

IN THE MATTER OF

THE PERRIER GROUP OF AMERICA, INC., ET AL.

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

Docket C-3339. Complaint, Aug. 5, 1991—Decision, Aug. 5, 1991

This consent order prohibits, among other things, a Connecticut-based company and its subsidiary from making false claims that any mineral water it sells is unprocessed or unfiltered, or regarding the manner by which the water is carbonated.

Appearances

For the Commission: *Robert C. Cheek* and *Joel Winston*.

For the respondents: *Lewis Rosen* and *Christopher Smith*, *Arent, Fox, Kintner, Plotkin & Kahn*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Perrier Group of America, Inc., and Great Waters of France, Inc. (“respondents”), have violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondents The Perrier Group of America, Inc. and Great Waters of France, Inc. are Delaware corporations with their offices and principal places of business located at 777 W. Putnam Avenue, Greenwich, Connecticut. Great Waters of France, Inc. is a wholly-owned subsidiary of The Perrier Group of America, Inc.

PAR. 2. Respondents have advertised, offered for sale, sold, and distributed carbonated mineral water to the public under the registered trademark Perrier. Perrier water is a “food” as that term is defined in Section 15 of the Federal Trade Commission Act.

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

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and other promotional materials for

Perrier mineral water, including, but not limited to, the attached Exhibits A and B.

These advertisements contain the following statements:

You can't add to perfection.

Unlike many bottled waters that add artificial carbonation, Perrier needs nothing more than this rare gift from nature. In fact, Perrier, just as it bubbles up to the surface, is a perfectly-made water. So we don't tamper.

(Exhibit A)

A Natural Beverage: A perfect mineral water like Perrier needs no treatment, no purification. Natural water has nothing added to it and nothing removed. Its clarity, its unique balance of minerals and its unprocessed goodness are a gift of nature, unearthed after centuries of careful protection.

Source: . . . Now, this pristine resource trickles upward through layers of natural filtration, gaining a light, natural effervescence from volcanic gasses along the way. This rare combination rises to a single spring—Source Perrier.

Filtration: Perrier water travels upward through a succession of natural filtration layers of porous limestone, cracked marl (a hard rock rich in calcium carbonate, mostly formed with clay) and pure white sand which preserves its icy, crystalline quality as it bubbles to the surface at a single source.

(Exhibit B)

PAR. 5. Through the statements referred to in paragraph four, and others in advertisements and promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that Perrier mineral water is not processed or filtered before being bottled.

PAR. 6. In truth and in fact, Perrier mineral water is processed and filtered before being bottled. Perrier mineral water is created by extracting carbonated water from a deep geological formation in the earth, removing the carbonation from the water, and then filtering the carbonation to remove certain substances; adding the carbonation to carbonated water that is extracted from a higher depth within the same geological formation; and bottling the final product. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce and false advertisements in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Commissioner Yao not participating.

EXHIBIT A

EXHIBIT A

One of the things that makes our water so good is something that isn't made of water.

It's our bubbles. And while you'll see bubbles in a lot of bottled waters, the ones you see in Perrier tell a unique story about our water, and why it tastes so good.

Natural carbonation from when the world was young.

The unique chain of events that led to the creation of Perrier began 130 million years ago, during the Cretaceous Era. It was then that volcanic eruptions trapped natural gasses deep in the earth, in a secret hiding place. To this day, this is the natural carbonation that blesses Perrier with its sparkling effervescence.

You can't add to perfection.

Unlike many bottled waters that add artificial carbonation, Perrier needs nothing more than this rare gift from nature. In fact, Perrier, just as it bubbles up to the surface, is a perfectly-made water. So we don't tamper.

Water from heaven. Minerals from earth.

The water we call Perrier started as rainfall in southern France, where, over the Eons, it filtered deep into underground limestone caves from the same Cretaceous Era. There it slowly absorbs a delicate balance of minerals like calcium, magnesium, and potassium, just as it has for millions of years. Until the carbonation bubbles up to join the water, and the water called Perrier bubbles up for us to drink.

Bubbles (and water) like this don't happen every day.

It took 130 million years for nature to make Perrier. Odds are, she doesn't plan to duplicate the feat in the foreseeable future. And that's something that's nice to know whenever you enjoy its delightful, unique effervescence.

All you have to do is remember the bubbles.

**Perrier. It could never
happen again.**



486

Complaint

EXHIBIT B



EXHIBIT B

The Perrier Group

777 WEST PUTNAM AVENUE • P.O. BOX 1313 • GREENWICH, CT 06836

A PERRIER PRIMER

Telephones (203) 531
 Telex 121130 CWT
 TWX 710-179-2985

Perrier is a naturally sparkling mineral water bottled only at one single spring in Vergèze, France. Perrier has a unique mineral balance that imparts a fresh, clean taste, combined with the delicate gasses of natural carbonation. Today Perrier is preferred in more than 110 countries worldwide as the popular choice for natural refreshment.

A Natural Beverage:

A perfect mineral water like Perrier needs no treatment, no purification. Natural water has nothing added to it and nothing removed. Its clarity, its balance of minerals are a gift of nature, unearthed after centuries of careful protection.

Source:

Perrier's famous source has been studied for decades by scientists. In fact, research traces the Source back to the Cretaceous period, more than 130 million years ago. The water we see today is the result of fresh rainfall on southern French plains and hillsides that filters deep into the earth. The water slowly absorbs its taste and mineral balance from the strata of rocks around it. Now, this pristine resource trickles upward through layers of natural filtration, gaining a light, natural effervescence from volcanic gasses along the way. This rare combination rises to a single spring — Source Perrier.

Filtration:

Perrier water travels upwards through a succession of natural filtration layers of porous limestone, cracked marl (a hard rock rich in calcium carbonate, mostly formed from clay) and pure white sand which preserve its icy, crystalline quality as it bubbles to the surface at a single source.

Its integrity is further protected by a eight-foot layer of non-porous clay which stretches like an umbrella for over a mile in all directions, preserving the bubbling spring from contamination by surface waters.

Carbonation:

Perrier's carbonation process takes place naturally underground. Volcanic gasses trapped some 100 million years ago travel upwards towards the surface. As they bubble through cracks and fissures in the limestone strata, they mingle naturally with the icy waters of the Perrier source, imparting the delicate carbonation which is its trademark. Scientists credit the purity of these gasses from deep in the earth with inhibiting bacteriological growth in Perrier water.

2/

Mineral Content

A unique and delicate balance of minerals is what gives Perrier its distinctive qualities and refreshing taste. Perrier is blessed with a balance of the body's essential minerals, such as calcium and magnesium, which contribute to recommended daily requirements.

Taste:

Each natural water has its own taste, distinctive as a fingerprint. This taste is slowly nurtured over centuries of contact with natural rock strata, which provide a matchless balance of minerals and effervescence. So unique is the taste of a single mineral water source that even nearby springs tapping the same underground water reserves would not produce the same flavor.

The taste of Perrier has been described as crisp, clean, fresh, palatable, refreshing, a taste with "personality".

Perrier Quality:

The unique qualities of Perrier are carefully guarded from source to table. The formation of the Source itself protects the water and acts as a natural barrier to environmental hazards. The famous green glass bottles are molded, blown and created at the bottling site. As the naturally sparkling mineral water rises to the surface it is quickly captured in these glass bottles to further protect it from any contact with the environment.

This bottling process is strictly monitored and product samples constantly tested to insure consistency and quality. The French government holds strict control over much of the bottling process. For example, water must be bottled directly at the source. Bottles cannot exceed the two liter size and no disinfectants, such as chlorine and ozone gas, may be added.

Perrier's natural refreshment may be further enjoyed knowing that it contains no calories, no sodium, nothing artificial. Aside from the original sparkling Perrier, there are the calorie-free, all-natural varieties of Perrier With A Twist: lemon, lime, orange and berry.

Heritage:

Perrier's source dates back to the Cretaceous period, more than 130 million years ago. Man's acquaintance with its sparkling waters began more than 2,000 ago.

In 218 B.C., Hannibal's Carthaginian troops stopped to refresh themselves at Perrier's natural spring after victory against the Romans. In 1863, the Emperor Napoleon III ordered the waters of Perrier bottled "for the good of France."

Perrier was first available in the U.S. in the early 1900's. In 1976, when Great Waters of France was formed as the sole U.S. importer and marketer for Perrier, the product became more widely available in supermarkets and restaurants in all 50 states.

The Perrier Group of America was established in 1987 to encompass Perrier and other domestic bottled waters. The Perrier Group is a subsidiary of Source Perrier, France.

3/

Usage:

Perrier is enjoyed as a natural refreshment beverage. It is an alternative for the calorie-conscious, the salt-free crowd and those who pass on alcohol. It is also ideal when avoiding caffeine and additives.

Perrier consumers are adults aged 25-44, well-educated, reside in major metropolitan areas and are regularly involved in a fitness program.

Perrier is as appropriate when entertaining as it is after exercise. It is quickly absorbed into one's system to facilitate hydration. Perrier has been a long-time sponsor of road racing and tennis events.

Positioning:

Perrier is the number one imported sparkling water in the U.S., representing about 80% of category sales. About 60% of Perrier's sales are in supermarkets and convenience stores, with 40% in restaurants and hotels. The original Perrier is most popular, with Perrier With A Twist flavors sharing 40% of total sales.

Since 1980, Perrier sales have more than doubled, currently growing at 6% yearly vs. the soft drink industry growth at less than 4%.

Contrary to common belief, Perrier is not much more expensive than other sparkling waters. The cost of Perrier is reflected in its protected source, sophisticated monitoring, quality packaging and shipment from France in individual bottles.

Perrier's competition spans from soft drinks and diet drinks to domestic sparkling waters. Club soda and seltzers can be considered competitive sparkling waters, but are differentiated by their being artificially carbonated, processed tap water.

Perrier's advertising aims at educating consumers about Perrier's natural goodness and as a healthy alternative refreshment beverage. Television and magazines are the most frequently used mediums to reach the target audience. Advertising is placed in the spring and summer months and holiday period when beverage consumption is the highest.

Perrier is distributed locally by food brokers, soft drinks bottlers or beer and wine wholesalers, depending upon the specific needs of each market.

Earnings to date are not available as the company is privately held.

For more information, please write or call:

The Perrier Group
777 West Putnam Avenue
Greenwich, CT 06830
1-800-243-5326

DECISION AND ORDER

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

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, 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 Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondents The Perrier Group of America, Inc. and Great Waters of France, Inc. are Delaware corporations with their offices and principal places of business located at 777 W. Putnam Avenue, Greenwich, Connecticut. Great Waters of France, Inc. is a wholly-owned subsidiary of The Perrier Group of America, Inc.

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

ORDER

DEFINITIONS

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

“*Mineral water*” means any water that is placed in a sealed container or package and offered for sale for human consumption or any other consumer use and is any of the following:

- (1) From Source Perrier in Vergeze, France,
- (2) Labeled as a mineral water, or
- (3) Contains not less than 500 parts per million total dissolved solids, *provided that* if “mineral water” is defined by federal law, or by regulation of the U.S. Food and Drug Administration, such definition shall replace this subparagraph (3).

“*Processing*” means treating, filtering, altering, adding any substance to, or removing any substance from, any mineral water or any ingredient or constituent of any mineral water, through the application of any mechanical or chemical means.

I.

It is ordered, That respondents The Perrier Group of America, Inc., and Great Waters of France, Inc., corporations, their successors and assigns, and their officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any mineral water in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication:

- A. The existence or extent of processing of any such water, or of any ingredient or constituent of such water, or
- B. The manner by which the water is carbonated.

II.

It is further ordered, That respondents shall distribute a copy of this order to each of their operating divisions and to each of their officers, directors, agents, or employees having sales, advertising, or policy responsibilities with respect to the subject matter of this order.

III.

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

IV.

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

Commissioner Yao not participating.

IN THE MATTER OF

MADISON COUNTY VETERINARY MEDICAL
ASSOCIATION, ET AL.

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

Docket C-3340. Complaint, Aug. 16, 1991—Decision, Aug. 16, 1991

This consent order prohibits, among other things, an Alabama association and four individual veterinarians from entering into any agreement: to refuse to deal with any person or program promoting the sale of veterinary services at discounted prices; or to fix or standardize the manner of sale, promotion or advertising of veterinary goods or services.

Appearances

For the Commission: *Chris M. Couillou.*

For the respondents: *E. Cutter Hughes, Jr., Bradley, Arant, Rose & White, Huntsville, AL.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondents have violated Section 5 of the Federal Trade Commission Act, and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

RESPONDENTS

1. Respondent Madison County Veterinary Medical Association ("MCVMA") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Alabama, with its office and principal place of business at 106 Rainbow Drive, Madison, Alabama.

2. Respondent MCVMA is a professional association formed to represent the interests of veterinarians who practice in and around Huntsville, Alabama.

3. Members of respondent MCVMA are engaged in the business of providing veterinary health care services for a fee.

4. Respondents Robert Neil Cole, Donald Butler Popejoy, Billy Joe Renfroe, and Charles L. Smith are members of MCVMA and are veterinarians practicing in Madison County, Alabama.

5. The following are the business addresses of the individual respondents: Robert Neil Cole, D.V.M., 3415 Governors Drive, S.W., Huntsville, AL.; Donald Butler Popejoy, D.V.M., 7708 Carlton Drive, S.W., Huntsville, AL.; Billy Joe Renfroe, D.V.M., 931 Cook Avenue, N.W., Huntsville, AL.; Charles L. Smith, D.V.M., 3303 North Memorial Parkway, Huntsville, AL.

6. Respondent MCVMA engages in substantial activities that further its members' pecuniary interests. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

7. Members of respondent MCVMA including, but not limited to, respondents Robert Neil Cole, Donald Butler Popejoy, Billy Joe Renfroe, and Charles L. Smith purchase equipment and supplies and prescribe medicines which are shipped in interstate commerce. Respondents' general business practices, and the acts and practices described below, are in or affect commerce within the meaning of Section 5(a) (1) of the Federal Trade Commission Act, 15 U.S.C. 45 (a) (1).

8. Except to the extent that competition has been restrained as alleged herein, members of respondent MCVMA including, but not limited to, Robert Neil Cole, Donald Butler Popejoy, Billy Joe Renfroe, and Charles L. Smith have been and are now in competition with at least some of the other respondents and/or with other veterinarians.

9. Respondent MCVMA has acted as a combination of its members or has conspired with at least some of its members to restrain competition in the provision of spaying and neutering services and to restrain competition in the promotion or advertising of veterinary services. In furtherance thereof, at least some members of respondent MCVMA, among other things, have:

(a) Agreed not to participate or agreed to cease participation in a program offered through the National Animal Welfare Association promoting low cost spays and neuters; and

(b) Agreed to restrict the nature of their listings in the Yellow Pages for Huntsville, Alabama.

10. Each of respondents Robert Neil Cole, Donald Butler Popejoy,

Billy Joe Renfro, and Charles L. Smith have combined or conspired with at least some of the other respondents or others to restrain competition in the provision of spaying and neutering services and to restrain competition in the promotion or advertising of veterinary services. In furtherance thereof, respondents, among other things, have:

(a) Agreed not to participate or agreed to cease participation in a program offered through the National Animal Welfare Association promoting low cost spays and neuters; and

(b) Agreed to restrict the nature of their listings in the Yellow Pages for Huntsville, Alabama.

11. Respondents' actions described above in paragraphs nine and ten have had, or have the tendency to have, the following effects, among others:

(a) Competition among veterinarians in the Huntsville area has been lessened, limited, or restrained; and

(b) Fees for spaying and neutering services have been raised, fixed, or stabilized.

12. The combinations or conspiracies and the acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. Such combinations or conspiracies and these acts or practices are continuing and will continue in the absence of the relief requested.

Commissioner Yao not participating.

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 Section 5 of the Federal Trade Commission Act, as amended;

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of

said agreement is for settlement purposes only and does not constitute an admission by respondents that the law 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. Respondent Madison County Veterinary Medical Association ("MCVMA") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its office and principal place of business at 106 Rainbow Drive, Madison, Alabama.

2. Respondent MCVMA is a professional association formed to represent the interests of veterinarians who practice in and around Huntsville, Alabama.

3. Members of respondent MCVMA are engaged in the business of providing veterinary health care services for a fee.

4. Individual respondents Robert Neil Cole, Donald Butler Popejoy, Billy Joe Renfroe, and Charles L. Smith are members of MCVMA and are veterinarians practicing in Madison County, Alabama.

5. The following are the business addresses of the proposed individual respondents: Robert Neil Cole, D.V.M., 3415 Governors Drive, S.W., Huntsville, AL.; Donald Butler Popejoy, D.V.M., 7708 Carlton Drive, S.W., Huntsville, AL.; Billy Joe Renfroe, D.V.M., 931 Cook Avenue, N.W., Huntsville, AL.; Charles L. Smith, D.V.M., 3303 North Memorial Parkway, Huntsville, AL.

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

ORDER

I.

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

A. “*MCVMA*” means the Madison County Veterinary Medical Association.

B. “*Veterinary goods*” means any commodity used in the care or treatment of animals.

C. “*Veterinary service*” means any service that a person duly registered and licensed to practice veterinary medicine in Alabama is authorized to perform.

II.

It is further ordered, That respondents, directly or indirectly, or through any device in connection with activities in or affecting commerce, as commerce is defined in Section 4 of the Federal Trade Commission Act, as amended, forthwith cease and desist from:

A. Organizing, agreeing or combining, attempting to agree or combine, threatening to agree or combine, or taking any action in furtherance of any agreement or combination with any person to refuse to deal, or to deal only on collectively determined terms, with any person or any program that offers or promotes the sale to consumers of veterinary services at discounted prices; and

B. Organizing, agreeing or combining, attempting to agree or combine, threatening to agree or combine, or taking any action in furtherance of any agreement or combination with any person to adopt, establish, fix, maintain or standardize the manner of sale, promotion or advertising or veterinary goods or services.

