existing and doing business under the laws of Oregon. Its principal place of business is 2727 North Central Avenue, P.O. Box 21502, Phoenix, Arizona.

5. For the fiscal year ending March 31, 1984, UHI had operating revenues of approximately $51.6 million and assets of approximately $33.8 million.

6. AMERCO owns 100 percent of a large number of corporations, including UHI, whose operations relate to the rental of moving equipment. These corporations are collectively referred to herein as "U-Haul." AMERCO has managed and controlled U-Haul since at least 1978 and continues to manage and control U-Haul.

7. UHI is the accounting clearinghouse for and provides technical and advisory services to U-Haul.

8. Respondents AMERCO and UHI maintain, and have maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

TRADE AND COMMERCE

9. There are two types of moving equipment rentals. One type involves only round-trip rentals, in which the moving equipment is returned to the location from which it was taken. The other type involves one-way rentals, in which the moving equipment is returned to a location other than the one from which it was taken. One-way rentals require a network of locations; round-trip rentals require only a single location.

10. The relevant product market ("one-way rental market") is the offering, directly through a network of store locations and/or indirectly through a network of dealer franchise locations, of one-way rentals of moving equipment. The firms (including associations of firms such as U-Haul) in this market purchase, lease, and/or manufacture moving equipment; provide for the maintenance and repair of that equipment; and distribute that equipment to a network of store locations

and/or franchise dealer locations, through which network the one-way rentals are made available to the public.
11. The relevant geographic market is the United States.
12. The United States one-way rental market ("relevant market") is highly concentrated, and entry into it is very difficult.
13. U-Haul has been the dominant firm in the relevant market for at least ten years and continues to dominate that market.

COMPETITION IN THE RELEVANT MARKET

14. Jartran, Inc. ("Jartran"), a Florida corporation, entered the relevant market in 1979. By 1980 it had gained approximately 10% of all revenues generated in the relevant market, and this gain was largely at the expense of U-Haul.
15. U-Haul and Jartran have competed with one another and each with the other firms in the relevant market since approximately 1979, and continue to do so.
16. On or about June 16, 1980, UHI, on behalf of U-Haul and AMERCO, sued Jartran in federal district court in Arizona for false and misleading advertising, seeking approximately $375 million in damages.
17. On or about December 31, 1981, Frank B. Hall & Company ("Hall"), a Delaware corporation, acquired the majority of Jartran's common stock. On or about December 31, 1981, Jartran filed in federal bankruptcy court in Northern Illinois for reorganization under 11 U.S.C. 1101–1174 ("Chapter 11 reorganization").
18. During January 1982, UHI, on behalf of U-Haul and AMERCO, filed a claim in Jartran's Chapter 11 reorganization proceeding for up to approximately $375 million. This claim was based on the damages UHI sought in its then on-going lawsuit against Jartran in Arizona for false and misleading advertising.

ANTICOMPETITIVE ACTS AND PRACTICES

19. During Jartran's Chapter 11 reorganization proceeding, UHI, on behalf of U-Haul and AMERCO, engaged in acts and practices that, in their individual and collective character, were inconsistent with U-Haul's legitimate interests as a creditor, and in fact were intended primarily to delay or prevent Jartran's reorganization as a competitor. Examples of such acts and practices by UHI, on behalf of U-Haul and AMERCO, include the following.

a. On several occasions, UHI proposed that AMERCO acquire Jartran, when UHI and AMERCO knew or had reason to believe that

such an acquisition would probably violate Section 7 of the Clayton Act, 15 U.S.C. 18, or at least would raise serious questions under that Act. Thus, such proposals could probably not be confirmed under the applicable bankruptcy laws, 11 U.S.C. 1101–1174, and could only delay Jartran's reorganization. Representatives of Jartran's unsecured creditors repeatedly requested that UHI seek government clearance of the proposed acquisition, or government comment on its legality, but UHI refused to approach government antitrust agencies for such purposes.

b. UHI opposed a settlement between Hall and certain Jartran creditors, even though this settlement would have effected an increase in the amount of money Jartran would distribute to UHI pursuant to Jartran's reorganization.

c. UHI attempted to void Hall's acquisition of Jartran, although Hall's financial support of Jartran was necessary for Jartran's survival.

d. UHI engaged in such additional acts and practices as (1) instigating, without colorable legal authority, an alter ego proceeding against Hall and a breach of fiduciary duty proceeding against Jartran's Board of Directors, (2) delaying Jartran's reorganization by attempting to have the vote resolicited on a modified reorganization plan, although such resolicitation would be pointless and unnecessary at law because the modified plan had been approved by those Jartran creditors adversely affected by it and because the modified plan made more money available to UHI and certain other Jartran creditors than did the previous reorganization plan, and (3) delaying confirmation of Jartran's reorganization plan through frequent, repetitious, and costly opposition.

20. Certain of the acts and practices, of which examples are set forth in the preceding paragraph, lacked any basis in law; others were not baseless, and were taken under color of law. Even the acts and practices that were not baseless were ultimately dismissed by the court having jurisdiction over the matter or withdrawn by UHI.

EFFECTS AND VIOLATION

21. By means of its anticompetitive acts and practices, respondent UHI, on behalf of U-Haul and respondent AMERCO, has pursued a deliberate course of action to abuse the judicial process in order to injure a competitor and competition and it has in fact injured competition by jeopardizing and substantially delaying Jartran's emergence as a reorganized company, capable of resuming its role as an effective competitor.

22. The aforesaid acts and practices constitute an attempt by a domi-

nant firm to monopolize the relevant market and constitute unfair methods of competition or unfair acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 15th day of August, 1985, A.D., at 10:00 a.m. o'clock is hereby fixed as the time and Federal Trade Commission Offices, Gelman Building, 2120 L Street, N.W., Washington, D.C. 20580 as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceeding in this matter that respondents, U-Haul International, Inc., and AMERCO, are in violation of Section 5 of the Federal Trade Commission Act as alleged in the complaint, the Commission may order such relief applicable to each respondent as is supported by the record and is necessary and appropriate including, but not limited to:

1. A prohibition against initiating or participating in any judicial or administrative proceeding not substantially for the purpose pleaded, but primarily to harass or injure any U. S. competitor in the one-way rental of moving equipment (hereinafter, "competitor") or franchise dealer of any competitor;

2. A prohibition against participating in any proceeding initiated under the bankruptcy laws in which any competitor or franchise dealer of any competitor is the debtor; in such a proceeding, a respondent would be free to divest any claim against the competitor or franchise dealer or put that claim in a blind trust or other arrangement in which each respondent's interest as a creditor is represented by legal or other representatives not under its control;

