IN THE MATTER OF

OSRAM SYLVANIA INC.

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

Docket C-3471. Complaint, Nov. 17, 1993--Decision, Nov. 17, 1993

This consent order prohibits, among other things, a Massachusetts-based corporation from misrepresenting the light output, wattage, and energy cost savings of any of its light bulbs, except for certain specialty bulbs. The respondent is also required to disclose, whenever it claims electricity cost savings or any environmental benefits for its bulbs, that the bulbs produce less light than the bulbs to which they are compared, if true.

Appearances

For the Commission: *Phoebe Morse, Sara Greenberg* and *Joel Winston.*

For the respondent: *David Grossi, Bowditch & Dewe*, Worcester, MA. and *Robert Paul, Shaw Pittman, Potts & Trowbridge*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that OSRAM SYLVANIA Inc., a corporation, hereinafter sometimes referred to as 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 OSRAM SYLVANIA Inc. is a Delaware corporation, with its offices and principal place of business located at 100 Endicott Street, Danvers, MA.

PAR. 2. Respondent has advertised, offered for sale sold, and distributed throughout the United States incandescent light bulbs under the trade names "Sylvania" and "Energy Saver."

PAR. 3. The acts or practices of respondent alleged in this complaint constitute the maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated package labels for its Energy Saver incandescent light bulbs, including but not necessarily limited to the attached Exhibits A through D. These package labels note the environmental and economic benefits of respondent's light bulbs by way of statements such as "Sylvania is committed to conserving the Earth's natural resources with a full line of energy saving products," and "save up to 15% in energy every second they burn" and describing the cost savings from using Energy Saver light bulbs instead of ordinary light bulbs.

PAR. 5. Respondent has also disseminated package labels for its Energy Saver "ellipsoidal reflector" bulbs including but not necessarily limited to the attached Exhibits E and F. These package labels state that the ellipsoidal reflector bulbs, which are designed for use in recessed, down fixtures, use "only 50% as much energy as . . . ordinary . . . light bulb[s]" and that their special reflector feature allows the bulbs to provide "as much useable light as . . . ordinary . . . watt bulb[s]. . . .

PAR. 6. The Energy Saver packaging suggests that consumers replace light bulbs of a particular wattage with a corresponding Energy Saver replacement light bulb. The corresponding Energy Saver light bulbs have less wattage than the bulbs they are designed to replace.

A. Respondent has offered, for example, a 90 watt Energy Saver incandescent bulb to replace ordinary 100 watt bulbs, a 67 watt Energy Saver incandescent bulb to replace ordinary 75 watt bulbs, a 52 watt Energy Saver incandescent bulb to replace ordinary 60 watt bulbs, and a 34 watt Energy Saver incandescent bulb to replace ordinary 40 watt bulbs.

B. Respondent has also offered a 75 watt Energy Saver ellipsoidal reflector bulb to replace ordinary 150 watt bulbs and a 50 watt Energy Saver ellipsoidal reflector bulb to replace ordinary 100 watt bulbs.

PAR. 7. The Energy Saver incandescent bulb packages, rather than prominently displaying the wattage of the light bulbs contained inside the package, display the wattage of the light bulb being replaced (*e.g.*, "100") in large prominent black numerals in the middle of the front panel (4-pack and 2-pack) and on the back panel as well on the 4-pack package. Below, in substantially smaller black print, is a phrase such as "[100] watt replacement for [90] watts." The second numeral *i.e.*, in the example given, the numeral 90, is depicted in black print that is substantially thinner and smaller than the larger numeral depicted above it. There is a further small black print statement of the lumens of the light bulb inside (*e.g.*, "Avg. lumens 1540"), but no adequate disclosure of the number of lumens of the ordinary light bulb being replaced or whether the ordinary bulb produces more light than the Energy Saver bulb. Moreover the side panel of the packages contains the statement that the Energy Saver bulbs provide "full light output."

PAR. 8. The Energy Saver ellipsoidal reflector bulb packages, rather than prominently displaying the wattage of the light bulbs contained inside the package, display the wattage of the light bulb being replaced (*e.g.*, "150") in large prominent black numerals on the front and back panels, followed on the same line by the phrase "[150] watts of light for [75] watts." The second numeral, *i.e.*, in the example given, the numeral 75, is depicted in black print that is substantially thinner and smaller than the larger numeral depicted prior to it. These packages contain no lumen disclosure. The side panels of the packages contain a statement that these bulbs provide "as much useable light as an ordinary [150] watt bulb."

PAR. 9. Through the use of the statements and depictions on the package labels referred to in paragraphs four, five, six, seven and eight above, including but not necessarily limited to the package

labels attached as Exhibits A through F, respondent has represented, directly or by implication, that:

A. The Energy Saver 90, 67, 52, and 34 watt incandescent light bulbs will provide the same amount of light as the ordinary 100, 75, 60 and 40 watt light bulbs that they are designed to replace.

B. Each Energy Saver incandescent light bulb will save consumers up to 15% in energy costs.

C. The Energy Saver 75 and 50 watt ellipsoidal reflector light bulbs will provide the same amount of light as the ordinary 150 and 100 watt light bulbs they are designed to replace.

PAR. 10. In truth and in fact:

A. The Energy Saver 90, 67, 52, and 34 watt incandescent light bulbs will not provide the same amount of light as the ordinary 100, 75, 60, and 40 watt light bulbs that they are designed to replace. The Energy Saver incandescent light bulbs use fewer watts and provide fewer lumens (a standard measurement of light output) than the light bulbs they are designed to replace.

B. The Energy Saver 90, 67, and 52 watt incandescent light bulbs will not save consumers up to 15% in energy costs. These Energy Saver bulbs save, respectively, only 10%, 10.7% and 13.3% in energy costs compared to the energy usage of the bulbs that they are designed to replace. Only the Energy Saver 34 watt light bulb provides savings of 15% compared to the 40 watt ordinary light bulb it is designed to replace.