III.

It is further ordered, That respondent MCVMA, directly or indirectly, or through any device, for a period of ten (10) years after the date this order becomes final, forthwith cease and desist from:

A. Continuing a formal or informal meeting after

(1) (a) any person makes any statement concerning one or more

veterinarians' intentions or decisions with respect to refusing to enter into, threatening to refuse to enter into, threatening to withdraw from, or withdrawing from any existing or proposed program that offers or promotes the sale to consumers of veterinary services at discounted prices and MCVMA fails to eject such person from the meeting, or (b) two persons make such statements; or

(2) (a) any person makes any statement concerning adopting, establishing, fixing, maintaining or standardizing the manner of sale, promotion or advertising of veterinary goods or services and MCVMA fails to eject such person from the meeting, or (b) two persons make such statements;

B. Communicating to any veterinarian or veterinary firm any information concerning any other veterinarian's intention or decision with respect to (1) refusing to enter into, threatening to refuse to enter into, threatening to withdraw from, or withdrawing from any existing or proposed program that offers or promotes the sale to consumers of veterinary services at discounted prices, or (2) adopting, establishing, fixing, maintaining or standardizing the manner of sale, promotion or advertising of veterinary goods or services; and

C. Providing comments or advice to any veterinarian or veterinary firm on the desirability or appropriateness of (1) participating in any existing or proposed program that offers or promotes the sale to consumers of veterinary services at discounted prices or (2) adopting, establishing, fixing, maintaining or standardizing the manner of sale, promotion or advertising of veterinary goods or services.

Provided that nothing in this order shall be construed to prevent respondents from exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body, concerning legislation, rules, programs or procedures, or to participate in any federal or state administrative or judicial proceeding. Provided further that nothing in this paragraph shall prohibit MCVMA from communicating to any veterinarian or veterinary firm purely factual information describing the terms and conditions of any program offered or proposed by an independent third party that offers or promotes the sale to consumers of veterinary services at discounted prices.

IV.

It is further ordered, That respondents Robert Neil Cole, Donald

Butler Popejoy, Billy Joe Renfroe, and Charles L. Smith, directly or indirectly, or through any device, for a period of ten (10) years after the date this order becomes final, forthwith cease and desist from stating or communicating in any way to any veterinarian or to any veterinary firm an intention, decision or advice with respect to (1) refusing to enter into, threatening to refuse to enter into, threatening to withdraw from, or withdrawing from any existing or proposed program that offers or promotes the sale to consumers of veterinary services at discounted prices, or (2) adopting, establishing, fixing, maintaining or standardizing the manner of sale, promotion or advertising of veterinary goods or services.

V.

It is further ordered, That respondent MCVMA:

A. Within sixty days of the date this order becomes final, send a copy of this order and accompanying complaint by first class mail to each and every one of its members;

B. For a period of five years, commencing on the date this order becomes final, provide a copy of this order and accompanying complaint to each new member of MCVMA; and

C. Within sixty days of the date this order becomes final, send a copy of this order and accompanying complaint by first class mail to Judy Scott, Customer Service Manager, Bell South Advertising and Publishing Company, 400 Chase Park South, Birmingham, Alabama 35244.

VI.

It is further ordered, That each respondent:

A. Within ninety days after the date this order becomes final, annually for a period of five years on or before the anniversary of the date on which this order becomes final and at such other times as the Federal Trade Commission may by written notice to the respondents require, submit a verified written report to the Federal Trade Commission setting forth in detail the manner in which that respondent has complied and is complying with this order;

B. For a period of five years after the date this order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, records adequate

to describe in detail all action taken in connection with any activity covered by paragraphs II, III and IV of this order, including all written communication and all summaries of oral communication.

Provided that if a respondent other than MCVMA retires from the practice of veterinary medicine, he shall be exempted from future compliance with paragraph VI(A) for the period subsequent to his retirement if he files, within one month of his retirement, a verified written report stating that he has retired from the practice of veterinary medicine and the date of his retirement and setting forth in detail the manner in which he has complied and is complying with this order. In the event that respondent ends his retirement and resumes the practice of veterinary medicine, he shall once again be subject to the requirements of paragraph VI(A).

VII.

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

Commissioner Yao not participating.

503

Complaint

IN THE MATTER OF

HARBOUR GROUP INVESTMENTS, L.P.

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 9244. Complaint, Nov. 28, 1990—Decision, Aug. 19, 1991

This consent order requires, among other things, a Missouri producer of telescopes, for a period of ten years, to seek prior Commission approval for certain mergers or acquisitions.

Appearances

For the Commission: *Claudia R. Higgins* and *Steven A. Newborn*.

For the respondent: *Sidney Dickstein, Dickstein, Shapiro & Morin*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the respondents, Harbour Group Investments L.P., a limited partnership subject to the jurisdiction of the Commission, and Diethelm Holding (U.S.A.) Ltd., a corporation subject to the jurisdiction of the Commission, have offered to enter into a joint venture between their respective subsidiaries Meade Instruments and Celestron International which, if completed, would violate the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that said joint venture agreement constitutes a violation of Section 5 of the FTC Act, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

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

a. "*Harbour Group*" means Harbour Group L.P., a limited partnership organized, existing, and doing business under and by virtue of the laws of Missouri with its principal offices at 7701 Forsyth Blvd, Suite 600, Clayton, Missouri, as well as its officers, employees, agents, parents, divisions, subsidiaries, successors, assigns, and the officers, employees, or agents of Harbour Group's divisions, subsidiaries, successors and assigns.

b. "*Meade*" means Meade Instruments, a subsidiary of Harbour Group.

c. "*Diethelm*" means Diethelm Holding (U.S.A.) Ltd., a corporation organized, existing, and doing business under and by virtue of the laws of Nevada with its principal offices at 17 Gina Drive, Centerport, New York, as well as its officers, employees, agents, divisions, subsidiaries, successors, assigns, and the officers, employees or agents of Diethelm's divisions, subsidiaries, successors and assigns.

d. "*Celestron*" means Celestron International, a subsidiary of Diethelm.

e. "*SCT*" means mid-sized Schmidt-Cassegrain telescopes used for astronomical viewing.

II. THE PARTIES

2. Harbour Group is a limited partnership organized and existing under the laws of Missouri, with its principal place of business at 7701 Forsyth Blvd, Suite 600, Clayton, Missouri. Harbour Group's subsidiary, Meade, a corporation organized and existing under the laws of California, has its principal place of business at 1675 Toronto Way, Costa Mesa, California.

3. In fiscal year 1990, Harbour Group estimates Meade sales of SCTs were approximately \$ 1.6 million in the United States.

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

5. Diethelm is a corporation organized and existing under the laws of Nevada, with its principal place of business at 17 Gina Drive,

Centerport, New York. Diethelm's subsidiary, Celestron, a corporation organized and existing under the laws of California, has its principal place of business at 2835 Columbia Street, Torrance, California.

6. In fiscal year 1990, Diethelm estimates Celestron sales of SCTs were approximately \$ 2.5 million in the United States.

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

III. THE PROPOSED JOINT VENTURE

8. On or about May 25, 1990, Harbour Group and Diethelm agreed to create a joint venture consisting of their respective telescope subsidiaries, Meade and Celestron. The transaction is valued at approximately \$ 25.5 million. Meade is engaged in the manufacture and sale of SCTs. Celestron is engaged in the manufacture and sale of SCTs. The entity created by joint venture, Celestron Meade International, would be a virtual monopolist in the manufacture and sale of SCTs.

IV. TRADE AND COMMERCE

9. The relevant line of commerce in which to analyze the proposed joint venture is SCTs.

10. The relevant geographic market is the United States.

V. MARKET STRUCTURE

11. The United States market for the manufacture and sale of SCTs is highly concentrated. Meade and Celestron are the two largest firms manufacturing and selling SCTs in the United States.

VI. ENTRY CONDITIONS

12. Entry into the relevant market is difficult.

VII. COMPETITION

13. Meade and Celestron are direct competitors in the manufacture and sale of SCTs. This joint venture would create a virtual monopoly in the relevant market.

VIII. EFFECTS

14. The effect of the joint venture, if consummated, may be

substantially to lessen competition or tend to create a monopoly in the relevant line of commerce in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

IX. VIOLATIONS CHARGED

15. The proposed joint venture between Meade and Celestron violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and would, if consummated, violate Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

Commissioner Starek not participating.

DECISION AND ORDER

The Federal Trade 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 Section 7 of the Clayton Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

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

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

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Harbour Group is a limited partnership organized, existing and doing business under and by virtue of the laws of the

State of Missouri, with its office and principal place of business located at 7701 Forsyth Blvd., Suite 600, in the City of Clayton, in the State of Missouri.

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

ORDER

I.

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

“*Harbour Group*” means Harbour Group Investments, L.P., as well as its officers, employees, representatives, agents, parents, divisions, subsidiaries, operating companies, successors, and assigns, as well as the officers, employees and agents of its parents, divisions, subsidiaries and operating companies.

“*Meade*” means Meade Instruments, a subsidiary of Harbour Group, as well as its officers, employees, representatives, agents, parents, divisions, subsidiaries, successors, and assigns, as well as the officers, employees and agents of its parents, divisions and subsidiaries.

“*SCTs*” means mid-sized Schmidt-Cassegrain telescopes with apertures of eight (8) to eleven (11) inches used for astronomical viewing.

II.

It is ordered, That for a period commencing on the date this order becomes final and continuing for ten (10) years, Harbour Group shall not acquire, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, equity interest, or assets, other than purchases of manufactured product in the ordinary course of business, of any company engaged in the manufacture or sale of SCTs in the United States.

III.

It is further ordered, That Harbour Group shall require, as a

condition precedent to the closing of any sale or other disposition of all or a substantial part of the stock of Meade, or a substantial part of the assets of Meade to any party that is engaged in or, to the best of Harbour Group's knowledge upon reasonable inquiry, is planning to, considering or contemplating engaging in the manufacture of SCTs in the United States or elsewhere for sale in the United States, that the acquiring party file with the Commission, prior to the closing of such sale or other disposition, a written agreement to be bound by the provisions of this order.

IV.

It is further ordered, That Harbour Group shall within sixty (60) days after this order becomes final and one year from the date this order becomes final and annually for nine (9) years thereafter, file with the Commission a verified written report setting forth in detail the manner and form in which it has complied and intends to comply with this order.

V.

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 Harbour Group made to its principal office, Harbour Group shall permit any duly authorized representatives of the Federal Trade Commission:

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

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

VI.

It is further ordered, That Harbour Group shall notify the

503

Decision and Order

Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor partnership or corporation, the creation, dissolution or sale of subsidiaries (except subsidiaries not engaged in any manner, directly or indirectly, in the manufacture or sale of SCTs), including, but not limited to, sale of the stock or assets of Meade, or any other change that may affect compliance obligations arising out of this order.

IN THE MATTER OF
DIETHELM HOLDING (U.S.A.) LTD.

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 9244. Complaint, Nov. 28, 1990—Decision, Aug. 19, 1991*

This consent order requires, among other things, a New York based producer of telescopes, for a period of ten years, to seek prior Commission approval for certain mergers or acquisitions.

Appearances

For the Commission: *Claudia R. Higgins* and *Steven A. Newborn*.

For the respondent: *Bernhardt K. Wruble, Verner, Liipfert, Bernhard, McPherson & Hand*, Washington, D.C.

DECISION AND ORDER

The Federal Trade Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

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

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

The Commission having considered the matter and having there-

*Complaint previously published at 114 FTC 503.

upon 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 Diethelm is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of business located at 17 Gina Drive, in the City of Centerport, in the State of New York.

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

ORDER

I.

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

“*Diethelm USA*” means Diethelm Holding (U.S.A.) Ltd., as well as its officers, employees, representatives, agents, parents, divisions, subsidiaries, successors, and assigns, as well as the officers, employees and agents of its parents, divisions and subsidiaries.

“*Celestron*” means Celestron International, a subsidiary of Diethelm USA, as well as its officers, employees, representatives, agents, parents, divisions, subsidiaries, successors, and assigns, as well as the officers, employees and agents of its parents, divisions and subsidiaries.

“*SCTs*” means mid-sized Schmidt-Cassegrain telescopes with apertures of eight (8) to eleven (11) inches used for astronomical viewing.

II.

It is ordered, That for a period commencing on the date this order becomes final and continuing for ten (10) years, Diethelm USA shall not acquire, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, equity interest, or assets that have at any time been used in the manufacture or sale of SCTs, other than purchases of manufactured product in the ordinary course of business,

of any company engaged in the manufacture or sale of SCTs in the United States, *provided*, this paragraph shall not require Diethelm USA to obtain prior approval of the Commission to purchase a foreign company that established its SCT manufacturing pursuant to contract with Diethelm USA and who, pursuant to such contract, may sell SCTs in the United States only to or through Diethelm USA or under the Celestron tradename.

III.

It is further ordered, That Diethelm USA shall require, as a condition precedent to the closing of any sale or other disposition of all or a substantial part of the stock of Celestron, or a substantial part of the assets of Celestron to any party that is engaged in or to the best of Diethelm USA's knowledge upon reasonable inquiry, is planning to, considering or contemplating engaging in the manufacture of SCTs in the United States or elsewhere for sale in the United States, that the acquiring party file with the Commission, prior to the closing of such sale or other disposition, a written agreement to be bound by the provisions of this order.

IV.

It is further ordered, That Diethelm USA shall within sixty (60) days after this order becomes final and one year from the date this order becomes final and annually for nine (9) years thereafter, file with the Commission a verified written report setting forth in detail the manner and form in which it has complied and intends to comply with this order.

V.

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 Diethelm USA made to its principal office, Diethelm USA shall permit any duly authorized representatives of the Federal Trade Commission:

(A) Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or

under the control of Diethelm USA relating to any matters contained in this order; and

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

VI.

It is further ordered, That Diethelm USA shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation or partnership, the creation, dissolution or sale of subsidiaries (except subsidiaries not engaged in any manner, directly or indirectly, in the manufacture or sale of SCTs), including, but not limited to, sale of the stock or assets of Celestron or any other change that may affect compliance obligations arising out of this order.

IN THE MATTER OF

JEROME RUSSELL COSMETICS, U.S.A., INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3341. Complaint, Aug. 21, 1991—Decision, Aug. 21, 1991*

This consent order prohibits, among other things, a California-based cosmetic company and its owner from representing that any product containing a Class I ozone-depleting substance will not damage the ozone layer, and from making unsubstantiated claims that any product containing an ozone-depleting substance offers environmental benefits.

*Appearances*For the Commission: *Michael Dershowitz.*For the respondents: *Robert E. Reimer*, Los Angeles, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Jerome Russell Cosmetics, U.S.A., a corporation, and David Jerome Marcus, individually and as an officer of said corporation hereinafter sometimes referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Jerome Russell Cosmetics, U.S.A., Inc. is a California corporation, with its office and principal place of business located at 19515 Business Center Drive, Northridge, California.

Respondent David Jerome Marcus is an officer of the corporate respondent named herein. He formulates, directs, and controls the acts and practices of the corporate respondent as hereinafter set forth. His address is the same as that of the corporation.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents have advertised, offered for sale, sold and distributed certain products containing the chemical 1,1,1 - Trichloroethane to the public, including but not limited to the following:

Jerome Russell Fluorescent Ultra Hair Glo, Jerome Russell Hair and Body Glitter Spray, Jerome Russell Hair Color, and Jerome Russell Fluorescent Color or Glitter (hereinafter "respondents' products").

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

PAR. 4. Respondents have disseminated or have caused to be disseminated promotional materials for their products. Typical examples of respondents' promotional materials and product labeling, but not necessarily all inclusive thereof, are attached as Exhibits A through C.

The aforesaid promotional material and product labeling (Exhibits A through C) includes the following statements:

Ozone Friendly, Ozone Safe - Contains no Fluorocarbons,
NO FLUOROCARBONS OZONE SAFE

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

1. There are no ingredients in respondents' products which will deplete the earth's ozone layer.

2. Because respondents' products contain no fluorocarbons, they will not deplete the earth's ozone layer.

PAR. 6. In truth and in fact, respondents' products contain 1,1,1 - Trichloroethane, a harmful chemical which will deplete the earth's ozone layer. Therefore, the representations set forth in paragraph five were, and are, false and misleading.

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

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

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

Commissioner Yao not participating.