3. A prohibition against initiating or participating in any judicial or administrative proceeding against any competitor or franchise dealer of any competitor without (a) providing the Commission with (1) a copy of the complaint, petition, or pleading that each respondent filed to initiate or to initiate participation in the proceeding, (2) a copy, upon request, of each filing made in the proceeding by each respondent and (3) a complete statement of the factual and legal bases underlying each respondent's initiation of or initial participation in the proceeding; (b) providing the court or tribunal in which the proceeding is being conducted with a copy of the Commission's complaint and order in the instant matter;

4. A prohibition against acquiring, without Commission approval, any competitor or any claim against any competitor;

5. A requirement to (a) distribute a copy of the Commission's complaint and order in this matter to all directors, officers, subsidiaries, and operating divisions, (b) notify the Commission of any material proposed change in a corporate respondent such as dissolution, assignment or sale, (c) file with the Commission a report, in writing, setting forth in detail the manner and form in which respondents have complied with the order issued in this matter and (d) provide the Commission, upon its request during any Commission investigation or litigation concerning respondents' compliance with such order, with

all documents relevant to compliance with the order in this matter, including documents subject to the attorney - client privilege.

Decision and Order

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

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

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

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

1. Respondent AMERCO is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its principal place of business at 3111 Bel Air, Las Vegas, Nevada.

Respondent U-HAUL INTERNATIONAL, INC. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its principal place of business at 2727 North Central Avenue, P.O. Box 21502, Phoenix, Arizona.

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

Order

A. For the purpose of this order, the following definitions shall apply:

1. "*person*" is any natural person, corporate entity (including subsidiaries thereof), partnership, joint venture, trust or legal entity;

2. "*competitor*" is any person or association of persons that offers one-way rentals of moving equipment, directly through a network of store locations and/or indirectly through a network of dealer locations, but does not refer to a dealer or a franchisee or licensee of such a person or association of persons;

3. "*potential competitor*" is any person or association of persons that either respondent knows or has reason to believe is planning or preparing to offer one-way rentals of moving equipment, directly through a network of store locations and/or indirectly through a network of dealer locations, but does not refer to a dealer or a franchisee or licensee of such a person or association of persons.

B. *It is ordered,* That each respondent, including each of its successors and assigns, directly or indirectly or through any subsidiary, affiliate, division, director, officer, employee, agent, representative, corporation or other device, in connection with the conduct of business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, forthwith cease and desist from initiating or participating in any judicial or administrative proceeding where such respondent's primary purpose is to harass or injure any competitor or potential competitor.

C. *It is further ordered,* That each respondent, including each of its successors and assigns, directly or indirectly or through any subsidiary, affiliate, division, director, officer, employee, agent, representative, corporation or other device, in connection with the conduct of business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, during the period of ten (10) years from date of service of this order, forthwith cease and desist from:

1. participating in any proceeding initiated by a competitor under the Bankruptcy Code, without (a) first giving twenty (20) days written notice to the Federal Trade Commission (or, if fewer than twenty (20) days, written notice shall be given to the Federal Trade Commission as soon as is reasonably practicable under the circumstances), and (b) serving a copy of each pleading filed by either respondent in the proceeding on the Federal Trade Commission by first-class mail at the same time that the pleading is filed;

2. filing or seeking to file in any proceeding initiated by a competitor under the Bankruptcy Code, without the prior approval of the Federal Trade Commission, a plan of reorganization by which either or both respondents would acquire the whole or any part of the stock, share capital, assets or equity interest of such competitor;

3. initiating or participating in any judicial or administrative proceeding against any competitor without providing the Federal Trade Commission (a) within ten (10) days of filing the complaint, petition, or pleading in question, a copy of that complaint, petition, or pleading that each respondent filed to initiate or to initiate participation in such a proceeding, and (b) within twenty (20) days of receiving a request from the Federal Trade Commission for such a statement, a statement of the factual and legal bases underlying each respondent's reasons for the initiation of or initial participation in such a proceeding; provided, however, that this subparagraph C.3 shall not apply to any insurance subrogation claim for personal injury or for damage to property.

D. *It is further ordered,* That each respondent, including each of its successors and assigns, directly or indirectly, during the period of ten (10) years from the date of service of this order:

1. shall not acquire from any person any claim or right under any claim such person has against a competitor, other than by means of insurance subrogation to any claim for personal injury or for damage to property;

2. shall not acquire, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, assets, or equity interest in any competitor; provided, however, that nothing in this subparagraph D.2 shall prohibit respondents from:

a. acquiring any assets the total value of which in any single acquisition is less than five million dollars ($5,000,000), or

b. entering into any transaction with any subsidiary or affiliate of either respondent, with any company wholly developed by either respondent, or with any noncompetitor, where such transaction involves the conduct of business, including mergers, consolidations, joint ventures, or other reorganizations, solely with or among these entities.

E. *It is further ordered,* That for a period of ten (10) years from the date of service of this order, respondents, including their successors and assigns, shall distribute a copy of the Federal Trade Commission's Complaint and Order to: (1) respondents' directors and officers and their successors, (2) respondents' in-house counsel and their successors, (3) respondents' auditor and its successors, (4) AMERCO District Vice Presidents and their successors, and (5) respondents' outside counsel in any judicial or administrative proceeding involving a competitor, other than a proceeding based on an insurance subrogation claim for personal injury or for damage to property. Respondents shall make their initial distribution under this paragraph E within thirty (30) days of date of service of this order.

F. *It is further ordered,* That respondents, including their successors and assigns, shall:

1. file with the Federal Trade Commission within ninety (90) days of date of service of this order a report in writing setting forth in detail the manner and form in which respondents have complied and are complying with this order;

2. notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in either respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or any other proposed change in the corporation which may affect compliance obligations arising out of this order.

CONCURRING STATEMENT OF CHAIRMAN DANIEL OLIVER

In June, 1985, the Commission issued the complaint in this matter. It alleged, *inter alia,* that the respondents "pursued a deliberate course of action to abuse the judicial process in order to injure a competitor and competition." I agree that the Commission had a reason to believe that the respondents had violated section 5 of the Federal Trade Commission Act when the complaint was issued. I also agree that the proposed consent order should prevent the conduct alleged in the complaint.

I have two concerns with the proposed consent order. First, I do not believe that it should prohibit the respondents from making certain acquisitions without securing prior Commission approval. In my view, an order should, in general, be directed to the wrongdoing alleged. In the present case, it is difficult to justify a prior approval provision because the complaint does not allege that the respondents made an acquisition that violated section 7 of the Clayton Act. Second, I believe that the entire order—rather than simply certain sections—should terminate after ten years.