C. The Energy Saver 75 and 50 watt ellipsoidal reflector light bulbs will not provide the same amount of light as the ordinary 150 and 100 watt light bulbs that they are designed to replace. The Energy Saver ellipsoidal reflector light bulbs use fewer watts and provide fewer lumens than the light bulbs they are designed to replace.

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

PAR. 11. In its sale of Energy Saver incandescent and ellipsoidal reflector light bulbs, respondent has represented, directly or by implication, that use of Energy Saver light bulbs will save energy, lower consumers electricity costs, and conserve natural resources, as compared to the ordinary light bulbs that they are designed to replace, but has failed to disclose adequately that the Energy Saver bulbs will provide less light than the light bulbs they are designed to replace. This fact would be material to consumers in their purchase or use decisions regarding the product. The failure to disclose adequately this fact, in light of the representations made, was, and is, a deceptive practice.

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

EXHIBIT A-1

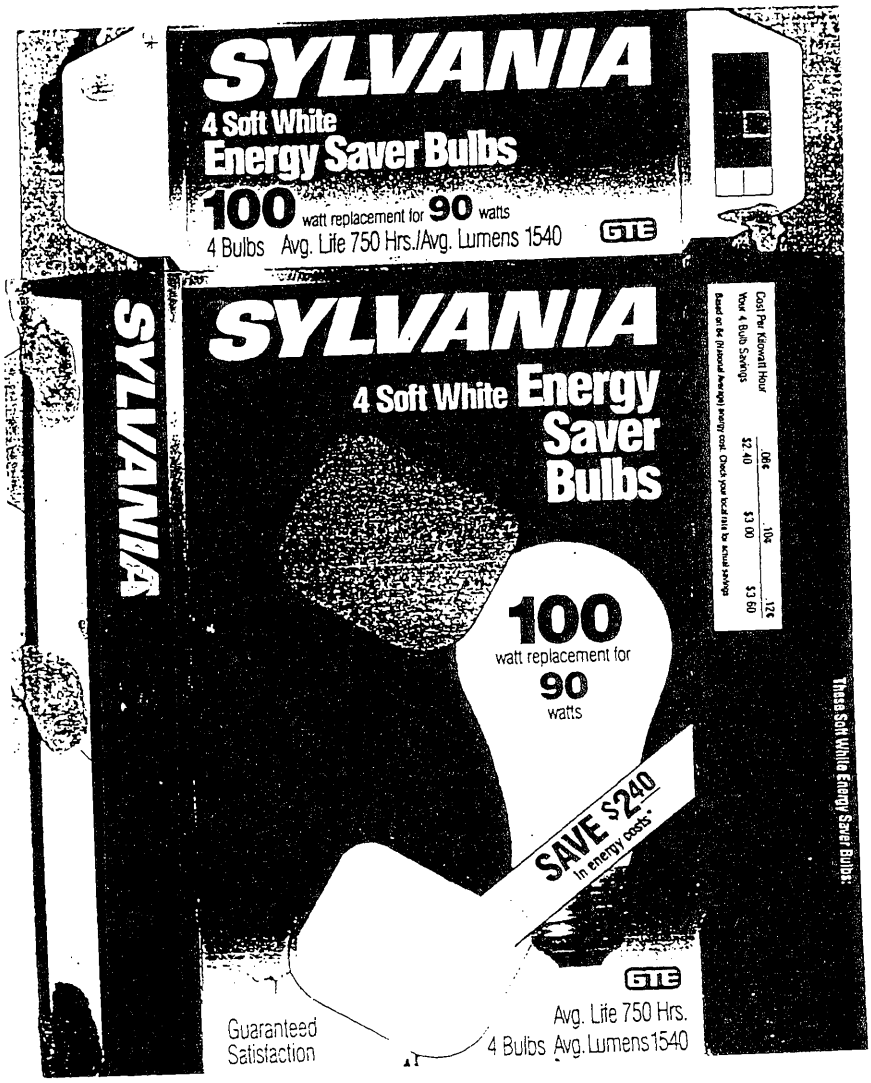

SYLVANIA
4 Soft White
Energy Saver Bulbs
100 watt replacement for 90 watts
4 Bulbs Avg. Life 750 Hrs./Avg. Lumens 1540
GTE
SYLVANIA
SYLVANIA
4 Soft White Energy Saver Bulbs
Cost Per Kilowatt Hour
Your 4 Bulb Savings
06¢ 10¢ 12¢
$2.40 $3.00 $3.60
100
watt replacement for
90
watts
SAVE $2.40
In energy costs.*
GTE
Guaranteed Satisfaction
Avg. Life 750 Hrs.
4 Bulbs Avg. Lumens 1540
These Soft White Energy Saver Bulbs