EXHIBIT A



EXHIBIT B

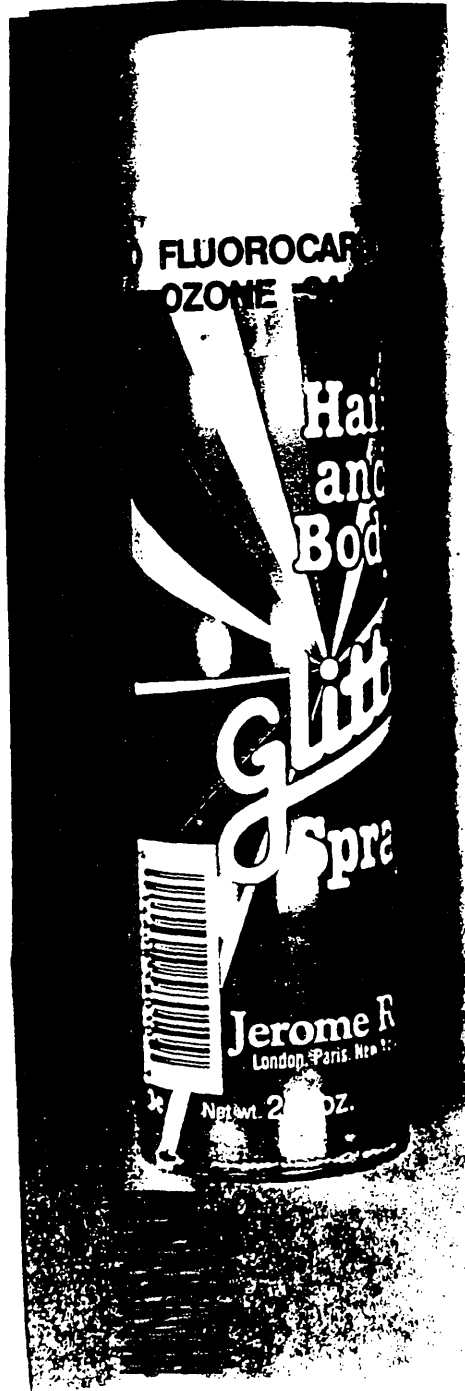


EXHIBIT C

SPRAY ON FLUORESCENT HAIR COLOR FOR HALLOWEEN

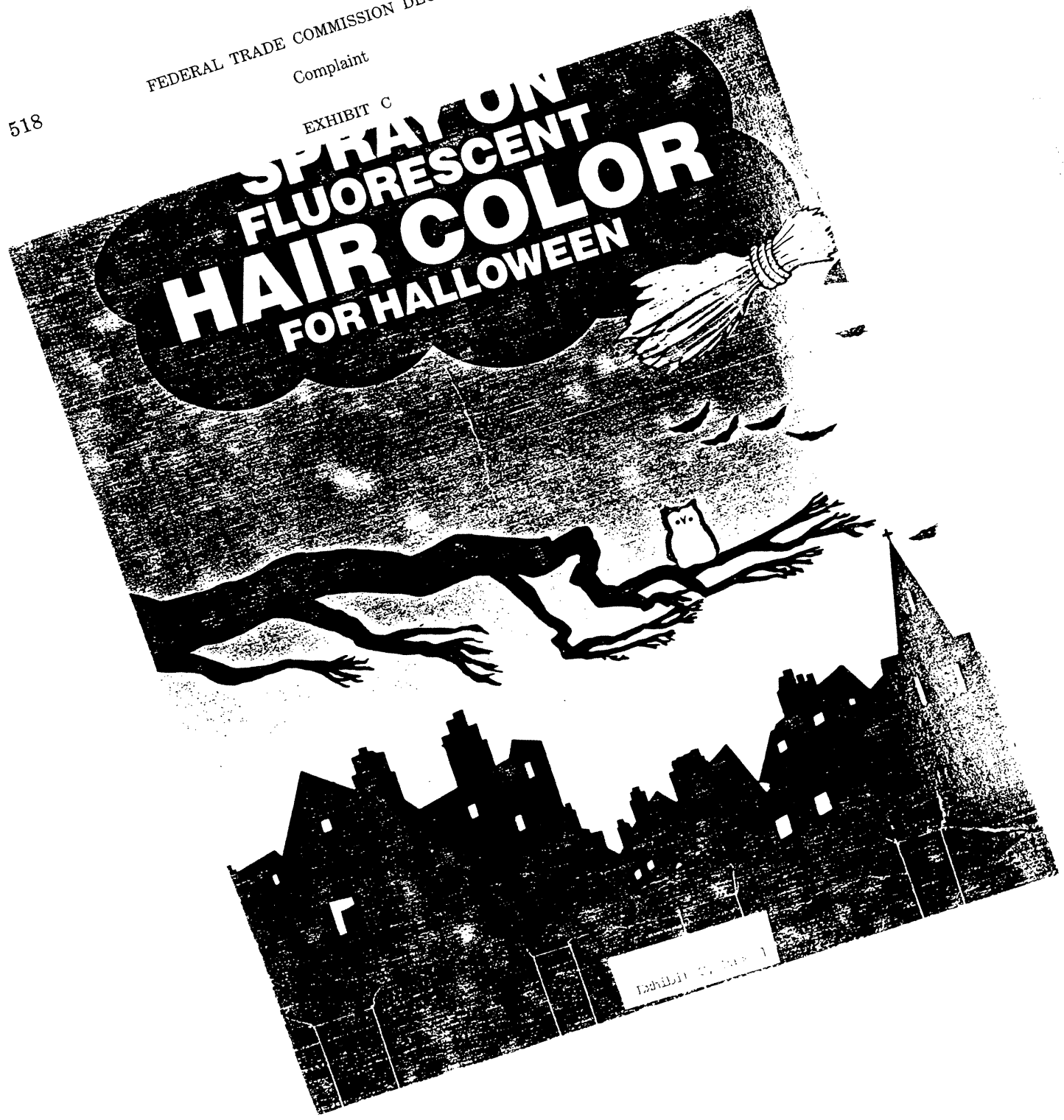
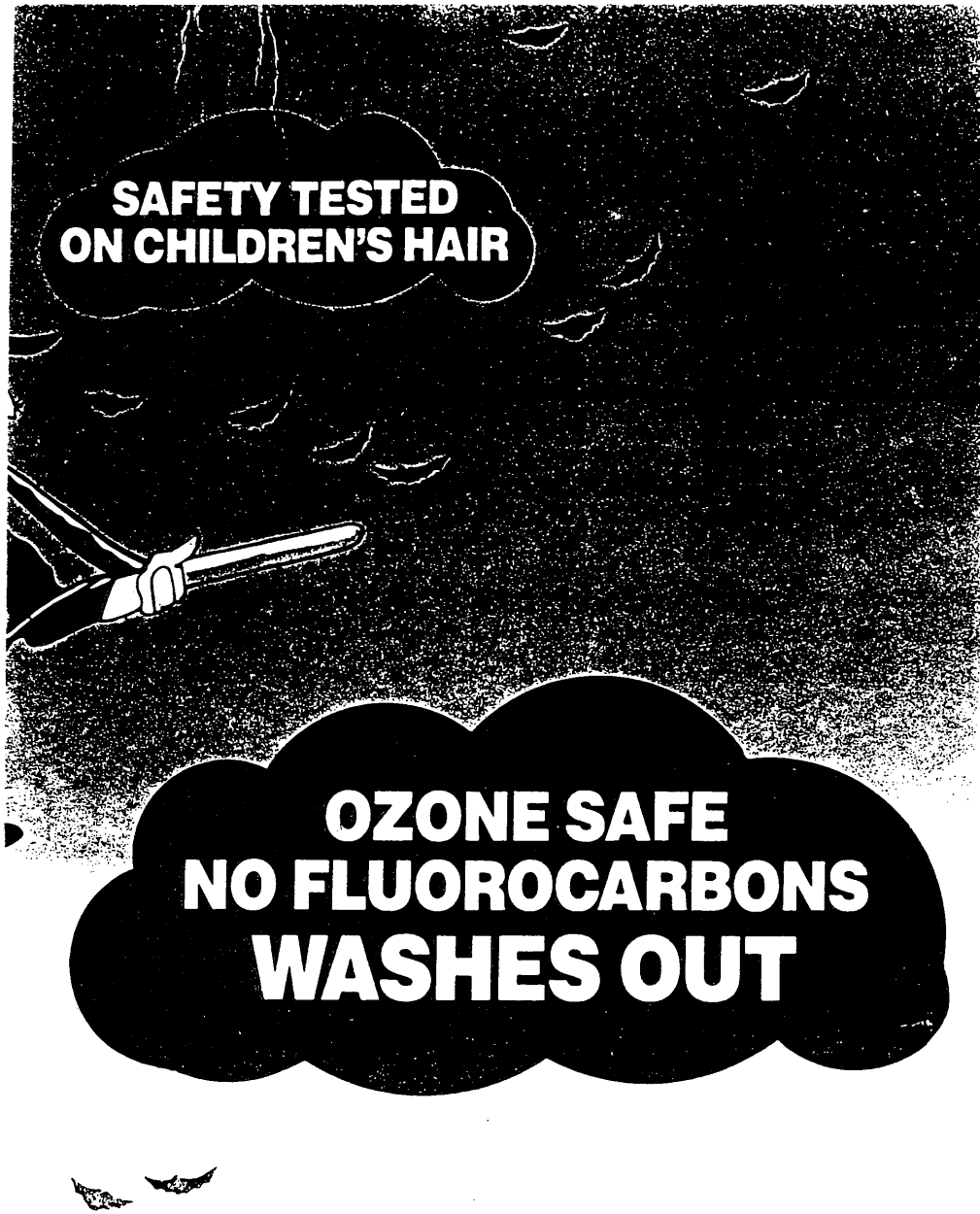


Exhibit C, page 1



DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondents Jerome Russell Cosmetics, U.S.A., Inc., a corporation, and David J. Marcus, individually and as an officer of said corporation, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

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

1. Respondent Jerome Russell Cosmetics, U.S.A., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Jerome Russell Cosmetics, U.S.A., Inc. has its offices and principal place of business at 19515 Business Center Drive, Northridge, California.

2. Respondent David J. Marcus is an officer of said corporation. He formulates, directs, and controls the acts and practices of said corporation as set forth in the complaint and his address is the same as that of Jerome Russell Cosmetics, U.S.A., Inc.

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

ORDER

DEFINITIONS

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

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

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

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

I.

It is ordered, That respondent Jerome Russell Cosmetics, U.S.A., Inc. (hereinafter “Jerome Russell”), a corporation, its successors and assigns, and its officers, and David Jerome Marcus, individually and as an officer of said corporation, and respondents’ representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any product, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, by words, depictions, or symbols that any product containing any Class I ozone depleting substance is “ozone safe,” “ozone friendly,” or through the use of any substantially similar term or expression, that any such product will not deplete, destroy, or otherwise adversely affect ozone in the upper atmosphere.

II.

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

III.

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

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

IV.

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

V.

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

VI.

It is further ordered, That the individual respondent named herein shall promptly notify the Commission in the event of the discontinuance of his present business or employment and of each affiliation with a new business or employment. In addition, for a period of five (5) years from the date of service of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the sale, distribution and/or manufacturing of cosmetic products or of his affiliation with a new business or employment in which his own duties and responsibilities involve the sale, distribution and/or manufacturing of cosmetic products. Such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

VII.

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

Commissioner Yao not participating.

IN THE MATTER OF
ELECTRONIC DATA SYSTEMS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 615 OF THE FAIR CREDIT REPORTING ACT AND
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3342. Complaint, Aug. 21, 1991—Decision, Aug. 21, 1991

This consent order requires, among other things, the respondent to mail to applicants—denied employment based on a consumer report from a consumer credit reporting agency since January 1, 1989—letters stating the reason for the denial, and the name and address of the consumer reporting agency that supplied the respondent with the report. In addition, the order requires the respondent to comply with the consumer disclosure provisions of the Fair Credit Reporting Act (FCRA) for future job applicants and to maintain various documents demonstrating compliance with the FCRA for the next five years.

Appearances

For the Commission: *Cynthia S. Lamb* and *Jean Noonan*.

For the respondent: *Richard Shlakman*, *Electronic Data Systems Corp.*, Dallas, TX. and *Ronald K. Perkowski*, *Electronic Data Systems Corp.*, Herndon, VA.

COMPLAINT

Pursuant to the provisions of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Electronic Data Systems Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts, 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:

DEFINITIONS

For the purposes of this complaint, the following definitions are applicable. The terms “consumer,” “consumer report,” and “consumer reporting agency” shall be defined as provided in Sections 603(c),

603(d), and 603(f), respectively, of the Fair Credit Reporting Act, 15 U.S.C. 1681, 1681a(c), 1681a(d) and 1681a(f).

PARAGRAPH 1. Respondent Electronic Data Systems Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 7171 Forest Lane, Dallas, Texas.

PAR. 2. Respondent, in the ordinary course and conduct of its business, uses information in consumer reports obtained from consumer reporting agencies in the consideration, acceptance, and denial of applicants for employment with respondent.

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

PAR. 4. Respondent, in the ordinary course and conduct of its business, has denied applications or rescinded offers for employment with respondent based in whole or in part on information supplied by a consumer reporting agency, but has failed to advise consumers that the information so supplied contributed to the adverse action taken on their applications or offers for employment, and has failed to advise consumers of the name and address of the consumer reporting agency that supplied the information.

PAR. 5. By and through the use of the practices described in paragraph four, respondent has violated the provisions of Section 615(a) of the Fair Credit Reporting Act, 15 U.S.C. 1681m(a).

PAR. 6. By its aforesaid failure to comply with Section 615(a) of the Fair Credit Reporting Act and pursuant to Section 621(a) thereof, respondent has engaged in unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

Commissioner Yao not participating.

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 Section 615(a) of the Fair Credit Reporting Act and Section 5(a) of the Federal Trade Commission Act; and

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

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

1. Respondent, Electronic Data Systems Corporation, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 7171 Forest Lane, Dallas, Texas.

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

ORDER

For the purpose of this order, the terms "consumer," "consumer report," and "consumer reporting agency" shall be defined as provided in Sections 603(c), 603(d), and 603(f), respectively, of the Fair Credit Reporting Act, 15 U.S.C. 1681a(c), 1681a(d), and 1681a(f).

I.

It is ordered, That respondent, Electronic Data Systems Corporation, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation,

subsidiary, division, or other device in connection with any application for employment, do forthwith cease and desist from:

1. Failing, whenever employment is denied either wholly or partly because of information contained in a consumer report from a consumer reporting agency, to disclose to the applicant for employment at the time such adverse action is communicated to the applicant (a) that the adverse action was based wholly or partly on information contained in such a report and (b) the name and address of the consumer reporting agency making the report. Respondent shall not be held liable for a violation of Section 615 of the Fair Credit Reporting Act if it shows by a preponderance of the evidence that at the time of the alleged violation it maintained reasonable procedures to assure compliance with Section 615(a) of the Fair Credit Reporting Act.

2. Failing, within ninety (90) days after the date of service of this order, to mail two (2) copies of the letter attached hereto as Appendix A, completed to provide the name and address of the consumer reporting agency supplying the report and to state the reasons for the denial of employment with respondent based wholly or partly on information contained in the report, to each applicant who was denied employment by Electronic Data Systems Corporation between January 1, 1989, and the date this order is issued, based in whole or in part on information contained in a consumer report from a consumer reporting agency, such copies of the letter to be sent first class mail to the last known address of the applicant that is reflected in respondent's files, and accompanied by a copy of the Federal Trade Commission brochure attached hereto as Appendix B, copies of which are to be provided by respondent. Copies of the letters attached as Appendix A need not be sent to any applicant who is denied employment with respondent during the time period specified above if the applicant's application file clearly shows that respondent Electronic Data Systems Corporation has previously given the applicant notification that complies in all respects with the provisions of paragraph I.1 of this order.

II.

It is further ordered, That respondent, its successors, and assigns shall maintain for at least five (5) years and upon request make available to the Federal Trade Commission for inspection and copying,

documents demonstrating compliance with the requirements of Part I of this order, such documents to include, but not be limited to, all employment evaluation criteria relating to consumer reports, instructions given to employees regarding compliance with the provisions of this order all notices provided to consumers pursuant to any provisions of this order, and the complete application files for all applicants for whom consumer reports were obtained for whom offers of employment are not made or have been withheld, withdrawn, or rescinded based, in whole or in part, on information contained in a consumer report.

III.

It is further ordered, That respondent shall deliver a copy of this order at least once per year for a period of four (4) years from the date of this order, to all persons responsible for the respondent's compliance with Section 615(a) of the Fair Credit Reporting Act.

IV.

It is further ordered, That respondent shall, for a period of four (4) years from the date of this order, notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate structure of respondent such as dissolution, assignment, or sale resulting in the emergence of a successor operation, the creation or dissolution of subsidiaries or divisions, or any other change in the corporation which may affect compliance obligations arising out of the order.

V.

It is further ordered, That respondent shall, within one hundred twenty (120) days of service of this order, file with the Federal Trade Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Yao not participating.

APPENDIX A

Dear Employment Applicant

Our records show that sometime within the last two years,

Electronic Data Systems Corporation denied your application for employment. The federal Fair Credit Reporting Act gives persons who are denied employment the right to know if the denial was based, in whole or in part, on information supplied by a consumer reporting agency or credit bureau and, if so, the name and address of the credit bureau.

Our records show that when we denied your application, we may not have told you that our decision was based, at least in part, on information contained in your credit report and may not have given you the reasons for our decision. The credit bureau that furnished the report is:

[Name of Consumer Reporting Agency]

[Street Address]

You should contact the credit bureau to learn what information is in your file. You may obtain this information without charge if you contact the credit bureau within 30 days. An extra copy of this notice is enclosed so that you may give it to the credit bureau when you request to review your file.

The information in your credit report led us, at least in part, to deny your application for the following reason(s):

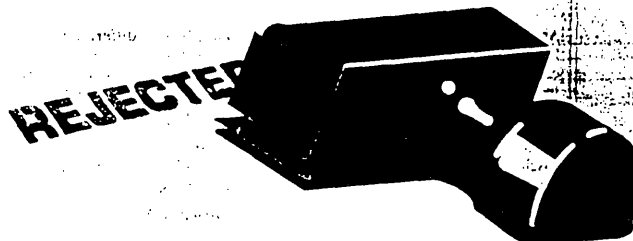
- no credit file
- unable to verify references
- delinquent past or present obligations with others
- excessive obligations in relation to income
- garnishment, attachment, foreclosure, repossession, collection action, or judgment
- bankruptcy
- other: _____

A brochure explaining your rights under the federal credit laws is enclosed. If you want more information about your rights, write to the Federal Trade Commission, Division of Credit Practices, Washington, D.C. 20580.