Notwithstanding these reservations, I have voted to accord final approval to the proposed consent order. On balance, I am of the opinion that the litigation should at this time be brought to a close.

CONCURRING STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

I support the majority's decision to give final approval to the consent agreement. I do so because I am persuaded that there is reason to believe U-Haul engaged in sham litigation against a competitor in an attempt to monopolize the market for one-way truck and trailer rentals. Moreover, I am persuaded that the consent order provides an effective and, for the most part, appropriate remedy for the conduct alleged.

My only reservation about the order stems from its inclusion of a ten-year prior approval requirement for asset acquisitions with a total value of at least $5 million. The theory of the case is not that U-Haul sought to monopolize the market by acquiring competitors but that sham litigation, including sham proposals by U-Haul to acquire Jartran as part of reorganization plans, was undertaken for that purpose. Therefore, I question the relevance of the prior approval requirement to the violations alleged. Moreover, the $5 million asset threshold for competitive concern has not been adequately justified. For these reasons, I would have preferred that the prior approval requirement be deleted from the consent order.

IN THE MATTER OF

THE ADVERTISING CHECKING BUREAU, INC.

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

Docket C–2947. Consent Order, Jan. 4, 1979—Set Aside Order, May 19, 1987

The Federal Trade Commission has set aside a 1979 consent order with The Advertising Checking Bureau, Inc. (93 F.T.C. 4), thus removing restrictions on respondent's involvement in cooperative advertising programs.

ORDER REOPENING AND SETTING ASIDE ORDER ISSUED ON JANUARY 4, 1979

On January 16, 1987, The Advertising Checking Bureau, Inc. ("ACB") filed its Petition to Reopen Proceeding And To Set Aside Consent Order ("Petition"), pursuant to section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, requesting that the Commission set aside the order in Docket No. C–2947, issued on January 4, 1979.[1] ACB's petition was placed on the public record for thirty days, pursuant to section 2.51 of the Commission's Rules. One comment was received.

The complaint in this case alleged that ACB violated section 5 of the Federal Trade Commission Act by auditing price restrictive cooperative advertising programs. ACB's conduct, as alleged in the complaint, had the effect of fixing or "illegally influencing" the resale prices of dealers selling ACB's clients' merchandise and eliminating intrabrand competition. It is clear that the complaint challenging ACB's conduct applied a *per se* rule of illegality. The order prohibits ACB from "designing, implementing, conducting, administering or auditing" any cooperative advertising program that conditions the right of any dealer to obtain cooperative advertising allowances or credits because the dealer, among other things, sells or advertises merchandise at a discount or sale price.[2]

In its petition, ACB asserts that the order's prohibitions hinder ACB's efforts to compete with cooperative advertising auditing firms not subject to the order's constraints. ACB states that setting aside

[1] ACB also requests the Commission to withdraw the Commission's "Policy Statement Regarding Price Restrictions In Advertising Programs" ("Policy Statement"), 4 Trade Reg. Rep. (CCH) ¶39,057 (October 26, 1981), issued on June 27, 1980. In conjunction with the issuance of this order, the Commission is also withdrawing its policy statement.

[2] The order does not bar ACB from auditing cooperative advertising programs that restrict any dealer's right to obtain cooperative advertising allowances for the advertising of "closeouts," "irregulars" or "seconds."

the order would enable ACB to become a more effective competitor. ACB also argues that the restraints prohibited by the order are generally procompetitive or competitively neutral. ACB also states that the restraints covered by the order do not prohibit retailers from selling at discount prices or advertising discounts or sale prices with their own funds. ACB would like the Commission to set aside the order because "there is no rational economic basis for the order and no sound legal justification exists for its continuation."

Based on the information provided by ACB, and other available information, the Commission has concluded that ACB has made a satisfactory showing that the public interest requires reopening the proceeding in Docket No. C–2947 and setting aside the order. The Supreme Court's decisions in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) make it clear that the rule of reason should be applied in determining whether nonprice vertical restraints unreasonably restrain competition and violate the antitrust laws. In a vertical setting, the *per se* rule applies only to agreements to fix resale prices that prevent the dealer from making independent pricing decisions. *See Monsanto,* 465 U.S. at 764. The fact that a distributional restraint may have an incidental effect on resale prices is not by itself enough to condemn the practice as *per se* unlawful.

The cooperative advertising practices prohibited by the order in this case would not by themselves constitute agreements to fix resale prices. Although such restrictions may in some cases reduce a dealer's incentive to cut prices, the restraints do not prevent the dealer from selling at discount prices or even from advertising discount prices at the dealer's own expense. Moreover, price restrictive cooperative advertising programs are likely to be procompetitive or at least competitively neutral in most cases by, for example, lowering the manufacturer's costs of monitoring retailer compliance with other, seemingly unrelated, cooperative advertising restrictions or channeling the retailer's advertising efforts in directions that the manufacturer believes consumers will find more compelling and beneficial. ACB's Petition at 5–9. This, in turn, may stimulate dealer promotion and investment and, thus, benefit interbrand competition.

Based on the record, the Commission believes that there is no evidence that price restrictive cooperative advertising programs, standing alone, are sufficiently likely to be harmful that a flat ban, rather than a case-by-case inquiry, is appropriate. The practices prohibited by the order do not appear to be ones that would always or almost always tend to restrict competition and decrease output and, thus, do not warrant summary condemnation. *Broadcast Music, Inc. v. CBS,*

441 U.S. 1 (1979). In sum, the impediments to effective competition resulting from the order outweigh any reasons to retain the order.

In light of the foregoing, continuation of the order against ACB is no longer justified and would not be in the public interest because its application harms ACB's ability to administer cooperative advertising programs that are likely to be lawful even though they contain restrictions on the prices advertised. Absent evidence that ACB is knowingly helping to enforce resale price maintenance agreements, any prosecution of cooperative advertising restrictions under the rule of reason would more properly be directed against ACB's clients rather than against ACB.

Accordingly, *it is ordered* that the order of January 4, 1979, in Docket No. C–2947 be, and it hereby is, set aside.

By direction of the Commission, Commissioner Bailey dissenting. Commissioner Strenio did not participate.

IN THE MATTER OF

PLAS-TIX USA, INC.

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

Docket C-3213. Complaint, June 5, 1987—Decision, June 5, 1987

This consent order prohibits, among other things, a Miamisburg, Ohio manufacturer of lighter-to-lighter automobile battery chargers from claiming that the chargers are jumper cables or that they can restart a disabled vehicle as quickly as jumper cables. Also, respondent is required to make specified disclosures on its packaging and in advertisements for a period of five years.