EXHIBIT A-2

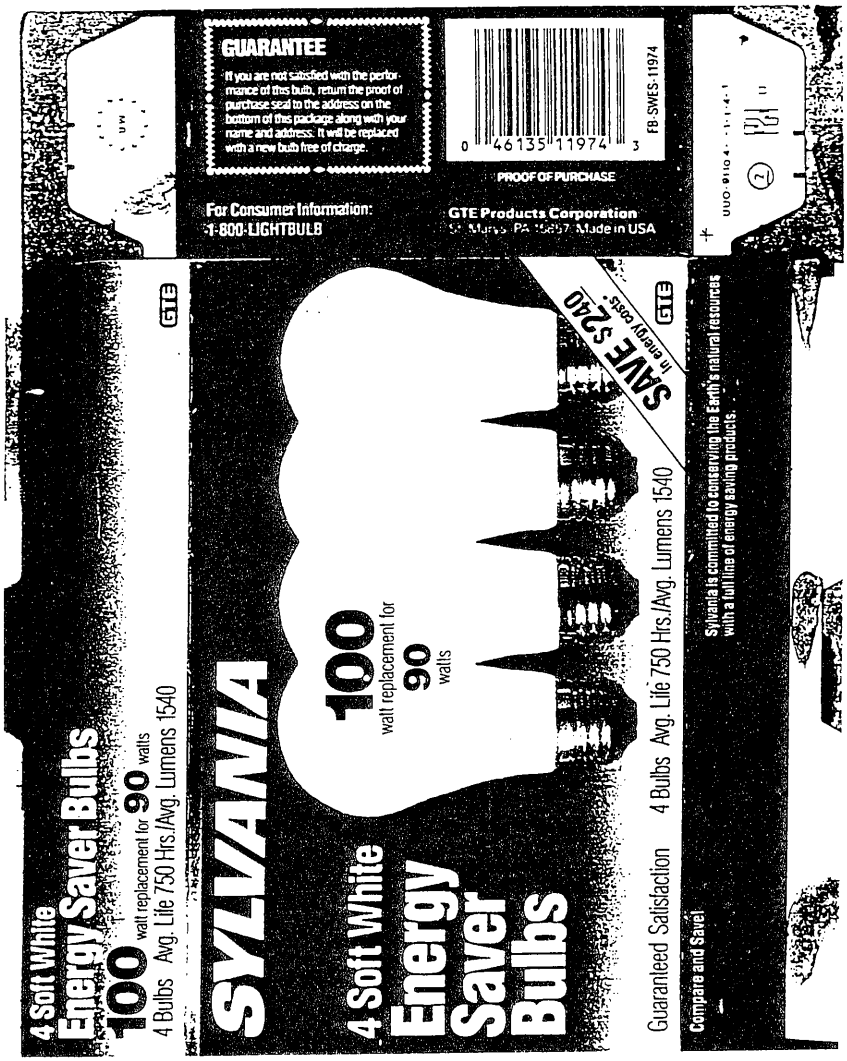

GUARANTEE
If you are not satisfied with the performance of this bulb, return the proof of purchase seal to the address on the bottom of this package along with your name and address. It will be replaced with a new bulb free of charge.
0 46135 11974 3
FB-SWES-11974
PROOF OF PURCHASE
For Consumer Information:
1-800-LIGHTBULB
GTE Products Corporation
Made in USA
4 Soft White
Energy Saver Bulbs
100 watt replacement for 90 watts
4 Bulbs Avg. Life 750 Hrs./Avg. Lumens 1540
SYLVANIA
100
watt replacement for
90
watts
SAVE $240
in energy costs
Guaranteed Satisfaction
Sylvania is committed to conserving the Earth's natural resources with a full line of energy saving products.
Compare and Save!

EXHIBIT A-3


Soft White
Energy Saver Bulbs
100 watt replacement for 90 watts GTE
2 Bulbs Avg. Life 750 Hrs./Avg. Lumens 1540
SYLVANIA
SYLVANIA
Soft White
Energy
Saver
Bulbs
100
watt replacement for
90
watts
Soft White
Energy
Saver
Bulbs
Guaranteed Satisfaction
2 Bulbs Avg. Life 750 Hrs.
Avg. Lumens 1540
SAVE $120
In energy costs.*
GTE
For Consumer Information: 1-800-LIGHTBULB
FB-SWES-11972
GTE Products Corporation
St. Marys, PA 15857 Made in USA

EXHIBIT A-4

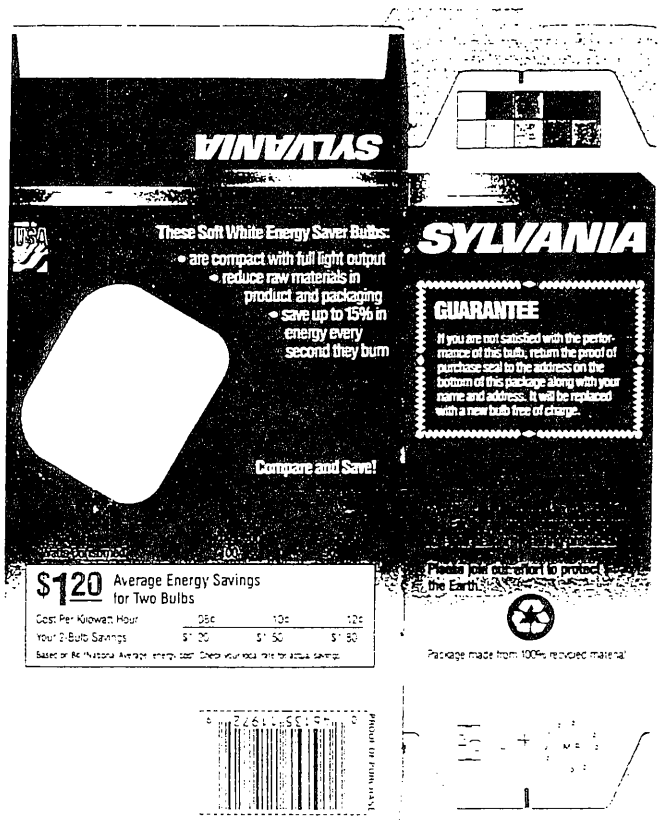

SYLVANIA
These Soft White Energy Saver Bulbs:
• are compact with full light output
• reduce raw materials in product and packaging
• save up to 15% in energy every second they burn
Compare and Save!
SYLVANIA
GUARANTEE
If you are not satisfied with the performance of this bulb, return the proof of purchase seal to the address on the bottom of this package along with your name and address. It will be replaced with a new bulb free of charge.
$120 Average Energy Savings for Two Bulbs
Cost Per Kilowatt Hour 08¢ 10¢ 12¢
Your 2-Bulb Savings $1.00 $1.50 $1.80
Please join our effort to protect the Earth.
Package made from 100% recycled material