Thank you.

APPENDIX B

APPENDIX B



Fair Credit Reporting

If you've ever applied for a charge account, a personal loan, insurance, or a job, someone is probably keeping a file on you. This file might contain information on how you pay your bills, or whether you've been sued, arrested, or have filed for bankruptcy.

The companies that gather and sell this information are called "Consumer Reporting Agencies," or "CRA's." The most common type of CRA is the credit bureau. The information sold by CRA's to creditors, employers, insurers, and other businesses is called a "consumer report." This generally contains information about where you work and live and about your bill-paying habits.

In 1970, Congress passed the Fair Credit Reporting Act to give consumers specific rights in dealing with CRA's. The Act protects you by requiring credit bureaus to furnish correct and complete information to businesses to use in evaluating your applications for credit, insurance, or a job.

The Federal Trade Commission enforces the Fair Credit Reporting Act. Here are answers to some questions about consumer reports and CRA's:

How do I locate the CRA that has my file?

If your application was denied because of information supplied by a CRA, that agency's name and address must be supplied to you by the company you applied to. Otherwise, you can find the CRA that has your file by calling those listed in the Yellow Pages under "credit" or "credit rating and reporting." Since more than one CRA may have a file about you, call each one listed until you locate all agencies maintaining your file.

Do I have the right to know what the report says?

Yes, if you request it. The CRA is required to tell you about every piece of information in the report and, in most cases, the sources of that information. Medical information is exempt from this rule, but you can have your physician try to obtain it for you. The CRA is *not* required to give you a copy of the report, although more and more are doing so. You also have the right to be told the name of anyone who received a report on you in the past six months. (If your inquiry concerns a job application, you can get the names of those who received a report during the past two years.)

Is this information free?

Yes, if your application was denied because of information furnished by the CRA, and if you request it within 30 days of receiving the denial notice. If you don't meet these requirements, the CRA may charge a reasonable fee.

What can I do if the information is inaccurate or incomplete?

Notify the CRA. They're required to reinvestigate the items in question. If the new investigation reveals an error, a corrected version will be sent, on your request, to anyone who received your report in the past six months. (Job applicants can have corrected reports sent to anyone who received a copy during the past two years.)

What can I do if the CRA won't modify the report?

The new investigation may not resolve your dispute with the CRA. If this happens, have the CRA include your version or a summary of your version of the disputed information in your file and in future reports. At your request, the CRA will also show your version to anyone who recently received a copy of the old report. There is no charge for this service if it's requested within 30 days after you



receive notice of your application denial. After that, there may be a reasonable charge.

Do I have to go in person to get the information?

No, you may also request information over the phone. But before the CRA will provide any information, you must establish your identity by completing forms they will send you. If you do wish to visit in person, you'll need to make an appointment.

Are reports prepared on insurance and job applicants different?

If a report is prepared on you in response to an insurance or job application, it may be an *investigative* consumer report. These are much more detailed than regular consumer reports. They often involve interviews with acquaintances about your lifestyle, character, and reputation. Unlike regular consumer reports, you'll be notified in writing when a company orders an investigative report about you. This notice will also explain your right to ask for additional information about the report from the company you applied to. If your application is rejected, however, you may prefer to obtain a *complete* disclosure by contacting the CRA, as outlined in this brochure. Note that the CRA does not have to reveal the sources of the investigative information.

How long can CRA's report unfavorable information?

Generally seven years. Adverse information can't be reported after that, with certain exceptions:

- bankruptcy information can be reported for 10 years;
- information reported because of an application for a job with a salary of more than \$20,000 has no time limitation;
- information reported because of an application for more than \$50,000 worth of credit or life insurance has no time limitation;
- information concerning a lawsuit or judgment against you can be reported for seven years or until the statute of limitations runs out, whichever is longer.

Can anyone get a copy of the report?

No, it's only given to those with a legitimate business need.

Are there other laws I should know about?

Yes, if you applied for and were denied credit, the Equal Credit Opportunity Act requires creditors to tell you the specific reasons for your denial. For example, the creditor must tell you whether the denial was because you have "no credit file" with a CRA or because the CRA says you have "delinquent obligations." This law also requires creditors to consider, upon request, additional information you might supply about your credit history.

You may wish to obtain the reason for denial from the creditor before you go to the credit bureau.

Do women have special problems with credit applications?

Married and formerly married women may encounter some common credit-related problems. For more information, write the FTC for a free brochure on "Women and Credit Histories" at the address listed below:

Where should I report violations of the law?

Although the FTC can't act as your lawyer in private disputes, information about your experiences and concerns is vital to the enforcement of the Fair Credit Reporting Act. Please send questions or complaints to the FTC, Washington, D.C. 20580.

Federal Trade Commission
Washington, D.C. 20580

Official Business, Penalty
For Private Use: \$300

FIRST CLASS MAIL
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Federal Trade Commission
Permit No. G-62

IN THE MATTER OF

TAYLOR WOODCRAFT, INC.

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

Docket C-3343. Complaint, Aug. 27, 1991—Decision, Aug. 27, 1991

This consent order prohibits, among other things, a Malta, Ohio, furniture company from representing that any household furniture product is constructed of a solid wood, unless every exposed surface of the furniture is made of that solid wood.

Appearances

For the Commission: *David V. Plottner* and *Kelly Larrick-Serrat*.

For the respondent: *Robert J. Christie, Christie & Christie*,
McConnelsville, OH.

COMPLAINT

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

PARAGRAPH 1. Respondent is an Ohio corporation, with its office and principal place of business located in Malta, Ohio.

PAR. 2. Respondent has manufactured, advertised, offered for sale, sold and distributed furniture, including, but not necessarily limited to, household furniture.

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

PAR. 4. Respondent has disseminated and caused the dissemination of promotional materials for its household furniture to consumers or to distributors for display or distribution to consumers.

PAR. 5. Respondent's promotional materials have included statements alluding to the wood content of such furniture. Typical, but not necessarily all-inclusive thereof, are the following:

A. "Solid maple night stand with two cedar-lined drawers."

B. "Today's version of the Armoire is sleek solid maple."

C. "Solid oak bunk beds, chest, mirror, night stand and student desk."

PAR. 6. By such statements, respondent has represented, directly or by implication, that all exposed surfaces of such furniture are constructed of solid maple or oak.

PAR. 7. In truth and in fact, such furniture contains veneered exposed surfaces. Therefore, the representations set forth in paragraph five, above, were and are false and misleading.

PAR. 8. The dissemination by respondent of the aforesaid false and misleading representations as alleged in this complaint, and the placement in the hands of others of the means and instrumentalities by and through which others may have disseminated said false and misleading representations, constitute unfair and deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

Commissioner Yao not participating.

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 Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, 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. Proposed respondent 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 in Malta, 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 purposes of this order, the following definition applies:

(A) “*Exposed surface*” means those parts and surfaces exposed to view when furniture is placed in the generally accepted position for use. Included in this definition are visible backs of such items of furniture as open bookcases, hutches, etc.

I.

It is ordered, That respondent Taylor Woodcraft, 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 manufacture, advertising, offering for sale, sale, or distribution of any household furniture 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, that such furniture is constructed of a solid wood, unless every exposed surface of such product is made of that solid wood.

II.

It is further ordered, That respondent shall maintain for a period of three (3) years, and upon request make available to the Commission for inspection and copying, accurate records of all materials relied upon by respondent to substantiate any representation covered by this order.

III.

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 sales 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.

IV.

It is further ordered, That respondent shall:

A. Notify any purchaser, prior to delivering the purchaser's order for household furniture and excluding those purchasers to whom the respondent has distributed this order under B of this paragraph, that the furniture contains exposed veneered surfaces, if the respondent has made representations that the furniture is solid wood and the furniture, in fact, contains exposed veneered surfaces.

B. Distribute this order to the following:

1. Each of its operating division, officers and other personnel responsible for the preparation or review of promotional material;
2. Each distributor, retail outlet, and wholesale outlet that stock or has stocked Taylor Woodcraft's furniture and to which it has sold or delivered household furniture since January of 1987; and,
3. Each distributor, retail outlet and wholesale outlet to which Taylor Woodcraft has sold or delivered household furniture for which it received payment of \$2,000 or more in any year since January of 1987.

V.

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

Commissioner Yao not participating.

IN THE MATTER OF
NEW ENGLAND MOTOR RATE BUREAU, INC.

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

Docket 9170. Final Order, Aug. 18, 1989—Modifying Order, Sept. 4, 1991

This order reopens the proceeding and modifies a 1989 final order that requires the respondent to halt its collective ratemaking activities in certain states. The Commission has determined to reopen the proceeding based on changed conditions of fact and to modify the order to permit the respondent to continue its collective ratemaking operations in New Hampshire.

ORDER REOPENING AND MODIFYING ORDER

On April 22, 1991, New England Motor Rate Bureau, Inc. ("NEMRB"), filed a Request to Reopen and Set Aside ("Request") the order in Docket 9170, 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. The Request was on the public record for thirty days, and no comments were received.

NEMRB in its Request asserts that reopening is required by changed conditions of fact, because the state of New Hampshire now actively supervises collective ratemaking. The request to reopen the order is granted, and the order is modified to permit NEMRB to engage in collective ratemaking in New Hampshire, but the request to set aside the order is denied for the reasons stated below.

BACKGROUND

The 1983 complaint in this matter alleged that NEMRB violated Section 5 of the Federal Trade Commission Act by collectively formulating and filing in four states motor common carrier rates for the intrastate transportation of property. NEMRB asserted in defense, *inter alia*, that its collective ratemaking activities were protected from Section 5 by the state action doctrine.

Private conduct is protected from Section 5 as state action if the conduct is pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation and is "actively supervised" by the state. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980);

Parker v. Brown, 317 U.S. 341, 351 (1943). The Commission in its opinion in *New England Motor Rate Bureau, Inc.*, Docket 9170, slip op. at 12-13 (August 18, 1989), found that the state of New Hampshire had clearly articulated a policy to displace competition with regulation of intrastate motor common carrier rates but concluded that the state did not actively supervise joint ratemaking. On appeal, NEMRB did not challenge the conclusions of the Commission concerning New Hampshire, which was then "engaged in establishing policies and procedures to implement the revised statutory framework." *New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064, 1066 n.2 (1st Cir. 1990).

The Commission's order required NEMRB, among other things, to cease its collective ratemaking activities in New Hampshire. The order permitted NEMRB to engage in collective ratemaking activities in states in which the Commission found that NEMRB's joint ratemaking was pursuant to a policy clearly articulated and actively supervised by the state.¹ NEMRB now requests that the order be reopened and set aside on the ground that conditions have changed and that New Hampshire now actively supervises collective ratemaking.

STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be altered, modified or set aside if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require.² 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

¹ The order, issued August 18, 1989, barred NEMRB's collective ratemaking in Massachusetts and New Hampshire. The Commission deleted all references to the state of Massachusetts in its Modified Order to Cease and Desist, issued November 6, 1990, pursuant to the decision of the Court of Appeals for the First Circuit in *New England Motor Rate Bureau v. FTC*, 908 F.2d 1064, 1077 (1st Cir. 1990), holding that NEMRB had a valid state action defense in Massachusetts.

² Section 5 (b) provides, in part:

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

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

need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket C-2956, Letter to John C. Hart (June 5, 1986), at 4; S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); see *Phillips Petroleum Co.*, Docket C-1088, 78 FTC 1573, 1575 (1971) (modification not required for changes reasonably foreseeable at time of consent negotiations); *Pay Less Drugstores Northwest, Inc.*, Docket C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers order sought to remedy); see also *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) (“clear showing” of changes that eliminate reasons for order or such that order causes unanticipated hardship).

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket C-2916, Letter to Joel E. Hoffman, Esq. (March 24, 1983), at 2 (“Damon Letter”). For example, it may be in the public interest to modify an order “to relieve any impediment to effective competition that may result from the order.” *Damon Corp.*, Docket C-2916, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. Damon Letter at 2; see, e.g., *Chevron Corp.*, Docket C-3147, 105 FTC 228 (1985) (public interest warrants modification where potential harm to respondent’s ability to compete outweighs any further need for order). The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a “satisfactory showing” of changed conditions to obtain reopening of the order. See also *Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982) (petition must show “exceptional circumstances, new, changed or unforeseen at the time the decree was entered”). The legislative history also makes clear that the petitioner has the burden of showing, by means other than

conclusory statements, why an order should be modified.³ If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974) ("sound basis for . . . [not reopening] except in the most extraordinary circumstances"); *RSR Corp. v. FTC*, 656 F.2d 718, 721-22 (D.C. Cir. 1981) (applying *Bowman Transportation* standard to FTC order).

CHANGED CONDITIONS OF FACT

NEMRB in its Request relies on changed conditions of fact as the basis for reopening. NEMRB also asserts that leaving the order in effect would be contrary to the public interest, Request at 7, but the Request offers no support for this conclusion. The Commission has based its decision to reopen and modify the order on the changed conditions of fact alleged in the Request.

The order of the Commission with respect to NEMRB's activities in New Hampshire was based on a conclusion that the state did not actively supervise collective ratemaking and, therefore, the state action doctrine did not protect NEMRB's collective ratemaking in New Hampshire. See *New England Motor Rate Bureau, Inc.*, Docket 9170, slip op. at 20-21 (Aug. 18, 1989). The changed conditions of fact alleged by NEMRB are the implementation by the state of New Hampshire of its clearly articulated policy to displace competition with regulation of motor common carrier rates. These changes in fact, if sufficient to constitute active supervision of common carrier rates, warrant reopening and modifying the order.

³ The legislative history of amended Section 5(b), S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979), states:

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

The active supervision requirement of the state action doctrine requires that “state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.” *Patrick v. Burget*, 108 S. Ct. 1658, 1663 (1988), quoted in *New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d at 1070. The inquiry involves two questions: whether state officials have the power to review and to disapprove proposed rates and whether they exercise that power. NEMRB has established that state officials in New Hampshire have and exercise the power to review rates and to disapprove those that do not meet the statutory requirements that rates be just and reasonable and not discriminatory.

According to the Request, a “regulatory agency has been established and funded” in New Hampshire to carry out the state’s regulation of motor common carrier rates, and “state officials are positioned to discharge their regulatory duties.” Request at 4, citing Affidavit of Douglas L. Patch, Assistant Commissioner, Department of Safety, State of New Hampshire (March 29, 1991). The state agency is charged with investigating the reasonableness of proposed rates, and it has authority to suspend rates that are unreasonable and to establish lawful rates. The agency’s rate analyst is “instructed to recommend for investigation any tariffs which appear to violate” the statutory standards. Patch Affidavit at 3. Based on these statements, the state agency appears to have sufficient authority to “review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.”

The next question under *Patrick v. Burget* is whether the state agency exercises this authority. According to Mr. Patch’s affidavit, the state agency reviews the proposed tariffs to determine whether they are consistent with the statutory requirements that rates be just and reasonable and nondiscriminatory. Also according to Mr. Patch, rates that do not satisfy the statutory standards are not allowed to become effective. Patch Affidavit at 3. Based on these statements, we conclude that the state agency exercises its authority to review the reasonableness of the collectively established rates and to disapprove those that are not reasonable.

THE ORDER SHOULD BE REOPENED AND MODIFIED

The changed conditions of fact make the state action doctrine applicable to NEMRB’s collective ratemaking in New Hampshire, and,

therefore, the order should be reopened and modified to permit NEMRB to engage in this conduct in New Hampshire. Modifying the order by deleting the references to the state of New Hampshire and by deleting the requirement to withdraw tariffs previously filed in New Hampshire is appropriate and sufficient to accomplish the relief that NEMRB seeks.

As modified, the order will prohibit collective ratemaking by NEMRB in states in which the conduct is not protected by the state action doctrine. This prohibition is consistent with law and with the violation that the Commission found. In addition, NEMRB does not claim that the conduct should be permitted in states in which it is not protected by the state action doctrine.⁴ Setting aside the order is unnecessary to permit NEMRB to engage in collective ratemaking in states in which the conduct is not unlawful.

Accordingly, *it is ordered*, that this matter be, and it hereby is, reopened and that the Commission's order in Docket 9170 be, and it hereby is, modified by deleting "except as to the state of New Hampshire" from the proviso to Paragraph I of the order and by deleting Paragraph II of the order.

Commissioner Yao not participating.

⁴ NEMRB alleges that it "does not file intrastate rates in any state" in which collective ratemaking is not protected by the state action doctrine. Request at 6. The claim that a respondent is not now engaged in unlawful conduct is not a basis for setting aside the order

IN THE MATTER OF
MEDICAL STAFF OF BROWARD GENERAL
MEDICAL CENTER

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

Docket C-3344. Complaint, Sept. 10, 1991—Decision, Sept. 10, 1991

This consent order prohibits, among other things, the medical staff of a Florida Hospital from entering, or attempting to enter, into any agreement which would prevent or restrict the offering or delivery of health care services by Broward General Hospital, Cleveland Clinic Florida (CCF), any CCF physician, or any other provider of health care services.