Appearances

For the Commission: *Allen Hile.*

For the respondents: *Joseph A. Koenig, Turner, Granzow, & Hollenkamp,* Dayton, OH.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 45 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Plas-Tix USA, Inc., hereinafter 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 as follows:

PARAGRAPH 1. Plas-Tix USA, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio, with its office and principal place of business located at 510 South Riverview, Miamisburg, Ohio.

PAR. 2. Respondent is now and for sometime in the past has been engaged in the manufacturing, marketing, distributing, advertising, offering for sale, and selling to the public of "Safe-T-Start" and other lighter-to-lighter chargers, which are devices to be used to recharge the battery in a disabled vehicle by connection to an operating vehicle through the cigarette lighter receptacles of both vehicles.

PAR. 3. In the course and conduct of its business, respondent causes, and in the past has caused Safe-T-Start and other lighter-to-lighter chargers to be offered and sold from its place of business to purchasers

located in various States of the United States and the District of Columbia. Respondent maintains and, at all times mentioned herein, has maintained a substantial course of trade in said products in or affecting commerce, as "commerce" is defined by the Federal Trade Commission Act, as amended.

PAR. 4. In the further course and conduct of its aforesaid business, respondent has at all times mentioned herein made numerous statements in writing, in various product packaging and promotional materials and instruction sheets prepared and/or disseminated by respondent for use in selling respondent's products. Illustrative and typical, but not inclusive, of the statements employed as aforesaid is the following:

"safe - sensible - JUMPER CABLES"

PAR. 5. Through the use of the statement referred to in Paragraph Four, and others contained in product packaging and promotional materials, instruction sheets, and advertisements, not specifically set forth herein, respondent has represented, and now represents, directly or by implication, that:

a. Lighter-to-lighter chargers are jumper cables; and

b. Lighter-to-lighter chargers can restart a disabled vehicle as quickly as jumper cables.

PAR. 6. In truth and in fact:

a. Lighter-to-lighter chargers are not jumper cables;

b. Lighter-to-lighter chargers cannot restart a disabled vehicle as quickly as jumper cables. Lighter-to-lighter chargers take significantly longer than jumper cables to restart a vehicle, even under the most favorable circumstances.

Therefore, the representations set forth in Paragraph Five were, and are, false and misleading.

PAR. 7. In the further course and conduct of its aforesaid business, respondent has at all times mentioned herein made numerous statements in writing, in various product packaging and promotional materials and instruction sheets prepared and/or disseminated by respondent for use in selling respondent's products. Illustrative and typical, but not inclusive, of the statements employed as aforesaid is the following:

"Start engine of vehicle with good battery and just let it idle for the amount of time indicated below:

(1) 5 minutes (if engine in vehicle with dead battery turned slowly, but wouldn't start)

(2) 10 minutes (if clicking sound was heard when trying to start vehicle with dead battery)

(3) 15 minutes (if no sound was heard when trying to start vehicle with dead battery)

(4) 20–25 minutes (if headlights did NOT burn on vehicle with dead battery)"

PAR. 8. Through the use of the statements referred to in Paragraph Seven, and others contained in product packaging and promotional materials, instruction sheets, and advertisements not specifically set forth herein, respondent has represented, and now represents, directly or by implication, that the times stated as required to recharge a battery in the four listed stages of discharge are typical times.

PAR. 9. Through the use of the statements referred to in Paragraph Seven, and others not specifically set forth herein, respondent has represented, directly or by implication, that at the time it made the representation set forth in Paragraph Eight it possessed and relied upon a reasonable basis for that representation.

PAR. 10. In truth and in fact, at the time respondent made such representation it did not possess and rely upon a reasonable basis for that representation. Therefore, the representation set forth in Paragraph Nine was, and is, false and misleading.

PAR. 11. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

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

The respondent, its attorneys, and counsel for 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;

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 Plas-Tix USA, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 510 South Riverview, Miamisburg, Ohio.

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

ORDER

For the purpose of this order,

a. "*lighter-to-lighter charger*" means any device to be used to recharge the battery in a disabled vehicle by connection to an operating vehicle through the cigarette lighter receptacles of both vehicles;

b. "*distributor*" means any person who purchases or receives on consignment from Plas-Tix lighter-to-lighter chargers for resale;

c. "*dealer*" means any person who purchases, or receives on consignment from a distributor, lighter-to-lighter chargers for resale to the public; and

d. "*person*" means any individual, partnership, corporation, firm, trust, estate, cooperative, association, or other entity.

I.

It is ordered, That respondent Plas-Tix USA, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, offering for sale, sale, or distribution of Safe-T-Start or any other lighter-to-lighter charger in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

a. that any such lighter-to-lighter charger is a jumper cable;

b. that any such lighter-to-lighter charger can restart a disabled vehicle as quickly as jumper cables;

c. that any such lighter-to-lighter charger can recharge a battery in any specified length of time, unless:

1. the representation is accompanied by a clear and prominent statement disclosing whether the specified time is a maximum, minimum, typical, or other such time, and that older batteries or colder temperatures may increase charging times; and

2. at the time the representation is made, respondent possesses and relies upon a reasonable basis for the representation which shall consist of competent and reliable evidence which substantiates such representation; provided, however, that to the extent such evidence of a reasonable basis consists of any scientific or professional test, experiment, analysis, research, study or other evidence based on the expertise of professionals in the relevant area, such evidence shall be "competent and reliable" for purposes of this paragraph only if the test, experiment, analysis, research, study, or other evidence is conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

d. any performance characteristic of any lighter-to-lighter charger unless, at the time the representation is made, respondent possesses and relies upon a reasonable basis for the representation which shall consist of competent and reliable evidence which substantiates such representation; provided, however, that to the extent such evidence of a reasonable basis consists of any scientific or professional test, experiment, analysis, research, study or other evidence based on the expertise of professionals in the relevant area, such evidence shall be "competent and reliable" for purposes of this paragraph only if the test, experiment, analysis, research, study, or other evidence is conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

II.

It is further ordered, That respondent Plas-Tix USA, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, offering for sale, sale or distribution of the Safe-T-Start or any other lighter-to-lighter charger in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith and for a period of five (5) years from the date of this order cease and desist from failing to disclose clearly and conspicuously on the packaging of each such lighter-to-lighter charger and clearly and prominently in each solicitation for the sale of such lighter-to-lighter charger either:

(a) the following information expressed in the exact language set forth below in ten point or larger bold face type:

"This product is not a jumper cable and will not instantly start your car. It must first recharge your battery. Older batteries or colder temperatures may increase charging times. Consult the operating instructions for charging times." or

(b) the specific length of time required to recharge a battery, accompanied by a statement disclosing whether the specified time is a maximum, minimum, typical, or other such time, and that older batteries or colder temperatures may increase charging times.