EXHIBIT B-1

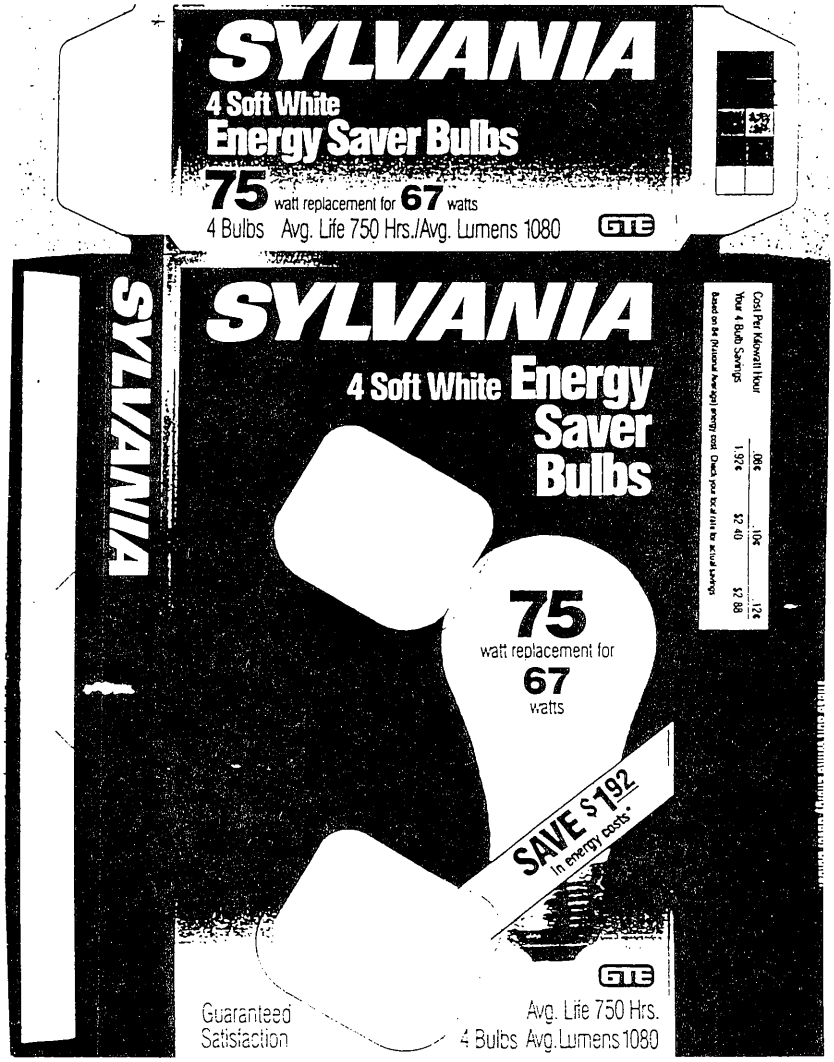

SYLVANIA
4 Soft White
Energy Saver Bulbs
75 watt replacement for 67 watts
4 Bulbs Avg. Life 750 Hrs./Avg. Lumens 1080
GTE
SYLVANIA
SYLVANIA
4 Soft White Energy Saver Bulbs
75
watt replacement for
67
watts
SAVE $1.92
in energy costs.*
GTE
Guaranteed Satisfaction
Avg. Life 750 Hrs.
4 Bulbs Avg. Lumens 1080
Cost Per Month/1 Hour
Your 4 Bulb Savings
1.92¢
$2.40
$2.88