Appearances

For the Commission: *Paul J. Nolan and Mark J. Horoschak.*

For the respondent: *Davis W. Duke, Gunser, Yoakley & Stewart, P.A., Fort Lauderdale, FL.*

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 the Medical Staff of Broward General Medical Center has violated and is violating Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges in that respect as follows:

RESPONDENT MEDICAL STAFF

PARAGRAPH 1. Respondent Medical Staff of Broward General Medical Center ("respondent Medical Staff" or "Medical Staff") is an unincorporated association, organized and existing under the laws of the State of Florida, with its mailing address at 1600 South Andrews Avenue, Fort Lauderdale, Fl. The Medical Staff is composed of physicians and other health care practitioners who have privileges to attend patients at Broward General Medical Center ("Broward

General” or “the Hospital”). Appointment to the Medical Staff is a prerequisite for physicians who seek to admit, diagnose, or treat patients at Broward General. Since 1987, Diran M. Seropian, M.D., has been the Chief of the Medical Staff.

OTHER HEALTH CARE PROVIDERS

PAR. 2. The North Broward Hospital District (“NBHD”) is a public hospital district chartered under Florida law to serve the northern two-thirds of Broward County, Florida. The NBHD is licensed by the State of Florida to operate 1567 general acute care beds. NBHD owns and operates four hospitals including Broward General, which is licensed to operate 744 general acute care beds. Broward General offers subspecialty services such as cardiac surgery, and is one of the few tertiary care hospitals in the Northern Broward County area.

PAR. 3. The Cleveland Clinic Foundation (“Cleveland Clinic” or “the Clinic”), located in Cleveland, Ohio, is a major provider of comprehensive health care services to patients requiring complex medical care. The Clinic is organized and operated as a multispecialty group medical practice and, as such, provides consumers an alternative to traditional individual and single specialty group forms of practice. Under the Clinic’s multispecialty group practice format, patients can obtain all necessary specialized medical care and ancillary services from employees of the Clinic, including salaried physicians.

COMPETITION AMONG RESPONDENT MEDICAL STAFF’S MEMBERS

PAR. 4. The overwhelming majority of physicians in Northern Broward County and on the Medical Staff practice medicine in individual or small group practices on a fee-for-service basis. Under this traditional form of practice, when a patient’s illness is beyond the capability or outside the medical specialty of an individual physician, the physician refers the patient to another independent physician.

PAR. 5. The Medical Staff, which includes approximately 650 members, is engaged in substantial activities for the economic benefit of its members. By virtue of its purposes and activities, the Medical Staff is a “corporation” within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. Except to the extent that competition has been restrained as herein alleged, most, if not all, members of the Medical Staff have been and are now in competition among themselves and with other health care practitioners in the Northern Broward County area.

PAR. 6. The acts and practices of the respondent Medical Staff, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

COMPETITION FACED BY RESPONDENT MEDICAL STAFF'S MEMBERS

PAR. 7. Beginning in 1984, Cleveland Clinic sought to establish in Northern Broward County a regional clinic that would operate as a fully integrated, multispecialty group practice, a form of practice which Cleveland Clinic officials believed would be attractive to consumers in that area. Cleveland Clinic officials had concluded that its form of practice controls medical care utilization and costs in a way that is not possible when patient care is provided on a fee-for-service basis by independent physicians, ancillary services providers, and hospitals. For example, the Clinic offers large employers and other third-party payors the alternative of all-inclusive prospective pricing for certain medical procedures requiring the services of a variety of medical and surgical specialists as well as hospital and ancillary services. In order to offer all of the features of Cleveland Clinic's form of practice, the Clinic needed access to a tertiary care hospital in the Northern Broward County area.

PAR. 8. As early as 1984, NBHD sought to offer consumers efficient, high quality alternatives to the traditional fee-for-service form of medical practice, such as a preferred provider organization, a hospital-owned primary care clinic, and a joint venture with the Cleveland Clinic to open a regional model of the Clinic's multispecialty group practice on Broward General's campus. NBHD officials believed that, in part because of the Cleveland Clinic's national reputation for providing high quality care, the proposed relationship with the Clinic would distinguish Broward General from other area hospitals and would help Broward General compete more effectively for patients. The NBHD proposed developing an affiliation at Broward General under which physicians on the Hospital's Medical Staff would be invited to participate in a joint venture with NBHD and the Clinic's Florida branch ("CCF"). During September 1985, the existence of discussions between the Clinic and NBHD became generally known to respondent Medical Staff.

PAR. 9. Respondent Medical Staff and Dr. Seropian considered the proposed affiliation between CCF and Broward General to be a competitive threat to the individual and small group fee-for-service

form of medical practice existing in Northern Broward County. CCF would offer consumers an alternative form of practice, integrating medical specialties and ancillary services into one economic unit with salaried physicians, and providing information to consumers by marketing, advertising, and using a trade name. Respondent Medical Staff was concerned that enough consumers would find CCF's alternative form of practice attractive to disrupt existing patterns of patient referrals among individual physicians and small single specialty groups.

THE CONSPIRACY TO RESTRICT COMPETITION

PAR. 10. Respondent Medical Staff, acting as a combination of its members and in conspiracy with at least some of its members, Dr. Seropian, and others, attempted to and did prevent, delay and limit competition from CCF through the use of boycott threats and other anticompetitive practices. The conspiracy contemplated that respondent Medical Staff would thwart or obstruct Cleveland Clinic from establishing CCF in Northern Broward County by all means necessary, including agreements to act collectively rather than competitively in deciding whether and on what terms to admit patients to Broward General or to make patient referrals to CCF's physicians. At various times during and in furtherance of the combination and conspiracy, respondent Medical Staff and Dr. Seropian have:

A. Agreed to boycott and threatened to boycott Broward General in order to coerce NBHD and Broward General:

(i) to refuse to affiliate with the Clinic, and
(ii) to prevent CCF physicians from becoming members of the respondent Medical Staff;

B. Refused to deal with Cleveland Clinic except on collectively determined terms;

C. Induced NBHD, through pretextual justifications, to deny hospital privileges to CCF physicians; and

D. Refused to process applications for privileges by CCF physicians.

CONDUCT FURTHERING THE CONSPIRACY

PAR. 11. On September 20, 1985, acting in furtherance of the conspiracy, the respondent Medical Staff's members formally resolved: (a) to demand that NBHD "immediately cease all negotiations with the Cleveland Clinic"; and (b) that the Medical Staff had "no

confidence" in Broward General's administration or the NBHD Board because of their negotiations with the Clinic. The respondent Medical Staff's resolutions, as well as other subsequent similar statements, were intended as, and were understood by Hospital officials to be, threats that the respondent Medical Staff's members would withhold patient admissions from Broward General if NBHD entered an affiliation with the Clinic.

PAR. 12. In late 1985, due at least in part to respondent Medical Staff's conspiracy, NBHD officials informed the Clinic that further discussions of an affiliation with NBHD would be futile, and the Cleveland Clinic thereafter terminated negotiations.

PAR. 13. From 1986 through 1987, the Cleveland Clinic unsuccessfully sought an affiliation with Holy Cross Hospital. The Clinic faced the prospect that its physicians would not be permitted to admit and treat their patients at any suitable hospital in the spring of 1988 when CCF's clinic was scheduled to open. In the fall of 1987, CCF decided to apply for a certificate of need ("CON") to build its own tertiary care hospital in Northern Broward County, anticipating that if the CON were approved the hospital would not become operational for three to five years. To ensure that its physicians would have immediate access to some hospital, CCF contracted as a last resort with North Beach Hospital ("North Beach"), a small hospital with limited facilities. Although CCF financed major renovations, North Beach could not support all of the services CCF sought to offer, including cardiac surgery services. Consequently, in early 1988, CCF still needed access to a Northern Broward County hospital at which its physicians could perform cardiac surgery and other specialty and subspecialty services that could not be performed at North Beach.

PAR. 14. During late 1987 and early 1988, the Chairman of the NBHD Board encouraged CCF to explore a long term affiliation with NBHD, under which initially CCF would establish its cardiac surgery program at Broward General, and eventually all CCF physicians would join the respondent Medical Staff. CCF revived discussions about an affiliation with NBHD, and five members of CCF's cardiac surgery team applied for staff privileges at Broward General.

PAR. 15. During 1988, continuing the conspiracy to restrict competition from CCF, respondent, among other things, obstructed CCF's attempts to obtain authority to build its own hospital, CCF's proposal to affiliate with Broward General, and CCF physicians' attempts to obtain hospital privileges at Broward General.

PAR. 16. In October 1988, due at least in part to respondent's and Dr. Seropian's conspiracy, the NBHD Board adopted the respondent Medical Staff's pretextual justifications to deny hospital privileges to all five CCF applicants. Thereafter, the NBHD Chief Executive Officer informed the NBHD Board that he believed that the Medical Staff's opposition to the Clinic in 1985 had been motivated by a fear of "doctor competition," and that Medical Staff physicians had recently made an "open threat" to leave the Hospital if the Board granted hospital privileges to the five CCF physicians. In addition, the Board's decision to deny privileges caused a public outcry, including expressions of concern from state legislators that the NBHD Board's decision would deny consumers the benefits of CCF's experienced cardiac surgery team. The NBHD Board thereupon rescinded its vote to deny privileges and urged the administration to negotiate a contract with CCF, under which CCF would establish a cardiac care unit at Broward General, bringing the five physicians from CCF's cardiac surgery team onto the respondent Medical Staff and permitting other CCF specialists and subspecialists to obtain privileges and consult on CCF cardiac patients admitted to Broward General.

PAR. 17. Since December 1988, respondent and Dr. Seropian have continued the conspiracy to prevent competition from CCF. For example:

A. Dr. Seropian threatened that unless NBHD backed respondent Medical Staff and refused to deal with CCF, he would urge all Medical Staff committee chairmen to resign their positions.

B. After the NBHD Board granted provisional hospital privileges to the five CCF physicians and approved an exclusive contract for cardiac surgery services with CCF, the respondent Medical Staff refused to evaluate the hospital privilege applications of 35 CCF physicians. The Medical Staff refused to evaluate the CCF physicians' privilege applications, unless, among other things, CCF and NBHD agreed to reduce CCF's rights under the contract.

PAR. 18. On April 26, 1989, the NBHD Board made a formal finding that the respondent Medical Staff had refused to evaluate applications for hospital privileges submitted by 35 CCF physicians, and that there was evidence of "a clear, consistent and intentional pattern of a boycott by the medical staff of the credentialing process . . . they are empowered and obliged to apply." As a consequence of the credentialing boycott and pressure by the Medical Staff on its members not to serve on any alternative credentialing panel, NBHD

contracted with a panel of outside physicians to review the credentials of the 35 CCF physicians. This panel found that all 35 CCF physicians were qualified to receive hospital privileges at Broward General.

PAR. 19. In August 1989, Joint Commission on Accreditation of Healthcare Organizations' surveyors concluded that because the respondent Medical Staff had failed both to process the applications from the 35 CCF physicians within a reasonable amount of time, and to monitor actively the quality of care provided by Medical Staff members, the Hospital's accreditation was at risk. As a result, respondent Medical Staff and Dr. Seropian agreed to evaluate future applications for hospital privileges from CCF physicians, but their continued opposition to the Hospital's relationship with CCF still jeopardizes the Hospital's accreditation.

EFFECTS

PAR. 20. The purpose, effects, tendency, or capacity of the respondent Medical Staff's conduct described in paragraphs 10 through 19 are and have been to restrain trade unreasonably and hinder competition in the provision of health care services in the Northern Broward County area in the following ways, among others:

A. Depriving consumers of the price and quality benefits of competition between CCF's integrated multispecialty group practice and independent fee-for-service practitioners;

B. Depriving consumers of the full array of services that CCF sought to offer consumers in Northern Broward County, on some occasions forcing consumers to travel outside the Northern Broward County area to receive specialty and subspecialty medical diagnosis and treatment;

C. Hindering CCF's ability to offer health care services to consumers by raising its costs, reducing its efficiency, and delaying or preventing CCF from offering specialty and subspecialty services;

D. Limiting competition among physicians in Northern Broward County to the extent that physicians have agreed not to compete with each other, but rather act only on collectively determined terms, in deciding whether to admit patients to Broward General, to refer patients to CCF physicians, or otherwise to deal with NBHD, Broward General, the Clinic, or CCF; and

E. Raising impediments to entry into the physician services market by innovative or nontraditional providers of health care services.

VIOLATION

PAR. 21. The combination, conspiracy, acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. Such combination, conspiracy, acts and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

Commissioner Yao not participating.

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 Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 5 of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondent has violated the said Act, and that the 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 procedures 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. The Medical Staff of Broward General Medical Center ("the Medical Staff") is an unincorporated association, organized and existing, under the laws of the State of Florida, with its office and principal place of business located at 1600 S. Andrews Avenue, Ft. Lauderdale, FL.

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

ORDER

I.

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

A. “*Medical Staff*” means the Medical Staff of Broward General Medical Center, its successors, assigns, officers, directors, committees, agents, employees, and representatives.

B. “*NBHD*” means the North Broward Hospital District, a tax supported entity with its principal offices located at 1625 Southeast Third Avenue, Fort Lauderdale, FL, the hospitals that are owned by the North Broward Hospital District, and its subsidiaries, affiliates, successors, assigns, officers, administrators, directors, committees, agents, employees, and representatives.

C. “*Broward General*” means the Broward General Medical Center, one of the hospitals of the North Broward Hospital District, located at 1600 South Andrews Avenue, Fort Lauderdale, FL, its subsidiaries, affiliates, successors, assigns, officers, administrators, directors, committees, agents, employees, and representatives.

D. “*CCF*” means Cleveland Clinic Florida, a nonprofit corporation organized under Florida law, located at 3000 West Cypress Creek Road, Ft. Lauderdale, FL, its parent foundation (Cleveland Clinic Foundation, which is located at 9500 Euclid Avenue, Cleveland, OH), any entity located in Florida that is owned, controlled or under the management of Cleveland Clinic Florida or Cleveland Clinic Foundation, and the officers, directors, committees, agents, employees, and representatives of Cleveland Clinic Florida or Cleveland Clinic Foundation.

E. “*Corrective action*” means action taken pursuant to and in conformance with the Medical Staff’s bylaws against any person with hospital privileges at Broward General whose activities or professional conduct is reasonably believed to be detrimental to patient safety or the delivery of quality patient care.

II.

It is further ordered, That the Medical Staff directly or indirectly, or through any device, in connection with activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from entering into, attempting to enter into, organizing, continuing, or acting in furtherance of any agreement or combination, express or implied, between or among its members or with other physicians, providers of health care services, medical societies, hospitals, or medical staffs, for the purpose or with the effect of preventing or restricting the offering or delivery of health care services by the NBHD, Broward General, CCF, any CCF physician, or any other provider of health care services, including any agreement to:

A. Refuse to deal or threaten to refuse to deal with the NBHD, Broward General, CCF, any CCF physician, or any other provider of health care services, including, but not limited to, any agreement or combination to refuse or threaten to refuse to:

1. Participate in any Medical Staff or NBHD Committee, admit any patient to any NBHD hospital, fulfill any Medical Staff obligation imposed or recognized under any provision of the Florida statutes, the Code of the NBHD, the By-Laws or Rules and Regulations of the Medical Staff, or fulfill any other function customarily performed by the Medical Staff;

2. Refer patients to, accept patient referrals from, provide back-up for, or consult in the treatment of any patient with, any CCF physician; or

3. Associate with NBHD or CCF as an employee or independent contractor, or otherwise deal with NBHD, CCF or any CCF physician.

B. Deny, impede, or refuse to consider any application for hospital privileges or for changes in hospital privileges by any person solely because of his or her affiliation with CCF.

C. Deny or recommend to deny, limit, or otherwise restrict hospital privileges for any CCF physician without a reasonable basis for concluding that the denial, limitation, or restriction serves the interests of the hospital in providing for the efficient and competent delivery of health care services.

D. Discriminate, or threaten to discriminate, against any CCF physician with hospital privileges at Broward General with respect to the rights accorded to a member of the Medical Staff.

E. Encourage, advise, pressure, induce, or attempt to induce any person to engage in any action prohibited by this order.

III.

A. *It is further ordered*, That this order shall not be construed to prohibit the respondent Medical Staff or its members from engaging, pursuant to the Medical Staff's bylaws, in credentialing, corrective action, utilization review, quality assurance, or peer review at Broward General, where such conduct neither constitutes nor is part of any agreement, combination or conspiracy the purpose, effect, or likely effect of which is to impede competition unreasonably.

B. *It is further ordered*, That this order shall not be construed to prohibit any individual member of the Medical Staff from entering into an agreement or combination with any other physician or health care practitioner with whom the individual Medical Staff member practices in partnership or in a professional corporation, or who is employed by the same person.

IV.

It is further ordered, That the Medical Staff shall:

A. Within thirty (30) days after the date this order becomes final:

1. Mail a copy of this order, the accompanying complaint, and the attached Announcement to: (a) each Commissioner on the NBHD Board of Commissioners; (b) the Chief Executive Officers of Cleveland Clinic Florida and Cleveland Clinic Foundation; and (c) each member of the Medical Staff as of the date this order becomes final; and

2. Retract in writing the Medical Staff's September 20, 1985, resolution opposing any affiliation between CCF and the NBHD.

B. For a period of three (3) years after the date this order becomes final:

1. Report to the Federal Trade Commission any adverse recommendation by the Medical Staff concerning any application for hospital privileges, or change in existing hospital privileges, of any CCF physician or other CCF health care practitioner, within thirty (30) days after final action upon the Medical Staff's recommendation;

2. Distribute to each new member of the Medical Staff a copy of this order, the accompanying complaint, and the attached Announcement

within 30 days after he or she is officially admitted to the Medical Staff; and

3. Maintain records adequate to describe in detail any action taken in connection with the activities covered by this order and, upon reasonable notice, make such records available to the Federal Trade Commission staff for inspection and copying.