III.

It is further ordered, That Plas-Tix USA, Inc., its successors and assigns, shall within thirty (30) days after the date of service of this order:

a. provide each distributor with labels which contain the disclosure required by Part II of this order in ten point or larger bold face type in sufficient quantity to cover the existing inventory of Safe-T-Start and other lighter-to-lighter chargers manufactured by Plas-Tix of:

(1) the distributor; and

(2) each dealer who purchased or received on consignment Safe-T-Start or other lighter-to-lighter chargers from such distributor; and

b. instruct each distributor to affix, and use its best efforts to ensure that each distributor affixes, the label described in Part III a of this order to the packaging of each Safe-T-Start or other lighter-to-lighter charger manufactured by Plas-Tix that is in the inventory of that distributor, and to each such lighter-to-lighter charger in the inventory of each dealer who purchased or received on consignment Safe-T-Start or other lighter-to-lighter chargers manufactured by Plas-Tix from such distributor.

IV.

It is further ordered, That Plas-Tix USA, Inc., its successors and assigns, shall distribute a copy of this order to each present and future officer, employee, agent and representative having sales, advertising, or policy making responsibilities for any lighter-to-lighter charger and secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That Plas-Tix USA, Inc., its successors and assigns, shall maintain for at least three years and upon request make available to the Federal Trade Commission for inspection and copying the originals of signed statements required by Part IV of this order and copies of all test results, data, and other documents or information relied upon for any representation for any lighter-to-lighter charger and any information in the possession of Plas-Tix which contradicts, qualifies or calls into serious question that representation.

VI.

It is further ordered, That respondent Plas-Tix USA, Inc., shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate 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 corporation which may affect compliance obligations arising out of the order.

VII.

It is further ordered, That respondent shall, within sixty (60) 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.

IN THE MATTER OF

WALGREEN CO.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3214. Complaint, June 10, 1987—Decision, June 10, 1987

This consent order prohibits, among other things, a Deerfield, Ill.-based retail drugstore chain from making unsubstantiated advertising claims for "Advil" pain reliever or any other over-the-counter analgesic drug product.

Appearances

For the Commission: *Donna S. Moffa.*

For the respondents: *Robert L. Wald and Robert A. Skitol, Wald, Harkrader, & Ross,* Washington, D.C.

COMPLAINT

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

PARAGRAPH 1. Walgreen is an Illinois corporation with its principal office or place of business located at 200 Wilmot Road, Deerfield, Illinois.

PAR. 2. Walgreen offers for sale and sells over-the-counter drug products.

PAR. 3. Walgreen has disseminated or caused to be disseminated, advertisements for over-the-counter drug products, which products are "drugs" within the meaning of that term in Section 12 of the Federal Trade Commission Act. These advertisements have been disseminated by various means in or affecting commerce, including newspapers distributed across state lines and radio broadcasts transmitted across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of drugs.

PAR. 4. The acts and practices of Walgreen alleged in this complaint have been in or affecting commerce.

PAR. 5. Typical of Walgreen's advertisements, but not necessarily inclusive thereof, are the Walgreen advertisements attached hereto

as Exhibits A through E. Specifically, the aforesaid Walgreen advertisements contain the following statements:

a. "Prescription Pain Reliever . . . without a prescription! ADVIL is 200 mg. Ibuprofen for pain. One of the most prescribed pain relievers. Anti-inflammatory and analgesic comfort for people with arthritis." (Exhibit A)

b. "Now available without prescription. Advanced 'ADVIL' . . . . Non-narcotic anti-inflammation Ibuprofen 200 mg. for pain relief." (Exhibit B)

c. "ADVIL. Generic equivalent of Motrin, No prescription necessary." (Exhibit C)

d. "An anti-inflammatory and an analgesic, ADVIL is a source of comfort for people who experience arthritis pain." (Exhibit D)

e. "One of the world's *most-prescribed* pain relievers—known to millions as Ibuprofen —is now available *without* a prescription, at Walgreens! . . . . *ADVIL* . . . a highly effective, non-narcotic, anti-inflammatory pain reliever." (Exhibit E)

PAR. 6. Through the use of the statements referred to in Paragraph Five (a) through (e), and other statements in advertisements not specifically set forth herein, Walgreen has made the following material representations, directly or by implication:

a. Consumers can substitute "Advil," in over-the-counter dose levels, for prescription ibuprofen, because when so substituted, "Advil" provides all of the same therapeutic benefits to consumers as prescription ibuprofen.

b. "Advil," in over-the-counter dose levels, provides an anti-inflammatory benefit to consumers.

PAR. 7. Through the use of the statements set forth in Paragraph Five, and others not specifically set forth herein, Walgreen has represented, directly or by implication, that at the time of making the representations set forth in Paragraph Six it possessed and relied upon a reasonable basis for those representations.

PAR. 8. In truth and in fact, at the time of the initial dissemination of the representations set forth in Paragraph Six and each subsequent dissemination, Walgreen did not possess and rely upon a reasonable basis for making such representations. Therefore, Walgreen's representation set forth in Paragraph Seven was and is false and misleading.

PAR. 9. The acts or practices of Walgreen, as alleged in this complaint, constitute unfair or deceptive acts or practices in or affecting commerce and false advertisements in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Chairman Oliver was recorded as voting in the negative.

EXHIBIT A


Myadec
7.99
SALE priced
Myadec Vitamins
High potency supplement with minerals for adults. Includes Zinc. Value pack of 100 plus 30 tablets.
Prescription Pain Reliever without a prescription!
ADVIL
is 200 mg. Ibuprofen for Pain
• One of the most prescribed pain relievers
• Anti-inflammatory and analgesic comfort for people with arthritis
In quantities of 24 tablets, 50 or 100 tablets.
Advil
6.99
SALE priced
Natural Fiber Laxative by Metamucil
Gentle powder in regular, strawberry or orange flavor. 21 oz.
Metamucil
250
Sweet'N Low
2.19 SALE priced
Sweet'N Low, 250's
Packets of low-cal granulated sugar substitute.
Senokot
RELIEVES
CONSTIPATION
7.99
SALE priced
Senokot Laxative Tabs, 100's
Natural vegetable formula gently relieves constipation.
LOSE WEIGHT
SUPER ODRINEX
3.99 SALE priced
Maximum Strength Super Odrinex
Diet plan tablets, 50's
4.99 SALE priced
Slim-Fast Diet Plan Packets
Chocolate flavor 1 oz. 8's
Slim-Fast
Walgreens Coupon
Gillette TRACII
GILLETTE TRAC II, 8's
Walgreens Coupon
AIR FOAM RAZOLES
Walgreens

Complaint

EXHIBIT B

EXHIBIT C

EXHIBIT C

EXHIBIT D

LAS VEGAS

Hospital loses $8 m

Continued from Page 1

said Jane Casey, chief of the Cook County state's attorney's Civil Action Bureau.