EXHIBIT B-2

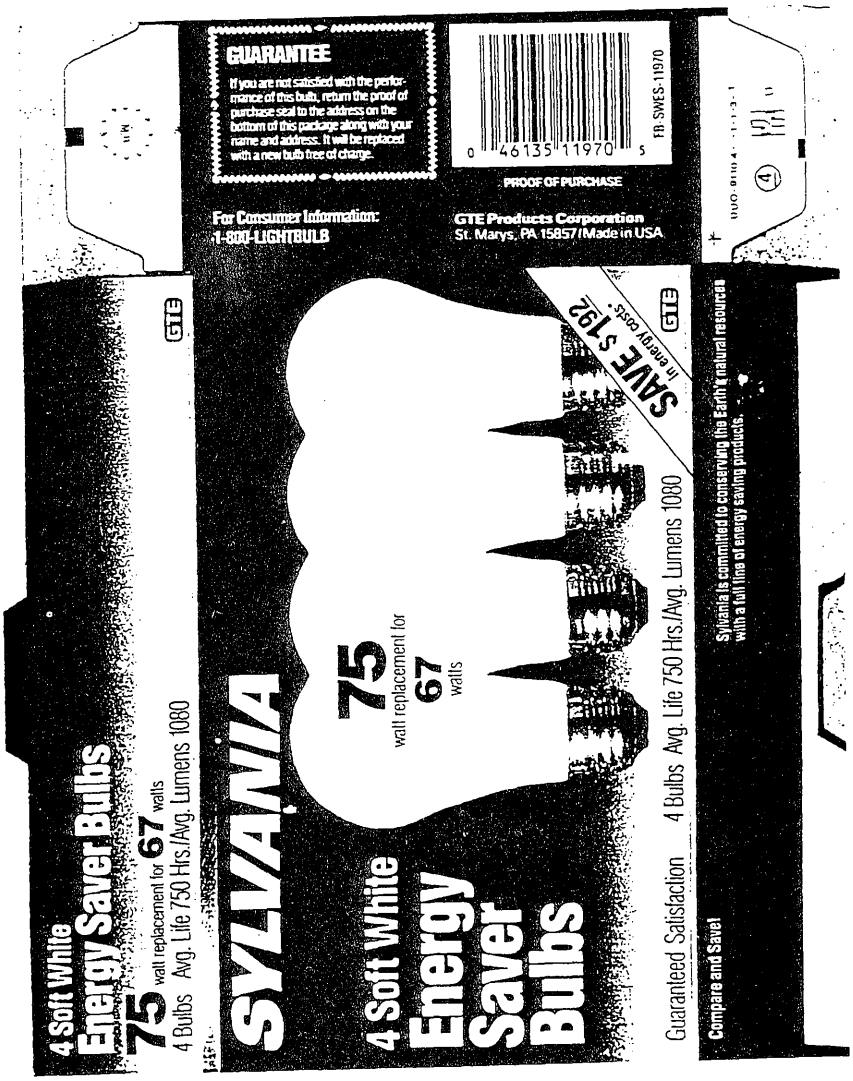

GUARANTEE
If you are not satisfied with the performance of this bulb, return the proof of purchase seal to the address on the bottom of this package along with your name and address. It will be replaced with a new bulb free of charge.
For Consumer Information: 1-800-LIGHTBULB
GTE Products Corporation St. Marys, PA 15857/Made in USA
PROOF OF PURCHASE
FB-SWES-11970
4 Soft White Energy Saver Bulbs
75 watt replacement for 67 watts
4 Bulbs Avg. Life 750 Hrs./Avg. Lumens 1080
GTE
SYLVANIA
4 Soft White Energy Saver Bulbs
75 watt replacement for 67 watts
SAVE $192 in energy costs.
Guaranteed Satisfaction 4 Bulbs Avg. Life 750 Hrs./Avg. Lumens 1080
Sylvania is committed to conserving the Earth's natural resources with a full line of energy saving products.
Compare and Save!

EXHIBIT B-3

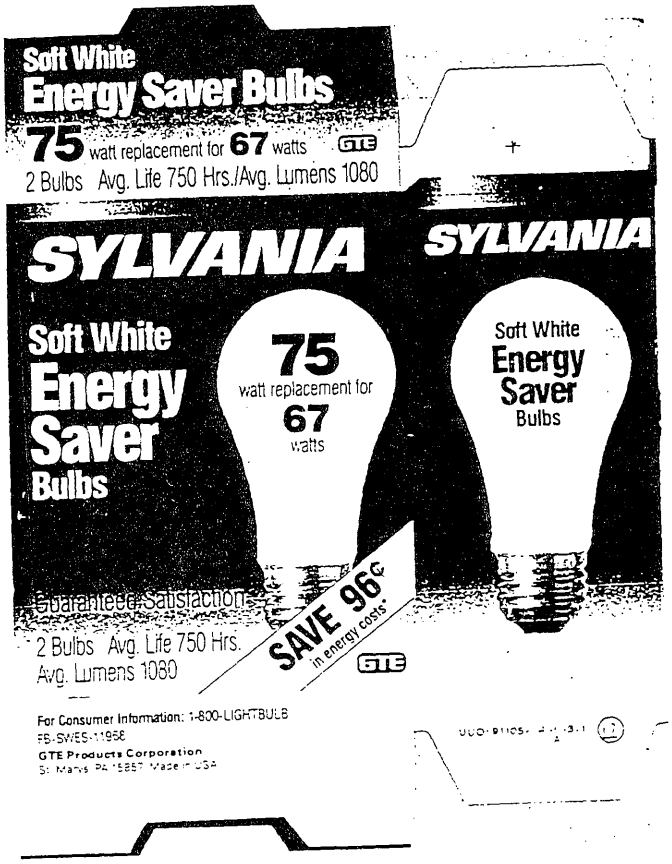

Soft White
Energy Saver Bulbs
75 watt replacement for 67 watts
GTE
2 Bulbs Avg. Life 750 Hrs./Avg. Lumens 1080
SYLVANIA
SYLVANIA
Soft White
Energy
Saver
Bulbs
75
watt replacement for
67
watts
Soft White
Energy
Saver
Bulbs
Guaranteed Satisfaction
2 Bulbs Avg. Life 750 Hrs.
Avg. Lumens 1080
SAVE 96¢
in energy costs*
GTE
For Consumer Information: 1-800-LIGHTBULB
FB-SWES-11958
GTE Products Corporation
St. Marys, PA 15857 Made in USA

EXHIBIT B-4

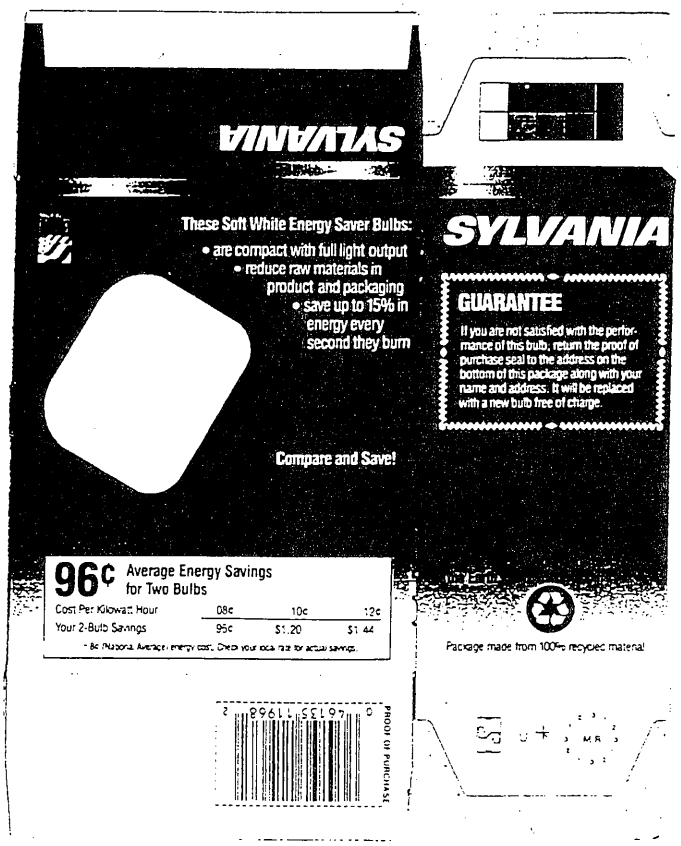

SYLVANIA
These Soft White Energy Saver Bulbs:
• are compact with full light output
• reduce raw materials in product and packaging
• save up to 15% in energy every second they burn
Compare and Save!
96¢ Average Energy Savings for Two Bulbs
Cost Per Kilowatt Hour 08¢ 10¢ 12¢
Your 2-Bulb Savings 95¢ $1.20 $1.44
SYLVANIA
GUARANTEE
If you are not satisfied with the performance of this bulb, return the proof of purchase seal to the address on the bottom of this package along with your name and address. It will be replaced with a new bulb free of charge.
Package made from 100% recycled material
PROOF OF PURCHASE