C. Within sixty (60) days after the date this order becomes final, annually for three (3) years on the anniversary date of the initial report, and at such other times as the Federal Trade Commission may by written notice require, file with the Federal Trade Commission a report setting forth in detail the manner and form in which it has complied with and intends to continue complying with this order.

D. Notify the Federal Trade Commission of any proposed change in its organization that may affect compliance obligations arising out of this order at least thirty (30) days prior to the effective date of any such proposed change.

Commissioner Yao not participating.

APPENDIX A

ANNOUNCEMENT

As you may be aware, on September 10, 1991 the Federal Trade Commission issued a complaint and a final consent order against the Broward General Medical Staff.

The order generally prohibits the Medical Staff from collectively refusing to deal with the North Broward Hospital District, Broward General ("Broward General"), Cleveland Clinic Florida ("CCF"), or CCF physicians. The order also prohibits the Medical Staff from refusing to evaluate applications for hospital privileges of any person because of his or her affiliation with CCF, or recommending the denial of hospital privileges for any CCF physician without a reasonable basis for concluding that the denial is reasonably related to the efficient operation and competent delivery of health care services at Broward General.

In addition, the order prohibits the Medical Staff from discriminating or threatening to discriminate against any CCF physician with privileges at Broward General, regarding the rights accorded to a member of the Medical Staff. Finally, the Medical Staff is also prohibited from encouraging any person or organization to take actions that the order prohibits the Medical Staff from taking.

Under the order, the Medical Staff retracted its September 20, 1985, resolution, which the complaint alleges was a threat to boycott Broward General to discourage the Hospital from affiliating with CCF.

The agreement between the Federal Trade Commission and the Broward General Medical Staff is for settlement purposes only and does not constitute an admission by the Medical Staff that the law has been violated as alleged in the complaint. The order does not prohibit the members of the Medical Staff from lawfully carrying on their medical practices and from providing patient care at Broward General and does not otherwise prohibit the Medical Staff, its officers and committees from engaging in lawful peer review and quality assurance at Broward General.

For more specific information, you should refer to the FTC complaint and order. The civil penalty for violation of the order is \$10,000 per day for each order violation. A copy of the order is enclosed.

(Vice Chief of Staff)
Broward General Medical Staff

555

Complaint

IN THE MATTER OF
MEDICAL STAFF OF HOLY CROSS HOSPITAL

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

Docket C-3345. Complaint, Sept. 10, 1991—Decision, Sept. 10, 1991

This consent order prohibits, among other things, the medical staff of a Florida hospital from entering, or attempting to enter, into any agreement which would prevent or restrict the offering or delivery of health care services by Holy Cross Hospital, Cleveland Clinic Florida (CCF), any CCF physician, or any other provider of health care services.

Appearances

For the Commission: *Paul J. Nolan and Mark J. Horoschak.*

For the respondent: *Bruno L. DiGiulian & Associates, P. A., Fort Lauderdale, FL.*

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 the Medical Staff of Holy Cross Hospital has violated and is violating Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges in that respect as follows:

RESPONDENT

PARAGRAPH 1. Respondent Medical Staff of Holy Cross Hospital ("the Medical Staff") is an unincorporated association, organized and existing under the laws of the State of Florida, with its mailing address at 4725 N. Federal Highway, Ft. Lauderdale, FL. The Medical Staff is composed of physicians and other health care practitioners who have privileges to attend patients at Holy Cross Hospital ("Holy Cross" or "the Hospital"). Appointment to the Medical Staff is a prerequisite for physicians who seek to admit, diagnose, or treat patients at Holy Cross Hospital.

OTHER HEALTH CARE PROVIDERS

PAR. 2. Holy Cross Hospital, Inc., incorporated under the Florida Nonprofit Corporation Law, operates Holy Cross Hospital, which is licensed by the State of Florida to operate 597 general acute care hospital beds. Holy Cross offers subspecialty services such as cardiac surgery, and is one of the few tertiary care hospitals in the Northern Broward County area.

PAR. 3. The Cleveland Clinic Foundation ("Cleveland Clinic" or "the Clinic"), located in Cleveland, Ohio, is a major provider of comprehensive health care services to patients requiring complex medical care. The Clinic is organized and operated as a multispecialty group medical practice and, as such, provides consumers an alternative to traditional individual and single specialty group forms of practice. Under the Clinic's multispecialty group practice format, patients can obtain all necessary specialized medical care and ancillary services from employees of the Clinic, including salaried physicians.

COMPETITION AMONG RESPONDENT'S MEMBERS

PAR. 4. The overwhelming majority of physicians in Northern Broward County and on respondent Medical Staff practice medicine in individual or small group practices on a fee-for-service basis. Under this traditional form of practice, when a patient's illness is beyond the capability or outside the medical specialty of an individual physician, the physician refers the patient to another independent physician.

PAR. 5. The Medical Staff, which includes approximately 300 members, is engaged in substantial activities for the economic benefit of its members. By virtue of its purposes and activities, the Medical Staff is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. Except to the extent that competition has been restrained as herein alleged, most, if not all, members of the Medical Staff have been and are now in competition among themselves and with other health care practitioners in the Northern Broward County area.

PAR. 6. The acts and practices of the respondent, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

COMPETITION FACED BY RESPONDENT'S MEMBERS

PAR. 7. Beginning in 1984, Cleveland Clinic sought to establish in

Northern Broward County a regional clinic that would operate as a fully integrated, multispecialty group practice, a form of practice which Cleveland Clinic officials believed would be attractive to consumers in that area. Cleveland Clinic officials had concluded that its form of practice controls medical care utilization and costs in a way that is not possible when patient care is provided on a fee-for-service basis by independent physicians, ancillary services providers, and hospitals. For example, the Clinic offers large employers and other third-party payers the alternative of all-inclusive prospective pricing for certain medical procedures requiring the services of a variety of medical and surgical specialists as well as hospital and ancillary services. In order to offer all of the features of Cleveland Clinic's form of practice, the Clinic needed access to a tertiary care hospital in the Northern Broward County area.

PAR. 8. As early as 1984, Holy Cross Hospital sought to offer consumers efficient, high quality alternatives to the traditional fee-for-service form of medical practice such as a health maintenance organization and a multispecialty diagnostic clinic. In 1986 Holy Cross and the Cleveland Clinic sought to enter an affiliation pursuant to which the Hospital's facilities would be utilized in the development of the Clinic's Florida branch, Cleveland Clinic Florida ("CCF"). Hospital officials believed that, in part because of the Cleveland Clinic's national reputation for providing high quality care, the proposed relationship with the Clinic would distinguish Holy Cross from other area hospitals and would help Holy Cross compete more effectively for patients. The proposed affiliation provided that CCF would utilize the Hospital by leasing unused hospital beds and purchasing ancillary hospital-based services from Holy Cross. During August 1986, the existence of discussions between the Clinic and Holy Cross became generally known to respondent Medical Staff.

PAR. 9. Respondent Medical Staff considered the proposed affiliation between CCF and Holy Cross to be a competitive threat to the individual and small group fee-for-service form of medical practice existing in Northern Broward County. CCF would offer consumers an alternative form of practice, integrating medical specialties and ancillary services into one economic unit with salaried physicians, and providing information to consumers by marketing, advertising, and using a trade name. The Medical Staff was concerned that enough consumers would find CCF's alternative form of practice attractive to disrupt existing patterns of patient referrals among individual physicians and small single specialty groups.

THE CONSPIRACY TO RESTRICT COMPETITION

PAR. 10. Respondent Medical Staff, acting as a combination of its members, and in conspiracy with at least some of its members, and others, attempted to and did prevent, delay and limit competition from CCF through the use of boycott threats and other anticompetitive practices. The conspiracy contemplated that respondent would thwart or obstruct Cleveland Clinic from establishing CCF in Northern Broward County by all means necessary, including agreements to act collectively rather than competitively in deciding whether and on what terms to admit patients to Holy Cross or to make patient referrals to CCF's physicians. At various times during and in furtherance of the combination and conspiracy, respondent Medical Staff has:

A. Agreed to boycott and threatened to boycott Holy Cross Hospital in order to coerce the Hospital:

- (i) to refuse to affiliate with the Clinic, and
- (ii) to prevent CCF physicians from becoming members of the Medical Staff;

B. Induced Holy Cross Hospital, through pretextual representations, to close the Medical Staff to new members and thereby prevent CCF physicians from becoming members of the Medical Staff;

C. Refused initially to provide Medical Staff application forms to CCF physicians and later to process Medical Staff applications submitted by CCF physicians.

CONDUCT FURTHERING THE CONSPIRACY

PAR. 11. Shortly after learning that the Cleveland Clinic and Holy Cross were discussing a possible affiliation, the Medical Staff, on August 26, 1986, held its first of several general meetings to discuss and decide what steps it would take in opposition to the Clinic. At that meeting the Medical Staff agreed, by a vote of 115 to 5, to condemn any possible affiliation between the Clinic and Holy Cross, and warned the Hospital of its concern that "the Cleveland Clinic is trying to come to Broward County to actively compete for our patient population and hospital census." In furtherance of the conspiracy, the President of the Medical Staff informed the Hospital that any "short term benefits" to the Hospital resulting from an affiliation with the Clinic would not "be worth it" because they would "be more than off-set by loss of support by disenchanted physicians on our staff." This statement, as well as subsequent similar statements, was intended as,

and was understood by Hospital officials to be, a threat from the Medical Staff that its members would withhold patient admissions if Holy Cross entered an affiliation with the Clinic.

PAR. 12. Following the August 26, 1986, Medical Staff meeting, the President of Holy Cross expressed her concern that the Medical Staff was attempting to have the Hospital cut off discussions with the Clinic, and stated that it was in the Hospital's interest to work with the Clinic. An official of the Medical Staff responded that the Medical Staff considered the proposed affiliation to be a competitive threat, stating: "from the Medical Staff standpoint they will be taking away their patients. . . . This is viewed as a financial threat to the Medical Staff."

PAR. 13. During the following eight months, until April 1987, various members of the Holy Cross Board of Trustees and its President met with representatives of the Clinic to discuss a possible affiliation and to address the concerns and opposition of the Holy Cross Medical Staff. In response, the Medical Staff, through its officials, continued to pressure and threaten the Hospital in order to coerce it not to deal with the Clinic and to exclude physician employees of CCF from the Hospital. Examples of such acts and practices by Medical Staff officials, include, but are not limited to, the following:

A. Coercing the President of Holy Cross, through express and implied threats that members of the Medical Staff would stop admitting patients to Holy Cross, to agree in writing to the Medical Staff demand that the Hospital "protect the private practice of medicine" from competition by CCF and the new form of medical practice that it represented;

B. Warning the Hospital that the Medical Staff members were virtually "unanimous in their feelings as to the effect CCF will have on their livelihood" and threatening that they would "react unfavorably and it will hurt the hospital";

C. Warning the Hospital that "the physicians are concerned and trying to protect their own practices" and threatening that if the Hospital Administration did not back up the Medical Staff, "many physicians are going to pull out and they are not bluffing"; and

D. Causing the Board of Trustees to close the Hospital to new applicants for Medical Staff privileges by making express and implied boycott threats against the Hospital and by presenting the Board of Trustees with pretextual reasons for closing the Medical Staff.

PAR. 14. In April 1987, as a result at least in part of respondent Medical Staff's conspiracy, the Holy Cross Board of Trustees terminated affiliation discussions between CCF and Holy Cross and closed the Hospital to applications for Medical Staff membership.

PAR. 15. The Cleveland Clinic faced the prospect that its physicians would not be permitted to admit and treat their patients at any suitable hospital in the spring of 1988 when CCF's clinic was scheduled to open. In the fall of 1987, CCF decided to apply for a certificate of need ("CON") to build its own tertiary care hospital in Northern Broward County, anticipating that if the CON were approved the hospital would not become operational for three to five years. To ensure that its physicians would have immediate access to some hospital, CCF contracted as a last resort with North Beach Hospital ("North Beach"), a small hospital with limited facilities. Although CCF financed major renovations, North Beach could not support all of the services CCF sought to offer, including cardiac surgery services. Consequently, in early 1988, CCF still needed access to a Northern Broward County hospital at which its physicians could perform cardiac surgery and other specialty and subspecialty services that could not be performed at North Beach. By this time, the Holy Cross Medical Staff had been reopened to applications for membership.

PAR. 16. On or about February 23, 1988, several members of CCF's cardiac surgery team submitted written requests for Holy Cross Medical Staff application forms. Although these physicians submitted their requests several times, the Medical Staff declined to provide the CCF physicians with application forms until sometime after August 12, 1988.

PAR. 17. While the Medical Staff was refusing to provide application forms to the CCF physicians, Medical Staff officials pressured the Holy Cross Board of Trustees with express and implied boycott threats in order to coerce the Board into taking actions to prevent CCF physicians from applying for Medical Staff privileges. Examples of such acts and practices by Medical Staff officials, taken on behalf of the Medical Staff, include but are not limited to the following:

A. Coercing the Chairman of the Board and the President of the Hospital to sign and send a letter, in February 1988, advising CCF that Medical Staff applications by their physicians would not be welcome and asking that they not be submitted; and

B. Causing the Hospital, in March 1988, again to be closed to new

applicants for Medical Staff privileges by making express and implied boycott threats against the Hospital and by presenting the Board of Trustees with pretextual reasons for closing the Medical Staff.

PAR. 18. The Medical Staff was reopened once again to new applicants on June 30, 1988, but before this date and before applications were provided to Clinic physicians, the Medical Staff added a new question to the Medical Staff application: "are you a full time employee of a corporation? If yes, a copy of the employment agreement must be provided." The purpose and effect of this question was to provide a basis for identifying and rejecting CCF and other Medical Staff applicants on the basis of the form of medical practice with which they were associated.

PAR. 19. Medical Staff applications were released to CCF physicians shortly after August 12, 1988, and two CCF physicians submitted applications. The Medical Staff rejected both applications for pretextual reasons and without regard to the qualifications of the applicants, because the applicants were employees of CCF. Following this rejection of the CCF physicians' applications, and in light of prior Medical Staff actions to keep CCF out of Holy Cross Hospital, CCF officials concluded that the Medical Staff had effectively blocked CCF physicians from obtaining Medical Staff privileges at Holy Cross, and CCF physicians ceased their efforts to obtain Medical Staff privileges at Holy Cross as futile.

EFFECTS

PAR. 20. The purpose, effects, tendency, or capacity of respondent's conduct described in paragraphs 10 through 19 are and have been to restrain trade unreasonably and hinder competition in the provision of health care services in the Northern Broward County area in the following ways, among others:

A. Depriving consumers of the price and quality benefits of competition between CCF's integrated multispecialty group practice and independent fee-for-service practitioners;

B. Depriving consumers of the full array of services that CCF sought to offer consumers in Northern Broward County, and, on some occasions, forcing consumers to travel outside the Northern Broward County area to receive specialty and subspecialty medical diagnosis and treatment;

C. Hindering CCF's ability to offer health care services to

consumers by raising its costs, reducing its efficiency, and delaying or preventing CCF from offering specialty and subspecialty services;

D. Limiting competition among physicians in Northern Broward County to the extent that physicians have agreed not to compete with each other, but rather act only on collectively determined terms, in deciding whether to admit patients to Holy Cross Hospital, to refer patients to CCF physicians, or otherwise to deal with Holy Cross, the Clinic, or CCF; and

E. Raising impediments to entry into the physician services market by innovative or nontraditional providers of health care services.

VIOLATION

PAR 21. The combination, conspiracy, acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. Such combination, conspiracy, acts and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

Commissioner Yao not participating.

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 Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 5 of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondent has violated the said Act, and that the 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 procedures 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. The Medical Staff of Holy Cross Hospital ("the Medical Staff") is an unincorporated association, organized and existing, under the laws of the State of Florida, with its office and principal place of business located at 4725 N. Federal Highway, Ft. Lauderdale, FL.

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

ORDER

I.

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

1. "*Medical Staff*" means the Medical Staff of Holy Cross Hospital, its successors, assigns, officers, directors, committees, agents, employees, and representatives.

2. "*Holy Cross Hospital*" means Holy Cross Hospital, Inc., a not-for-profit corporation with its principal offices located at 4725 N. Federal Highway, Ft. Lauderdale, FL, its subsidiaries, affiliates, successors, assigns, officers, administrators, directors, committees, agents, employees, and representatives.

3. "*CCF*" means Cleveland Clinic Florida, a nonprofit corporation organized under Florida law, located at 3000 West Cypress Creek Road, Ft. Lauderdale, FL, its parent foundation (Cleveland Clinic Foundation, which is located at 9500 Euclid Avenue, Cleveland, OH), any entity located in Florida that is owned, controlled, or under the management of Cleveland Clinic Florida or Cleveland Clinic Foundation, and the officers, directors, committees, agents, employees, and representatives of Cleveland Clinic Florida or Cleveland Clinic Foundation.

4. "*Corrective action*" means action taken pursuant to and in conformance with the Medical Staff's bylaws against any person with hospital privileges at Holy Cross Hospital whose activities or

professional conduct is reasonably believed to be detrimental to patient safety or the delivery of quality patient care.

II.