The case was defended by an outside law firm, Winston & Strawn.

Before the case came to trial, the Ahmeds' attorney would have settled for $2,750,000. The county offered to settle for $1.5 million, which later was raised

One of the world's most prescribed pain relievers

IBUPROFEN 200 mg.
now available
without prescription
at Walgreens

INTRODUCING

Advil
advanced medicine
for pain

Advil is ibuprofen specially formulated for use without prescription*

Advil comes in quantities of 24 tablets, 50 or 100.

An anti-inflammatory and an analgesic, Advil is a source of comfort for people who experience arthritis pain.

Non-narcotic Advil offers effective relief for the discomfort of headache, common colds, toothache, muscle pain and cramps. It helps to reduce fever.

*Non-prescription 200 mg. strength

First there was aspirin.
Now there is Advil.

Walgreens

EXHIBIT D

EXHIBIT E

renADa Advertising 200 Walnut Road, Deerfield, IL 60015 Phone 312-940-2900

ADIO
)PY

CLIENT WALGREENS/SLIM-FAST DATE 5/22/84

JOB DESCRIPTION :60 Radio - "Advil & Slim-Fast"

Script # WLG-270-60 THURSDAY & FRIDAY

TAPE

STATION ANNCR WITH MUSIC UNDER:

NOTE

'ROFEN IS PRONOUNCED
YE-BYOO-PRO-FENN"

WALGREENS MUSIC BED #59 UNDER ANNCR:

Here's good news for pain sufferers. One of the world's most-prescribed pain relievers-- known to millions as Ibuprofen -- is now available without a prescription, at Walgreens! Now you can buy it under the brand name ADVIL -- spelled A-D-V-I-L -- ADVIL for the temporary relief of minor arthritis pain ... headaches and toothaches ... muscle and backaches ... and menstrual cramps. ADVIL ... a highly effective, non-narcotic, anti-inflammatory pain reliever. ADVIL ... now availble without a prescription, at Walgreens!

And say, how many times have you tried to lose weight If the answer is "too many", better get SLIM-FAST at Walgreens! You won't find a more delicious, eas way to lose weight. SLIM-FAST gives you a real chocolate-tasting shake ... a tempting vanilla s a chocolate pudding you can really sink your tee into ... and a rich, creamy hot cocoa. Every SL weight-loss meal is complete with vitamins, mine protein, fiber and bran. And the SLIM-FAST Diet practically counts the calories for you. Get st now. Pickup SLIM FAST at Walgreens, today !

Signature of Station Official

Station

Type Name and Title

(Notarize Above)

EXHIBIT E

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge 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 Walgreen, Co. is a corporation organized, existing and doing business under an by virtue of the laws of the State of Illinois, with its office and principal place of business located at 200 Wilmot Road, Deerfield, Illinois.

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

Order

I.

It is ordered, That respondent Walgreen Co., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of "Advil," "Nuprin" or any other over-the-coun-

ter analgesic drug product, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in any manner, directly or by implication:

A. That any such product can be substituted by consumers, in over-the-counter dose levels, for a prescription form of the product, because when so substituted such product provides all of the same therapeutic benefits to consumers as the FDA-approved label indications for the prescription form of the product, unless at the time of making the representation respondent possesses and relies upon a reasonable basis substantiating such representation. Except as otherwise permitted by the provisions of paragraph IV hereinbelow, such reasonable basis shall consist of at least two adequate and well-controlled double-blinded clinical studies which conform to acceptable designs and protocols and are conducted by different persons independently of each other. Such persons shall be qualified by training and experience to conduct such studies.

B. That any such product provides anti-inflammatory benefits for arthritis or other conditions unless at the time of making the representation respondent possesses and relies upon a reasonable basis substantiating such representation. Except as otherwise permitted by the provisions of paragraph IV hereinbelow, such reasonable basis shall consist of at least two adequate and well-controlled double-blinded clinical studies which conform to acceptable designs and protocols and are conducted by different persons independently of each other. Such persons shall be qualified by training and experience to conduct such studies.

II.

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of "Advil," "Nuprin," any other over-the-counter analgesic drug product containing ibuprofen, or any other analgesic drug product existing simultaneously in over-the-counter and prescription forms, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in any manner, directly or by implication, that any such product is efficacious for any purpose unless at the time of making the representation respondent possesses and relies upon a reasonable basis substantiating such representation. Except as otherwise permitted by the

provisions of paragraph IV hereinbelow, such reasonable basis shall consist of at least two adequate and well-controlled double-blinded clinical studies which conform to acceptable designs and protocols and are conducted by different persons independently of each other. Such persons shall be qualified by training and experience to conduct such studies.

III.

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of "Advil," "Nuprin" or any other over-the-counter analgesic drug product containing ibuprofen, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in any manner, directly or by implication, any performance characteristic of any such product (other than those covered by paragraphs I and II hereinabove) unless at the time of making the representation respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence which substantiates such representation. Except as otherwise permitted by the provisions of paragraph IV hereinbelow, evidence shall be considered "competent and reliable" only if it consists of tests, experiments, analyses, research, studies, or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

IV.

The following provisions apply to paragraphs I through III of this order:

A. The term "analgesic drug product" means an oral dosage form of drug as to which the label indications for over-the-counter use are limited to the relief or reduction of pain, inflammation and/or fever.

B. If FDA promulgates any final standard or any FDA Advisory Review Panel has in effect findings and conclusions establishing that such representation is true, such final standard or findings and conclusions (as long as they remain in effect) shall also constitute a reasonable basis for such representation.

V.

It is further ordered, That respondent, its successors and assigns, for at least three (3) years after the date of the last dissemination of the representation, shall maintain and upon request make available to the staff of the Commission for inspection and copying:

1. All materials possessed and relied upon to substantiate any claim or representation covered by this order.
2. All test reports, studies, surveys, or demonstrations in their possession or control or of which they have knowledge that contradict, qualify or call into question any representation covered by this order.

VI.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in 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 corporation which may affect compliance obligations arising out of this order.

VII.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

VIII.

It is further ordered, That respondent shall, within sixty (60) days after the date of service 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.

Chairman Oliver was recorded as voting in the negative.

IN THE MATTER OF

OCCIDENTAL PETROLEUM CORPORATION, ET AL.