EXHIBIT C-1

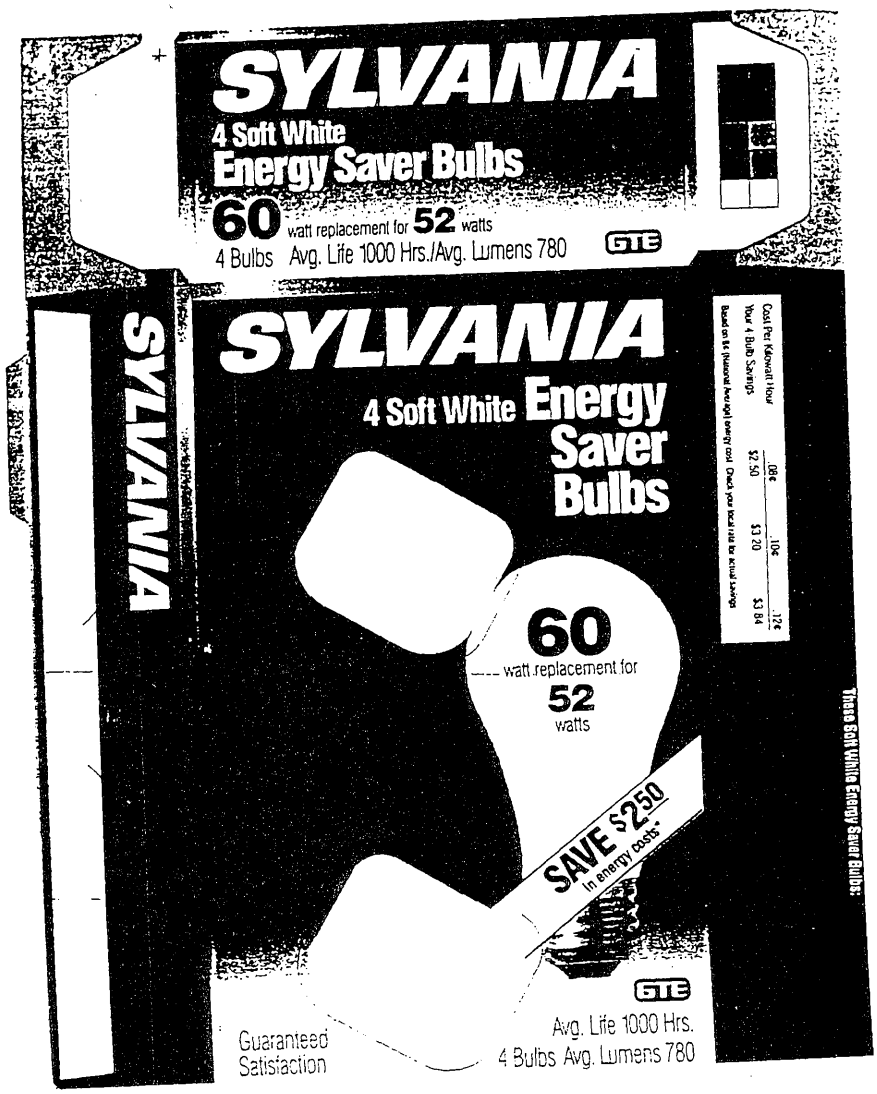

SYLVANIA
4 Soft White
Energy Saver Bulbs
60 watt replacement for 52 watts
4 Bulbs Avg. Life 1000 Hrs./Avg. Lumens 780
GTE
SYLVANIA
SYLVANIA
4 Soft White Energy Saver Bulbs
60
watt replacement for
52
watts
SAVE $2.50 in energy costs*
GTE
Avg. Life 1000 Hrs.
4 Bulbs Avg. Lumens 780
Guaranteed Satisfaction
Cost Per Kilowatt Hour
Your 4 Bulb Savings
.08¢
$2.50
10¢
$3.20
12¢
$3.84
These 60W White Energy Saver Bulbs