It is ordered, That the Medical Staff, directly or indirectly, or through any device, in connection with activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from entering into, attempting to enter into, organizing, continuing, or acting in furtherance of any agreement or combination, express or implied, between or among its members or with other physicians, providers of health care services, medical societies, hospitals, or medical staffs, for the purpose or with the effect of preventing or restricting the offering or delivery of health care services by Holy Cross Hospital, CCF, any CCF physician, or any other provider of health services, including any agreement to:

A. Refuse to deal or threaten to refuse to deal with Holy Cross Hospital, CCF, any CCF physician, or any other provider of health care services, including, but not limited to, any agreement or combination to refuse or threaten to refuse to:

1. Admit any patient to Holy Cross Hospital, fulfill any Medical Staff obligation imposed or recognized under any provision of the Florida statutes, the By-Laws or Rules and Regulations of the Medical Staff, or fulfill any other function customarily performed by the Medical Staff;

2. Refer patients to, accept patient referrals from, provide back-up for, or consult in the treatment of any patient with, any CCF physician; or

3. Associate with Holy Cross Hospital or CCF as an employee or independent contractor, or otherwise deal with Holy Cross Hospital, CCF or any CCF physician.

B. Refuse or threaten to refuse to provide, or delay unreasonably in providing, an application for medical staff privileges to any CCF physician who submits a written request for the same.

C. Deny, impede, or refuse to consider any application for hospital privileges or for changes in hospital privileges by any person solely because of his or her affiliation with CCF.

D. (i) Deny or recommend to deny, limit, or otherwise restrict hospital privileges for any CCF physician, or (ii) close or recommend

to close any portion of the Medical Staff without a reasonable basis for concluding that such action or recommendation serves the interests of the hospital in providing for the efficient and competent delivery of health care services.

E. Discriminate, or threaten to discriminate, against any CCF physician with hospital privileges at Holy Cross Hospital with respect to the rights accorded to a member of the Medical Staff.

F. Encourage, advise, pressure, induce, or attempt to induce any person to engage in any action prohibited by this order.

III.

A. *It is further ordered*, That this order shall not be construed to prohibit the respondent Medical Staff or its members from engaging, pursuant to the Medical Staff's bylaws, in credentialing, corrective action, utilization review, quality assurance, or peer review at Holy Cross Hospital, where such conduct neither constitutes nor is part of any agreement, combination, or conspiracy the purpose, effect, or likely effect of which is to impede competition unreasonably.

B. *It is further ordered*, That this order shall not be construed to prohibit any individual member of the Medical Staff from entering into an agreement or combination with any other physician or health care practitioner with whom the individual Medical Staff member practices in partnership or in a professional corporation, or who is employed by the same person as said Medical Staff member.

IV.

It is further ordered, That the Medical Staff shall:

A. Within thirty (30) days after the date this order becomes final:

1. Mail a copy of this order, the accompanying complaint, and the attached Announcement to: (a) each member of the Board of Trustees of the Holy Cross Hospital; (b) the Chief Executive Officer of Holy Cross Hospital; (c) the Administrator of Holy Cross Hospital; (d) the Chief Executive Officers of Cleveland Clinic Florida and Cleveland Clinic Foundation; and (e) each member of the Medical Staff; and

2. Revise the Medical Staff privilege application form by deleting any question relating to whether an applicant is an employee of a corporation and any request for a copy of any employment agreement between an applicant and any other person or corporation. A copy of

such revised application form shall be provided to the Federal Trade Commission within thirty (30) days after being adopted by vote of the Medical Staff as provided in the Medical Staff bylaws.

B. For a period of three (3) years after the date this order becomes final:

1. Report to the Federal Trade Commission any adverse recommendation by the Medical Staff concerning any application for hospital privileges, or change in existing hospital privileges, of any CCF physician or other CCF health care practitioner, within thirty (30) days after final action upon the Medical Staff's recommendation;

2. Distribute to each new member of the Medical Staff a copy of this order, the accompanying complaint, and the attached Announcement within 30 days after he or she is officially admitted to the Medical Staff; and

3. Maintain records adequate to describe in detail any action taken in connection with the activities covered by this order and, upon reasonable notice, make such records available to the Federal Trade Commission staff for inspection and copying.

C. Within sixty (60) days after the date this order becomes final, annually for three (3) years on the anniversary date of the initial report, and at such other times as the Federal Trade Commission may by written notice require, file with the Federal Trade Commission a report setting forth in detail the manner and form in which it has complied with and intends to continue complying with this order.

D. Notify the Federal Trade Commission of any proposed change in its organization that may affect compliance obligations arising out of this order at least thirty (30) days prior to the effective date of any such proposed change.

Commissioner Yao not participating.

APPENDIX A

ANNOUNCEMENT

As you may be aware, on September 10, 1991 the Federal Trade Commission issued a complaint and a final consent order against the Holy Cross Hospital Medical Staff.

The order generally prohibits the Medical Staff from collectively refusing to deal with Holy Cross Hospital, Cleveland Clinic Florida ("CCF"), or CCF physicians. The order also prohibits the Medical

Staff from refusing to evaluate applications for hospital privileges of any person because of his or her affiliation with CCF, or recommending the denial of hospital privileges for any CCF physician without a reasonable basis for concluding that the denial is reasonably related to the efficient operation of and competent delivery of health services at Holy Cross Hospital.

In addition, the order prohibits the Medical Staff from discriminating or threatening to discriminate against any CCF physician with privileges at Holy Cross Hospital, regarding the rights accorded to a member of the Medical Staff. Finally, the Medical Staff is also prohibited from encouraging any person or organization to take actions that the order prohibits the Medical Staff from taking.

Under the order, the Medical Staff removed from the hospital privilege application form the inquiry whether an applicant is an employee of a corporation, which the complaint alleges was added to the application form as a means of discriminating against applications filed by physician employees of CCF.

For more specific information, you should refer to the FTC complaint and order. The civil penalty for violation of the order is \$10,000 per day for each order violation. A copy of the order is enclosed.

(President)

Holy Cross Hospital Medical Staff

IN THE MATTER OF

NIPPON SHEET GLASS COMPANY, LTD., 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-3346. Complaint, Oct. 7, 1991—Decision, Oct. 7, 1991

This consent order requires, among other things, the respondents, suppliers of wired glass, for a period of ten years, to obtain prior Commission approval before engaging any other entity in North America into any joint manufacturing, marketing or distribution agreement that involves selling to customers located in the United States.

Appearances

For the Commission: *Robert W. Doyle, Jr. and James C. Eagan, Jr.*

For the respondents: *Bruce D. Stokler, Glovsky & Popep, P.C., Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondent Nippon Sheet Glass Company, Ltd. ("Nippon") and its subsidiary, respondent NSG Holding USA, Inc. ("NSG-USA"), corporations subject to the jurisdiction of the Commission, have, pursuant to a Common Stock Purchase Agreement ("Purchase Agreement"), purchased approximately 20% of the stock or voting securities of respondent Libbey-Owens-Ford Co., ("LOF"), a subsidiary of respondent Pilkington plc ("Pilkington"), and said Purchase Agreement constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

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

a. "*Nippon*" means respondent Nippon Sheet Glass Company, Ltd., as well as its officers, employees, agents, divisions, subsidiaries (including but not limited to NSG-USA), successors, assigns, and the officers, employees, or agents of Nippon's divisions, subsidiaries, successors and assigns.

b. "*NSG-USA*" means respondent NSG Holding USA, Inc., a wholly owned subsidiary of Nippon, as well as its officers, employees, agents, divisions, subsidiaries, successors, assigns, and the officers, employees, or agents of NSG-USA's divisions, subsidiaries, successors and assigns.

c. "*Pilkington*" means respondent Pilkington plc, as well as its officers, employees, agents, divisions, subsidiaries (including but not limited to LOF), successors, assigns, and the officers, employees or agents of Pilkington's divisions, subsidiaries, successors and assigns.

d. "*LOF*" means respondent Libbey-Owens-Ford Co., a subsidiary of Pilkington, as well as its officers, employees, agents, divisions, subsidiaries, successors, assigns, and the officers, employees or agents of LOF's divisions, subsidiaries, successors and assigns.

e. "*Wired glass*" means any flat glass containing wire netting.

f. "*North America*" means the United States, Canada and Mexico.

II. THE PARTIES

2. Respondent Nippon is a corporation organized, existing, and doing business under and by virtue of the laws of Japan with its principal offices at 5-11, Doshomacho 3-chome, Chuo-Ku, Osaka, Japan.

3. Respondent Nippon is, and at all times relevant herein has been, a corporation whose business is affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

4. Respondent NSG-USA, a wholly owned subsidiary of respondent Nippon, is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its principal place of business at 1209 Orange Street, Wilmington, Delaware.

5. Respondent NSG-USA is, and at all times relevant herein has been, a corporation whose business is affecting commerce as

“commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

6. Respondent Pilkington is a corporation organized, existing, and doing business under and by virtue of the laws of England with its principal offices at Prescot Road, St. Helens, Merseyside, England WA10 3TT.

7. Respondent Pilkington is, and at all times relevant herein has been, a corporation whose business is affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

8. Respondent LOF, a subsidiary of respondent Pilkington and respondent NSG-USA, is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its principal place of business at 811 Madison Avenue, Toledo, Ohio. Prior to the transaction described in paragraph 10, LOF was wholly owned by Pilkington.

9. Respondent LOF is, and at all times relevant herein has been, a corporation whose business is affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE AGREEMENT

10. Pursuant to a Common Stock Purchase Agreement with respondent Pilkington and respondent LOF dated May 21, 1989, respondent Nippon, through respondent NSG-USA, agreed to purchase approximately 20% of respondent LOF's stock or voting securities and further agreed to allow LOF to distribute wired glass in North America produced by both Pilkington and Nippon. On or about March 12, 1990, Nippon purchased approximately 20% of LOF's voting securities for approximately \$230 million.

IV. THE RELEVANT MARKET

11. The relevant market is the distribution and sale of wired glass in North America.

V. COMPETITION

12. Respondent Nippon is engaged in the manufacture and sale of wired glass. Respondent Pilkington is engaged in the manufacture and sale of wired glass. Respondents Nippon and Pilkington are engaged in the sale of wired glass in North America.

VI. MARKET STRUCTURE

13. The wired glass market in North America is highly concentrated whether measured by the Herfindahl-Hirschmann Index ("HHI") or by a four-firm concentration ratio.

VII. BARRIERS TO ENTRY

14. The barriers to entry into the relevant market are significant.

VIII. EFFECTS

15. The effects of the aforesaid agreement and the aforesaid acquisition may be substantially to lessen competition in the market for wired glass in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) It will eliminate actual and potential competition between Nippon and Pilkington;

(b) It will significantly increase the already high levels of concentration in the market for wired glass;

(c) It will eliminate Nippon and/or Pilkington as a substantial independent competitive force in the market for wired glass; and

(d) It will enhance the possibility of collusion or interdependent coordination by the remaining firms in the market for wired glass.

IX. VIOLATIONS CHARGED

16. The acquisition of 20% of the voting securities of LOF by Nippon violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

17. The acquisition of 20% of the voting securities of LOF by Nippon violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Yao not participating.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof relating to the acquisition of certain stock or voting securities of Libbey-Owens-Ford Co. ("LOF"), a subsidiary of Pilkington plc ("Pilkington") by NSG Holding USA, Inc. ("NSG-USA"), a subsidiary of Nippon Sheet Glass Company, Ltd. ("Nippon"), pursuant to a

Common Stock Purchase Agreement, and respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Clayton Act; and

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

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

1. Respondent Nippon is a corporation organized, existing and doing business under the laws of Japan, with its office and principal place of business located at 5-11, Doshomacho 3-chome, Chuo-Ku, Osaka, Japan.

2. Respondent NSG-USA, a wholly owned subsidiary of respondent Nippon, is a corporation organized, existing and doing business under the laws of Delaware, with its office and principal place of business located at 1209 Orange Street, Wilmington, Delaware.

3. Respondent Pilkington is a corporation organized, existing and doing business under the laws of England, with its office and principal place of business located at Prescott Road, St. Helens, Merseyside, England WA10 3TT.

4. Respondent LOF, a subsidiary of respondent Pilkington, is a corporation organized, existing and doing business under the laws of Delaware, with its office and principal place of business located at 811 Madison Avenue, Toledo, Ohio.

5. 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:

1. "*Nippon*" means respondent Nippon Sheet Glass Company, Ltd., as well as its officers, employees, agents, divisions, subsidiaries (including but not limited to NSG-USA), successors, assigns, and the officers, employees, and agents of Nippon's divisions, subsidiaries, successors and assigns. LOF shall not be treated as a subsidiary of Nippon for purposes of this order.

2. "*NSG-USA*" means respondent NSG Holding USA, Inc., as well as its officers, employees, agents, divisions, subsidiaries, successors, assigns, and the officers, employees, and agents of NSG-USA's divisions, subsidiaries, successors and assigns.

3. "*Pilkington*" means respondent Pilkington plc, as well as its officers, employees, agents, divisions, subsidiaries (including but not limited to LOF), successors, assigns, and the officers, employees and agents of Pilkington's divisions, subsidiaries, successors and assigns.

4. "*LOF*" means respondent Libbey-Owens-Ford Co., as well as its officers, employees, agents, divisions, subsidiaries, successors, assigns, and the officers, employees and agents of LOF's divisions, subsidiaries, successors and assigns.

5. "*Wired glass*" means any flat glass containing wire netting.

I.

It is ordered, That for a period of ten (10) years from the date this order becomes final, respondent Nippon and respondent Pilkington, directly or indirectly, or through any corporate or other device including respondent LOF, shall cease and desist, without the prior approval of the Federal Trade Commission, from engaging together in North America in any marketing or manufacturing joint venture, corporate or non-corporate, or joint distribution agreement, to sell wired glass, directly or indirectly, to customers located in the United States.

II.

It is further ordered, That within ten (10) days after the date this

order becomes final, respondent Nippon and respondent Pilkington shall each distribute a copy of this order to its current directors and corporate officers at the level of the parent company, and to the directors and officers of each subsidiary involved in the manufacture or sale of wired glass.

III.

It is further ordered, That within thirty (30) days after the date this order becomes final, and at such other times as the Commission or its staff may require, each respondent shall submit to the Commission a verified report setting forth in detail the manner and form in which it has complied with this order.

IV.

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 by the Commission or its staff and on reasonable notice to any respondent made to its principal office, such respondent shall permit duly authorized representatives of the Commission:

A. Reasonable access during respondent's office hours, in the presence of counsel, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of respondent relating to any matters contained in this order, for inspection and copying; and

B. An opportunity, subject to respondent's reasonable convenience, to interview, in the presence of counsel, officers or employees of respondent regarding such matters.

V.

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

Commissioner Yao not participating.

IN THE MATTER OF
AMERICAN MEDICAL ASSOCIATION

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

Docket 9064. Final Order, Oct. 12, 1979—Modifying Order, Oct. 10, 1991

This order reopens the proceeding and modifies the Commission's order issued on Oct. 12, 1979 [94 FTC 701], by allowing the respondent to give its member organizations the choice of: supplying the certification originally required; or allowing the AMA to review their codes of ethics and other materials to ensure that they are not restricting truthful advertising, or interfering with the compensation physicians are offered in contracts for their services.

ORDER REOPENING AND MODIFYING ORDER
ISSUED ON OCTOBER 12, 1979

On June 14, 1991, the American Medical Association ("AMA") filed a petition pursuant to Section 5(b) of the Federal Trade Commission Act and Rule 2.51 of the Commission's Rules of Practice requesting that the Commission reopen and modify its order in Docket No. 9064. The litigated order,¹ which became final on July 2, 1982, prohibits AMA from restricting truthful, nondeceptive advertising, and from interfering with the amount or form of compensation provided a physician in exchange for his or her professional services in contracts with entities offering physician services to the public. AMA's petition asks the Commission to reopen the order and delete paragraph IV(D), which requires AMA to obtain certifications from its state and local societies that they agree to adhere to the requirements of the order, or, in the alternative, to substitute for it two additional proposed provisions. For the reasons set forth below, the Commission denies AMA's request to modify the order by deleting paragraph IV(D) and grants AMA's alternative request to modify the order by adding the two new provisions proposed by AMA.

I.

The Commission issued its order against AMA after finding that

¹ *American Medical Association*, 94 FTC 701 (1979), *modified*, 638 F.2d 443 (2d Cir. 1980), *affirmed by an equally divided Court*, 452 U.S. 960 (1982).

AMA had violated Section 5 of the Federal Trade Commission Act by, among other things, restricting the ability of its member physicians (1) to engage in truthful, non-deceptive advertising and (2) to freely contract to sell their services. In addition to prohibiting AMA itself from engaging in such conduct, the order contains two provisions designed to ensure that AMA's constituent (state) and component (local) societies also do not illegally restrict physician advertising and contract practices.

The first provision that concerns AMA's affiliates, which is the subject of AMA's petition, is paragraph IV(D) and it provides that AMA is to:

[r]equire as a condition of affiliation with respondent that any constituent or component organization agree by action taken by the constituent or component's governing body to adhere to the provisions of Parts I, II, and III of this order.

The second provision, paragraph IV(E), requires AMA to disaffiliate any of its constituent or component organizations that AMA knows or has reason to know is engaging in conduct that if engaged in by AMA would violate the order.

II.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent makes a satisfactory showing that changed conditions of law or fact require such modification. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that those changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4.

If the Commission determines that a petitioner has made the required showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of such modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one, given the public interest in the finality of Commission orders. See *Federal Department Stores v. Moitie*, 452

U.S. 394 (1981) (strong public interest considerations support repose and finality).

In addition, Section 5(b) provides that the Commission has discretion to modify an order when, in its opinion, the public interest requires such modification. Accordingly, Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, invites respondents, in petitions to reopen, to show how the public interest warrants the requested modification. To obtain review on this ground, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 24, 1984), at 2 ("Damon Letter") (unpublished). If the respondent satisfies this threshold requirement, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. Damon Letter at 2.

AMA argues that there have been changes of fact since the order was entered sufficient to render paragraph IV(D) unnecessary. AMA argues that advertising and contract practice by physicians has become commonplace, and that since the order was issued state and local medical societies have come to understand the antitrust laws and generally have ceased restricting truthful advertising and lawful contract practice.