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

Docket C-3191. Complaint, June 25, 1986—Decision, June 25, 1986[1]

This consent order, among other things, allows Occidental Petroleum Corp. to proceed with its tender offer for MidCon Corp. and their subsequent merger. Respondent is required to divest MidCon's subsidiary, Mississippi River Transmission Corp. (MRT), within one year after the order becomes final. Additionally, respondent and its subsidiary, Cities Service Oil and Gas Corp., is prohibited from entering into any new agreements to sell natural gas to MRT until the divestiture is completed.

Appearances

For the Commission: *Marc G. Schildkraut.*

For the respondents: *Gerald M. Stein, Occidental Petroleum Corp.,* Los Angeles, CA. and *Paul E. Goldstein, MidCon Corp.,* Lombard, IL.

COMPLAINT

The Federal Trade Commission having reason to believe that respondent Occidental Petroleum Corporation, a corporation subject to the jurisdiction of the Federal Trade Commission, intends to acquire, or has acquired the stock or assets of respondent MidCon Corp., 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. "*Occidental*" means Occidental Petroleum Corporation, its subsidiaries, divisions, groups, affiliate entities, and each of their directors, officers, employees, agents and representatives; and each

[1] This matter was inadvertently omitted from the Federal Trade Commission Decisions-Volume 107.

partnership, joint venture, joint stock company or concession in which Occidental is a participant.

b. "*MidCon*" means MidCon Corp., its subsidiaries, divisions, groups, affiliate entities, and each of their directors, officers, employees, agents and representatives; and each partnership, joint venture, joint stock company or concession in which MidCon is a participant.

c. "*The acquisition*" means the transaction described, in whole or in part, in paragraph 10 of this complaint.

d. "*Transportation*" means transportation for one's own account as well as for others.

II. RESPONDENTS

A. Occidental

2. Respondent Occidental is a corporation organized and doing business under the laws of the state of California with its principal place of business located at 10889 Wilshire Boulevard, Los Angeles, California.

3. Respondent Occidental is the parent of a group of companies engaged primarily in the production and marketing of oil, gas and coal and in the manufacture and sale of chemicals and agricultural products.

4. In 1984, respondent Occidental had net sales of $15.6 billion. Occidental is a major producer of natural gas in the United States. In 1984, Occidental produced approximately 248 billion cubic feet of natural gas.

5. At all times relevant herein, respondent Occidental 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.

B. MidCon

6. Respondent MidCon is a corporation organized and doing business under the laws of the state of Delaware with its executive offices at 701 East 22nd Street, Lombard, Illinois.

7. Respondent MidCon owns businesses that operate at several levels in the natural gas transportation industry. MidCon had sales of $4.1 billion in the fiscal year ending September 30, 1985. As of September 30, 1985, MidCon owned and operated natural gas pipeline systems in the United States consisting of over 29,000 miles of pipe-

line. MidCon also owned and operated various other natural gas gathering and transmission facilities.

8. Among the pipeline companies owned by respondent MidCon is Mississippi River Transmission Corporation ("MRT"). MRT is an interstate pipeline that runs from Texas and Louisiana to the St. Louis, Missouri area. Approximately 93 percent of MRT's gas sales were made in the St. Louis area in 1984.

9. At all times relevant herein, respondent MidCon 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. THE ACQUISITION

10. On December 31, 1985 respondent Occidental and respondent MidCon entered into a merger agreement whereby Occidental agreed to initiate a cash tender offer of $75 per share for up to 21,000,000 shares, approximately 54 percent of MidCon's stock. The agreement further provides that, subsequent to the successful completion of the tender offer, Occidental will consummate the merger by exchanging either $75 or 2.2472 shares of Occidental stock for each of the remaining MidCon shares. The total value of the transaction is approximately $3 billion.

IV. RELEVANT MARKETS

11. One relevant line of commerce in which to evaluate the effects of the acquisition is the transportation by pipeline of natural gas into consuming areas.

12. Another relevant line of commerce in which to evaluate the effects of the acquisition is the sale of natural gas into consuming areas.

13. One relevant section of the country is the St. Louis area, consisting of that part of Missouri containing St. Louis city and Franklin, Jefferson, St. Charles and St. Louis counties and the part of Illinois containing Clinton, Jersey, Madison, Monroe and St. Clair counties.

V. EFFECTS

14. Respondent MidCon, through its MRT and Natural Gas Pipeline Company of America (NGPL) subsidiaries, is the sole supplier of natural gas to the St. Louis area. In 1985, MidCon supplied 100 percent of

the natural gas consumed in the St. Louis area. In 1985, MRT supplied 100 percent of the natural gas purchased by LaClede Gas Company, the local distribution company for and sole supplier of gas to the city of St. Louis, Missouri.

15. MRT is the only company that owns a pipeline for the transmission of natural gas into the city of St. Louis, Missouri.

16. It is difficult to enter into the business of transporting by pipeline and selling natural gas in the St. Louis area.

17. For the reasons set forth in paragraphs 11 through 16, respondent MidCon has market power in the transportation by pipeline of natural gas and the sale of natural gas into the St. Louis area.

18. Interstate natural gas pipelines are subject to regulation by the Federal Energy Regulatory Commission (FERC) under the authority of the Natural Gas Act, 15 U.S.C. 717w, and Natural Gas Policy Act, 15 U.S.C. 3301–3432. MRT is among the pipelines regulated by the FERC. The FERC regulates the rates charged by interstate pipelines, including MRT, for the transportation of natural gas and the sale of natural gas for resale (sales to local distribution companies). The FERC's review and regulation of these rates is based upon a pipeline's cost of service. To a degree, this regulation constrains the prices and profits of MRT.

19. Some natural gas production and sale at the wellhead is regulated pursuant to the Natural Gas Act and the Natural Gas Policy Act. By operation of the Natural Gas Policy Act, many categories of natural gas production were deregulated on January 1, 1985. 15 U.S.C. 3331(a). At the present time, most natural gas production is deregulated. Pipelines purchase deregulated natural gas at prices negotiated with producers. The portion of natural gas production that is deregulated will increase over time as production from regulated wells declines.

20. The FERC regulates an interstate pipeline's rates based upon the pipeline's costs. If FERC does not disallow an increase in these costs, it would allow the pipeline to charge higher rates. When a pipeline with market power over transportation of natural gas or the sale of natural gas into consuming areas purchases natural gas from an unregulated producing affiliate, there is an incentive to pay higher prices for natural gas. Such transactions between regulated and unregulated affiliate companies present a recognized means of seeking to circumvent rate-of-return regulation covering the regulated affiliate.