EXHIBIT C-2

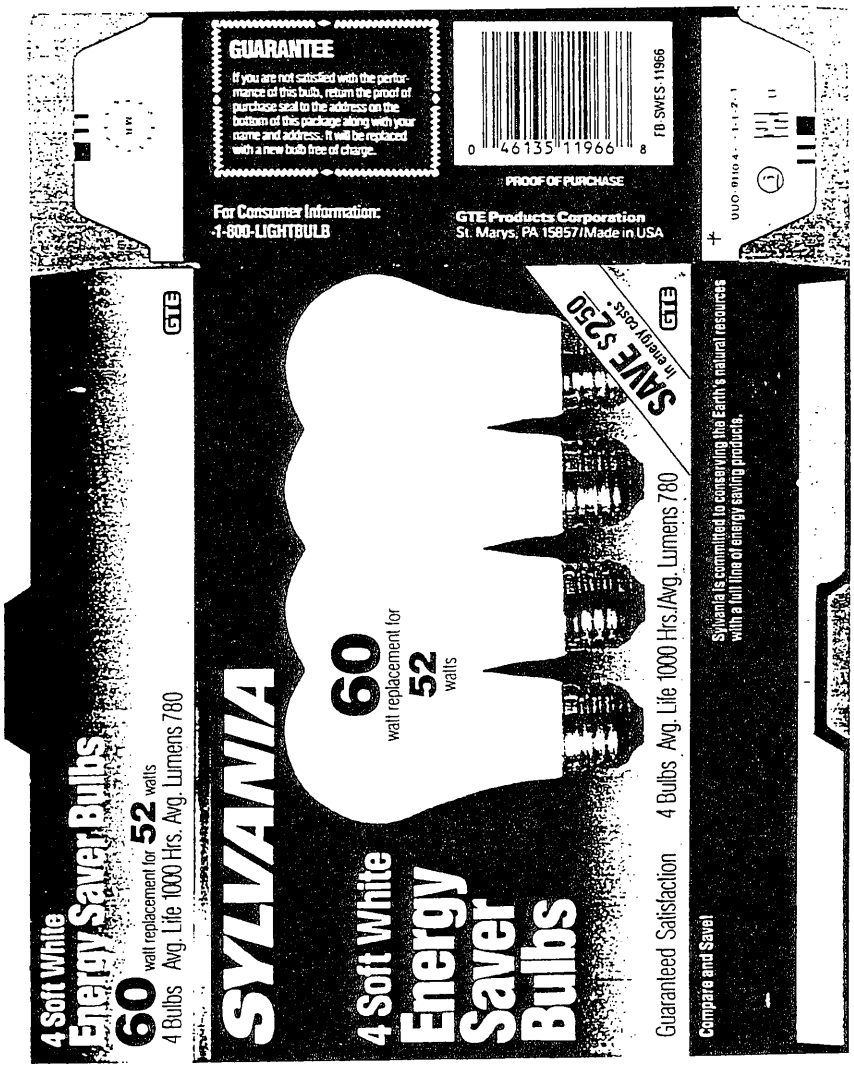

4 Soft White
Energy Saver Bulbs
60 watt replacement for 52 watts
4 Bulbs Avg. Life 1000 Hrs. Avg. Lumens 780
GTE
SYLVANIA
4 Soft White
Energy
Saver
Bulbs
60
watt replacement for
52
watts
GUARANTEE
If you are not satisfied with the performance of this bulb, return the proof of purchase seal to the address on the bottom of this package along with your name and address. It will be replaced with a new bulb free of charge.
0 46135 11966 8
PROOF OF PURCHASE
FB SWES-11966
For Consumer Information:
1-800-LIGHTBULB
GTE Products Corporation
St. Marys, PA 15857/Made in USA
SAVE $250
in energy costs.
GTE
Guaranteed Satisfaction 4 Bulbs Avg. Life 1000 Hrs./Avg. Lumens 780
Sylvania is committed to conserving the Earth's natural resources with a full line of energy saving products.
Compare and Save!

EXHIBIT C-3


Soft White
Energy Saver Bulbs
60 watt replacement for 52 watts GTE
2 Bulbs Avg. Life 1000 Hrs./Avg. Lumens 780
SYLVANIA
SYLVANIA
Soft White
Energy
Saver
Bulbs
60
watt replacement for
52
watts
Soft White
Energy
Saver
Bulbs
Guaranteed Satisfaction
2 Bulbs Avg. Life 1000 Hrs.
Avg. Lumens 780
SAVE $125
in energy costs.*
GTE
For Consumer Information: 1-800-LIGHTBULB
FB-SWES-11954
GTE Products Corporation
St. Marys, PA 15857 Made in USA

EXHIBIT C-4

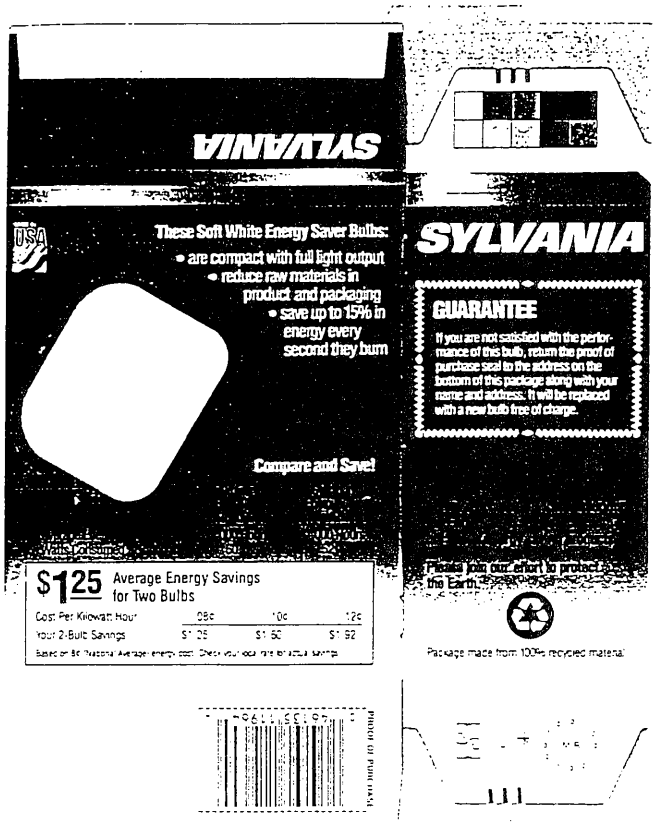

SYLVANIA
These Soft White Energy Saver Bulbs:
• are compact with full light output
• reduce raw materials in product and packaging
• save up to 15% in energy every second they burn
Compare and Save!
$1.25 Average Energy Savings for Two Bulbs
Cost Per Kilowatt Hour
Your 2-Bulb Savings
SYLVANIA
GUARANTEE
If you are not satisfied with the performance of this bulb, return the proof of purchase seal to the address on the bottom of this package along with your name and address. It will be replaced with a new bulb free of charge.
Please join our effort to protect the Earth.
Package made from 100% recycled material