Even assuming that AMA is correct that such changes have occurred, they are not changes that eliminate the need for paragraph IV(D) or make continued application of that provision inequitable or harmful to competition.² The changes cited by AMA—that state and local medical societies have come to understand the antitrust laws, that they generally have ceased restricting truthful advertising and lawful contract practice, and that advertising and contract practice by physicians has become commonplace—were foreseeable at the time the order was issued; they were precisely the changed circumstances the Commission intended to achieve when it issued the order. The fact that an order is having the effect sought by the Commission offers no basis for eliminating one of its provisions.

² The Commission does not necessarily agree with AMA that the physician services market is free of restrictions on advertising and contract practice. While some state and local medical societies may have brought themselves into compliance with the antitrust laws since the *AMA* Order, others have not. For example, in 1987 the Commission issued a consented-to order against the Tarrant County Medical Association prohibiting Tarrant County from restricting truthful, nondeceptive advertising. *Tarrant County Medical Society*, 110 FTC 119. Moreover, AMA has offered no evidence that it has taken any steps to determine whether its affiliates unlawfully are restricting physician advertising or contract practice; thus, its statement that the market is free of such restrictions is not supported.

AMA also argues that because its state and local societies are not bound by AMA policies, and because AMA does not have the power to disaffiliate them—and thus has no power to force them to agree by action taken by their governing bodies to adhere to the order—it is impossible for it to comply with paragraph IV(D). AMA used this argument to challenge both paragraphs IV(D) and IV(E) when this matter was in litigation; this argument, however, has been considered, and rejected, by the Commission and by the Second Circuit,³ and AMA has provided nothing to indicate that anything has occurred since the order was issued that would make its argument any more compelling today. Moreover, AMA's argument is even less persuasive now because since the order was issued AMA has never tried to comply with paragraph IV(D)—it has never asked its affiliates for the assurances required by that provision of the order.

Further, to the extent that AMA's argument is that it cannot comply with paragraph IV(D) because it is impossible for it to disaffiliate a constituent or component, AMA's argument is not persuasive. There is nothing in AMA's Constitution or Bylaws that prevents AMA's House of Delegates—AMA's decision-making body—from refusing to recognize an affiliate that does not adopt the required resolution. Moreover, such a power is acknowledged by Section 6.4014 of AMA's Bylaws, which addresses the issue of a denial of membership in a component or constituent on the basis of "color, creed, race, religion, ethnic origin, national origin, or sex."⁴ The fact is that AMA is its House of Delegates. Therefore, even if AMA believes it currently does not have the power to disaffiliate a constituent society, it could, through its House of Delegates, amend its bylaws specifically to provide for disaffiliation of any constituent organization in the event that the constituent, or one of the constituent's local societies, does not adopt the resolution required by paragraph IV(D). By arguing that "the most that the AMA can do is ask the House of Delegates to adopt a by-law amendment authorizing the House, by a majority vote, to refuse to seat the delegation of a state society that did not adopt the order," AMA seems to suggest that AMA's House of Delegates is some unrelated third-party. AMA

³ The Commission found that "AMA's claim that it does not have the power to disaffiliate state and local medical societies is without merit." 94 FTC at 1031-32. The Second Circuit addressed the disaffiliation issue in the context of AMA's argument that the disaffiliation provision violated AMA's due process rights. The court rejected this argument and expressly affirmed paragraph IV(D), as well as paragraph IV(E). 638 F.2d at 453.

⁴ In the event of repeated discrimination on the basis of "color, creed, race, religion, ethnic origin, national origin, or sex" by an AMA constituent, the AMA House of Delegates may declare the constituent "no longer a constituent member of the American Medical Association."

Memorandum in Support of Petition, at 17. This is not the case. The House of Delegates and AMA are the same entity, and it is within AMA's control to do whatever it has to do to bring itself into compliance with the order.

In support of its impossibility argument, AMA cites two cases, neither of which the Commission finds applicable. In the first case cited by AMA, *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 781 (9th Cir. 1983), a district court had held Falstaff in contempt for refusing to produce certain documents. The Ninth Circuit reversed, holding that it was impossible for Falstaff to produce the documents since they most likely were lost and therefore no longer within Falstaff's control. In contrast, as discussed above, it is well within AMA's power to require that its constituent and component organizations adopt the required resolution. Similarly, in *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d 1114, 1120 (3rd Cir. 1979), the Third Circuit ruled that the district court did not err in modifying a decree where "[d]espite a good faith effort at compliance, circumstances largely beyond the defendants' control and not contemplated by the court or the parties in 1976 put achievement of [court-mandated goals] beyond reach." This case is not applicable because: (1) AMA has made no attempt to comply with paragraph IV(D); (2) the means of complying are within AMA's control; and (3) no circumstances not contemplated by the court or the parties when the order was entered put achievement of compliance with paragraph IV(D) "beyond [AMA's] reach." While an attempt by AMA to disaffiliate a constituent for any reason is likely to provoke some controversy within AMA, Section 6.4014 shows that it is not "impossible."

The Commission is not persuaded either by AMA's argument that changes of fact require the Commission to vacate paragraph IV(D), or by AMA's argument that it is impossible for it to comply with paragraph IV(D), and, thus, that it would be inequitable for the Commission to insist upon compliance with that provision. AMA has not met its burden of demonstrating changed circumstances of fact that require the Commission to reopen the order and vacate paragraph IV(D), and the Commission therefore denies that part of AMA's request.

III.

AMA, in the alternative, requests that the Commission, in the public

interest, reopen and modify the order to add two provisions proposed by AMA. According to AMA's petition, AMA, pursuant to the proposed provisions, would collect information regarding the advertising and contract practices of its affiliates that comprise at least 40% of the total members of its constituents and large components,⁵ review the practices to ensure that the constituents and components are not illegally restricted advertising or contract practice, and, if necessary, work with the constituents and components to correct their practices. The remainder of AMA's constituents and large components would supply the resolutions required by paragraph IV(D). If after two years AMA has fulfilled the obligations imposed upon it by the two proposed provisions, the Commission would consider AMA's obligations satisfied under paragraph IV(D).

As a general rule the Commission will not reopen an order when it has reason to believe that a respondent is in violation of the provision it seeks to modify. *Union Carbide Corporation*, 108 FTC 184, 185 (1986). Circumstances that lead the Commission to make an exception to its *Union Carbide* rule are rare; in most situations the reasons for the policies underlying the *Union Carbide* rule will clearly outweigh any justifications proffered for the requested modification. Although the Commission believes that AMA currently is in violation of paragraph IV(D),⁶ it has determined that the public interest is served by modifying the order as AMA requests. In particular, the Commission finds that the modification AMA proposes furthers the purposes of the order, and the Commission's competition policy, better than does paragraph IV(D), the provision for which AMA seeks modification.

Neither of the two order provisions that affect AMA's constituents and components require AMA to conduct any review of the constituents' or components' advertising or contract practices. Paragraph IV(D) requires only that AMA's constituent and component organizations agree to adhere to the order; paragraph IV(E), while it does require AMA to disaffiliate any of its constituents or components that AMA has reason to believe are engaging in conduct that if engaged in by AMA would violate the order, does not require AMA to make any efforts to determine whether its constituents and components are

⁵ "Large components" are defined by the proposed modification to include AMA's 250 largest components, which comprise approximately 90% of the members of all AMA components.

⁶ AMA's argument that paragraph IV(D) was intended to apply prospectively—that it was intended to apply only to newly affiliated component and constituent organizations—is without merit. Given the unlikely addition of many new state and local medical societies, such an interpretation would render the provision useless.

engaged in such conduct. The modification AMA proposes, however, will encourage AMA to engage in a program of procompetitive self-regulation and to work with its affiliates to bring them into conformance with the *AMA* order. This expands the reach of the order, furthers the Commission's competition mission, and fosters legitimate, procompetitive self-regulation by AMA consistent with other provisions of the order.⁷

In addition, AMA's proposed modification will further the public interest because it provides that AMA will forward to the Commission copies of all Codes of Ethics that AMA receives from its affiliates. When a professional organization restricts truthful, nondeceptive advertising, its restrictions often are reflected in its Code of Ethics; the Codes AMA is obligated to forward to the Commission, therefore will provide the Commission with valuable information concerning the compliance of state and local medical societies with the antitrust laws. Finally, because substantially all of AMA's constituents and components will submit to AMA either resolutions agreeing to adhere to the requirements of the order, or documents reflecting their advertising and contract practices, substantially all of AMA's constituents and components to one degree or another will be re-evaluating their activities to ensure that they do not illegally restrict physician advertising or contract practice.

IV.

AMA has not demonstrated any changed conditions of fact or law that would require the Commission to reopen and modify the order to eliminate paragraph IV(D). With respect to AMA's alternative request, the Commission finds that the public interest would be served by adding to the order the two provisions proposed by AMA. The Commission therefore grants AMA's alternative request.

Accordingly, *it is ordered*, that the Commission's order in Docket No. 9064 be reopened and modified to append the following two provisions to paragraph IV of the order:

F. (1) Within sixty (60) days of the date of receipt by respondent of

⁷ The Commission modified the original order in this case, entered by the Administrative Law Judge, to permit AMA to adopt and enforce reasonable guidelines with respect to advertising that would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, and to disseminate guidelines proscribing uninvited, in-person solicitation of actual or potential patients, who, because of their particular circumstances, are vulnerable to undue influence. The Commission gave as its reason for so modifying the order that the Commission firmly believed that AMA has a "valuable and unique role" to play with respect to deceptive advertising and oppressive forms of solicitation by physicians. 94 FTC 701, 1029-1030 (1979).

this modified Part IV(F) ("the effective date"), send a letter to each of its constituent organizations ("constituents"), and each of its 250 largest component organizations ("large components"), that gives the constituents and large components the choice of submitting to respondent:

Option 1

a statement adopted by the organization's governing body agreeing to adhere to Parts I, II and III of this Order. -or-

Option 2

a copy of the organization's current Code of Ethics, all other codes of ethics to which the organization adheres, and other documents relating to its position on physician advertising and contract practices. Such other documents shall consist of the following materials adopted or in effect at any time from January 1, 1987, that relate to physician advertising or contract practice:

- (a) resolutions and policies;
- (b) rules, guidelines, and regulations, and any interpretations of its, or of AMA's Code of Ethics;
- (c) formal and informal advice; and
- (d) records of any formal or informal disciplinary proceedings.

(2) Within 180 days of the effective date, file with the Commission:

- (a) a verified statement that the mailing required by subpart F(1) above was completed;
- (b) a list of all constituents and large components that AMA has reason to believe have not provided either the statement required by Option 1 or all documents required by Option 2;
- (c) any resolutions submitted to respondent pursuant to Option 1 and copies of any Codes of Ethics submitted to respondent pursuant to Option 2 in response to the mailing required by subpart F(1) above.

(3) For a period of five [5] years after the effective date, maintain the documents that it receives in response to Option 2.

(4) Within 24 months of the effective date, file with the Commission a report in writing:

- (a) listing all constituents and large components that respondent has reason to believe, from information obtained by respondent in connection with the mailing required by subpart F(1), are engaging

in conduct at the time of the report that if engaged in by respondent would violate Parts I, II, or III of this order;

(b) setting forth the basis for respondent's belief that the constituents and large components identified in subpart (4)(a) are engaging in conduct that if engaged in by respondent would violate Parts I, II or III of this order;

(c) detailing any changes made by constituents and large components in their Codes of Ethics that respondent submitted to the Commission pursuant to subpart (2)(c) above since the time that such Codes were submitted to the Commission; and

(d) stating whether it believes it has satisfied the requirements of subparts (1) and (2) of Part IV(G) below, and detailing its reasons for such belief.

G. Respondent's obligations under Part IV(D) of this order are stayed for a period of 24 months from the effective date. After such 24 months, the Commission will notify respondent that its obligations under Part IV(D) are satisfied if:

(1) Respondent's constituents are large components, to the best of respondent's knowledge, have provided all documents responsive to Option 1 or Option 2 of the letter sent by respondent to such constituents and large components pursuant to subpart (F)(1) above; and

(2) Constituents comprising at least 40% of the total members of respondent's constituents, and large components comprising at least 40% of the total members of all large components have chosen Option 2 in response to the mailing required by subpart (F)(1) above.

Commissioner Azcuenaga dissenting and Commissioner Yao not participating.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I dissent from the decision of the majority to reopen and modify the order as proposed by the American Medical Association ("AMA"). First, under *Union Carbide Corp.*, 108 FTC 184 (1986), the Commission should deny the petition on the ground that the AMA currently is in violation of the original order. Second, the AMA has failed to show changed conditions of fact or law or public interest considerations that warrant reopening the order. *See, e.g., Canada Cement Lafarge Ltd.*, 111 FTC 590, 591-92 (1989); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5,

1986), at 4. Third, the changes proposed by the AMA and accepted by the majority, while superficially minor, weaken a significant order provision and grant extraordinary and ill-advised concessions to the AMA.

As the Commission concludes and as the AMA admits, AMA is not, and never has been, in compliance with the final order of the Commission issued in 1982. “[G]enerally [the Commission] should refrain from reopening an order provision when there exists reason to believe that a respondent is in violation of the very provision it seeks to modify.” *Union Carbide*, 108 FTC at 185. Certainly, the Commission should refrain from reopening an order that a respondent is currently violating, without articulating good reason for the exception to this principle.

Paragraph IV(D) of the Commission’s 1982 order directs the AMA to require that its constituent and component organizations agree to abide by the order as a condition of affiliation. The AMA vigorously resisted this provision during the litigation, but it was specifically endorsed by the Commission and affirmed by the Court of Appeals. *American Medical Association*, 94 FTC 701, 1031-32 (1979), *modified*, 638 F.2d 443, 453 (2d Cir. 1980), *aff’d by an equally divided Court*, 452 U.S. 960 (1982). Nonetheless, as early as October 1982, the AMA communicated to the Commission its refusal to comply with this paragraph of the order, and it has openly and consistently refused to comply since that time.

Despite the AMA’s longstanding and flagrant violations of the order, the majority creates an exception to the general rule set forth in *Union Carbide*, on the ground that the modification “furthers the purposes of the Order, and the Commission’s competition policy better than” the existing order. Order of the Commission at page 6. The exception is so broad that it swallows the rule. In *Union Carbide*, the Commission concluded:

The public interest is served by denying a request for reopening and modification of an order provision while compliance issues remain unresolved. This action by the Commission will enhance its ability to ensure compliance with this order and other outstanding orders, enhance the deterrent effect of all orders and of Section 5 itself, and serve to discourage ‘self-help’ order modifications.

108 FTC at 187. The point of *Union Carbide* is that even beneficial and procompetitive modifications should be rejected while the respondent is violating the order.

Reopening an order may be warranted in the public interest when the respondent shows as a threshold matter some affirmative need to modify the order, usually a competitive disadvantage resulting from the order. Absent a showing, there is no justification for revisiting a final order. The majority here states the correct standard but fails to apply it. The AMA does not allege competitive disadvantage and even if we might infer a showing of need from the AMA's petition, the discussion of the majority regarding the AMA's ability to comply with the order indicates that the AMA has not shown need sufficient to justify reopening. *See* Order Reopening and Modifying Order in Docket No. 9064 at 3 and 6. The public interest in repose and the finality of orders is threatened when the decisionmaker is willing to reopen and modify orders without the requisite showing.

The modification that the Commission has granted does not strengthen, but rather seriously weakens, paragraph IV(D), a key part of the order. Indeed, this order modification contains virtually unprecedented concessions to a respondent. The most remarkable concession appears in new paragraph IV(G)(1), which provides that if the AMA satisfies two modest conditions within two years "the Commission will notify [AMA] that its obligations under Part IV(D) are satisfied." In most orders, the respondent is obligated to send compliance reports to the Commission, but this order, for no reason, turns the usual practice on its head and obligates the Commission to report to, and essentially to bless, the AMA.

In this order modification, the Commission relinquishes its order enforcement role to the AMA. In effect, the Commission appoints the AMA guardian of the proverbial chicken coop despite its years of defying the order. The AMA, not the FTC, will be the entity evaluating whether practices violate the order. Paragraph IV(F) of the modified order contemplates that the AMA will undertake a survey of antitrust compliance by some of its constituents and components. Although private efforts to monitor antitrust compliance are to be encouraged, they have not in the past been acceptable substitutes for compliance with Commission orders.

The modified order requires the AMA to obtain certain relevant documents related to advertising regulations from its affiliates, but does not provide for Commission access to these important documents. The AMA is not required to turn these documents over to the Commission or to make them available for inspection by the Commission. Instead of providing all relevant documents, the AMA

will turn over to the Commission only the affiliates' Codes of Ethics, which are widely distributed public documents.

Virtually every order entered by the Commission in recent history has contained a requirement that the respondent make the relevant compliance documents available for inspection during reasonable business hours. The reason for insisting on access to the relevant documents is to enable the Commission to verify compliance. The order, as modified, includes no such provision. The majority provides no explanation of its decision to omit the usual means to verify compliance.

Few possible explanations for the action of the majority present themselves. Has the majority decided implicitly to overrule *Union Carbide* without acknowledging it or explaining why? Has the Commission changed its firm and long-standing commitment to the finality and enforcement of its orders? I have searched in vain for a reason I can understand, regardless of whether I agree with it. Unfortunately, no creditable explanation comes to mind. At best, today's decision is an aberration, not to be repeated. For the sake of the Commission's overall law enforcement program, I can only hope it will be so viewed.

I emphatically dissent.