21. By combining a major natural gas producer (respondent Occidental) with an interstate gas transmission pipeline with market power in the transportation of natural gas or the sale of natural gas into consuming areas (MRT), the acquisition substantially increases

the potential for MRT to purchase its gas supplies from affiliated producing companies. The acquisition thereby is likely to increase the ability and the incentive of MRT to purchase its supplies of deregulated natural gas in the field from affiliated companies at higher prices than it would have been willing to pay absent the acquisition of respondent MidCon by respondent Occidental. Because some such increase in costs is likely to be permitted, MRT would likely be able to charge higher rates than it would have absent the purchases of natural gas at higher prices from Occidental's affiliated gas producing entities. Prices to customers of MRT would be likely to rise.

22. By increasing the amount of gas MRT purchases from producing affiliates, the acquisition is likely to increase the incentive and ability of MRT to pay high prices to producing affiliates.

23. Under FERC regulations, MidCon is under no obligation to transport gas for others, and as a result can bar access by third parties wishing to sell gas into the St. Louis area.

24. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the transportation by pipeline of natural gas and the sale of natural gas into the St. Louis area 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. the acquisition will create the incentive and ability for respondent MidCon to raise the price and reduce the sales of natural gas in the St. Louis area; and

b. the acquisition will create an additional incentive for respondent MidCon to refuse to transport lower priced natural gas for others into the St. Louis area.

VI. VIOLATION CHARGED

25. The proposed acquisition of the stock and assets of MidCon by Occidental, as set forth in paragraph 10 herein, violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended, and the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Decision and Order

The Federal Trade Commission having initiated an investigation of Occidental Petroleum Corporation's ("Occidental") acquisition of shares of Common Stock of MidCon Corp. ("MidCon") and the subse-

quent merger of MidCon into an affiliate of Occidental pursuant to an Agreement and Plan of Reorganization, and Occidental and MidCon, having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration, and which, if issued by the Commission would charge Occidental and MidCon with violations of the Clayton Act and Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested parties 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. Occidental is a corporation organized under the laws of California with its executive office at 10889 Wilshire Boulevard, Los Angeles, California.

2. MidCon is a corporation organized under the laws of Delaware with its executive office at 701 East 22nd Street, Lombard, Illinois.

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

ORDER

I.

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

1. "*Acquisition*" means Occidental's acquisition of shares of the Common Stock of MidCon and the subsequent merger of MidCon into

an affiliate of Occidental pursuant to an Agreement and Plan of Reorganization.

2. "*MRT*" means Mississippi River Transmission Corporation, an indirect, wholly-owned subsidiary of MidCon.

3. "*Occidental*" means Occidental Petroleum Corporation, its subsidiaries, divisions, groups and affiliates controlled by Occidental and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

4. "*MidCon*" means MidCon Corp. as it was constituted prior to the acquisition, including its parents, subsidiaries, divisions, groups and affiliates controlled by MidCon, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

II.

It is further ordered, That:

(A) Within 12 months of the date this order becomes final, Occidental shall divest, absolutely and in good faith, MRT.

B. Divestiture of MRT shall be made only to an acquirer or acquirers and only in a manner that receives the prior approval of the Federal Trade Commission. The purpose of the divestiture of the MRT is to ensure the continuation of MRT as an ongoing, viable enterprise engaged in the same business in which it is presently engaged and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. So long as Occidental shall own MRT, Occidental and its subsidiary, Cities Service Oil and Gas Corporation, shall not enter into any new agreement(s) for sale of natural gas to MRT.

III.

It is further ordered, That:

A. If Occidental has not divested the MRT within the 12–month period, Occidental shall consent to the appointment of a trustee in any action that the Federal Trade Commission may bring pursuant to section 5(*1*) of the Federal Trade Commission Act, 15 U.S.C. 45 (*1*), or any other statute enforced by the Commission. In the event the court declines to appoint a trustee, Occidental shall consent to the appointment of a trustee by the Commission pursuant to this order.

B. If a trustee is appointed by a court or the Commission pursuant to paragraph III(A) of the order, Occidental shall consent to the fol-

lowing terms and conditions regarding the trustee's duties and responsibilities:

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

2. The trustee shall have 18 months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission, and if the trustee was appointed by the court, subject also to the prior approval of the court. If, however, at the end of the 18–month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission or by the court, if the trustee was appointed by a court.

3. The trustee shall have full and complete access to the personnel, books, records, and facilities of MRT and Occidental shall develop such financial or other information relevant to the assets to be divested as such trustee may reasonably request. Occidental shall cooperate with the trustee and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

4. The power and authority of the trustee to divest shall be at the most favorable price and terms available consistent with the order's absolute and unconditional obligation to divest and the purposes of the divestiture as stated in paragraph II(B). If bona fide offers are received by the trustee from more than one prospective purchaser, the Commission shall determine whether to approve each such purchaser, and the trustee shall divest to the purchaser elected by Occidental from among the purchasers approved by the Commission.

5. The trustee shall serve at the cost and expense of Occidental on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the court or the Commission of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to Occidental and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on commission arrangement contingent on the trustee divesting MRT.

6. Promptly upon appointment of the trustee and subject to the approval of the Commission, Occidental shall, subject to the Commission's prior approval and consistent with provisions of this order, execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to cause divestiture.

7. If the trustee ceases to act or fails to act diligently, a substitute

trustee shall be appointed for the balance of the 18–month period specified in paragraph III(B) (2) or any extension thereof.

8. The trustee shall report in writing to Occidental and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

C. Occidental shall maintain the viability and marketability of MRT and shall not cause or permit the destruction, removal or impairment of any assets of MRT except in the ordinary course of business and except for ordinary wear and tear. Occidental shall use its best efforts to ensure that MRT continues to be an ongoing, viable enterprise engaged in the same business in which it is presently engaged.

IV.

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

V.

It is further ordered, That for a period commencing on the date this order becomes final and continuing for ten (10) years from and after the date this order becomes final, Occidental shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, assets used or previously used by (and still suitable for use by), any interest in or the whole or any substantial part of the stock or share capital of any natural gas transmission line located in whole or part in the St. Louis MSA; these prohibitions shall not relate to participation in any joint venture in which Occidental or MidCon is a participant on the date of service of this order or to the construction of new facilities.

VI.

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

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

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

VII.

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

TABLE OF COMMODITIES*

DECISIONS AND ORDERS

*Commodities involved in dismissing or vacating orders are *italicized*.

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DECISIONS AND ORDERS

* Pertaining to prohibited trade practices and affirmative corrective actions involved in Commission decisions and orders, as codified in 16 CFR Part 13.