EXHIBIT D-1

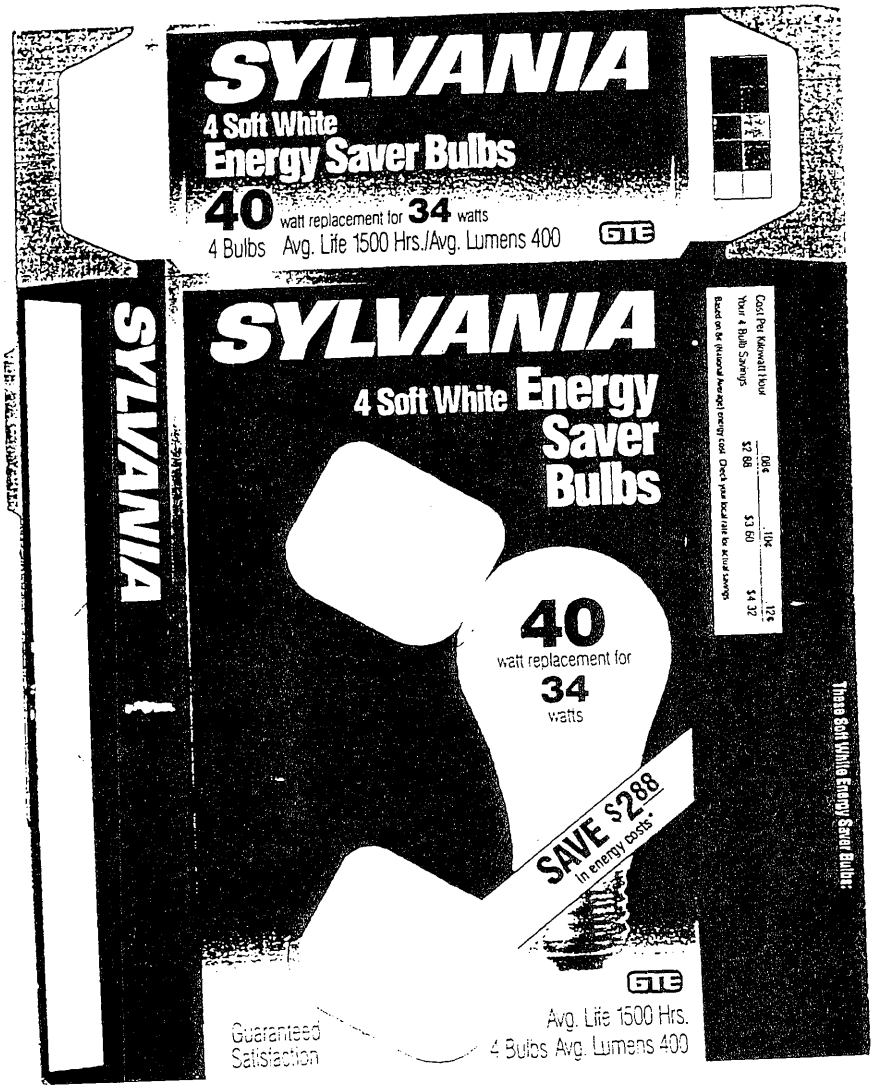

SYLVANIA
4 Soft White
Energy Saver Bulbs
40 watt replacement for 34 watts
4 Bulbs Avg. Life 1500 Hrs./Avg. Lumens 400
GTE
SYLVANIA
4 Soft White Energy Saver Bulbs
40
watt replacement for
34
watts
SAVE $2.88
in energy costs.
GTE
Guaranteed Satisfaction
Avg. Life 1500 Hrs.
4 Bulbs Avg. Lumens 400
These Soft White Energy Saver Bulbs

EXHIBIT D-2

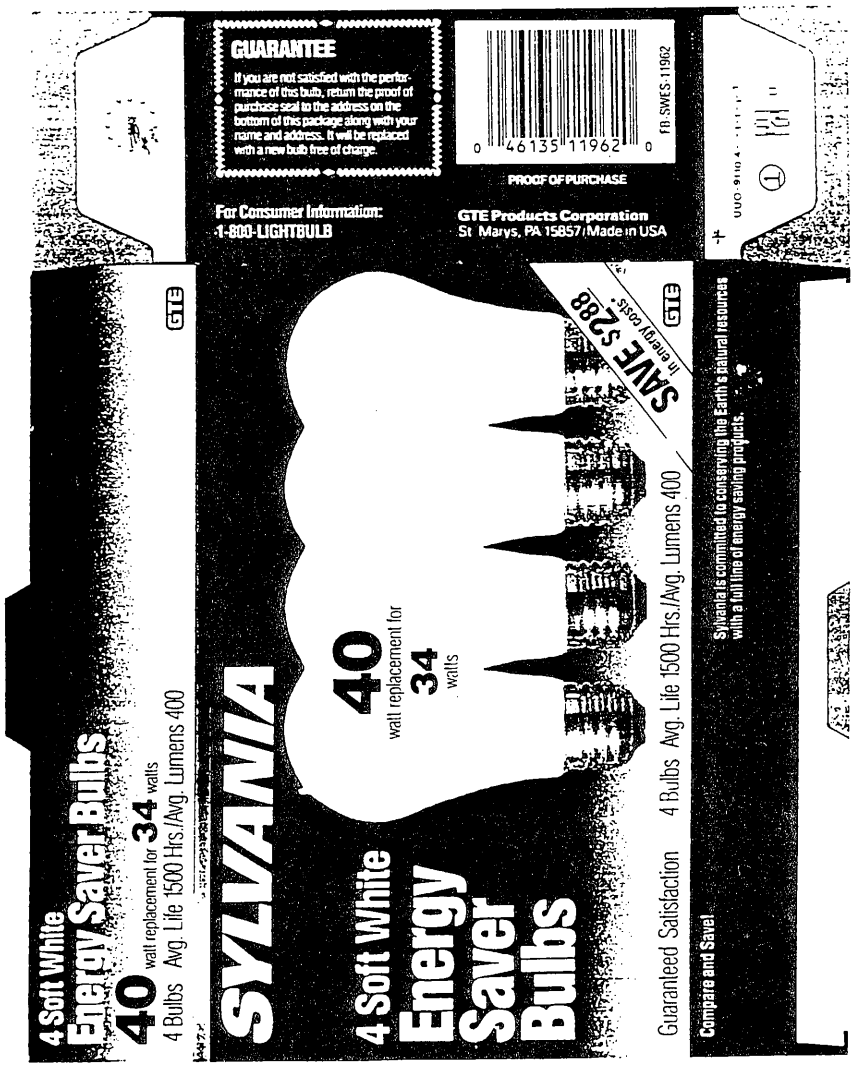

GUARANTEE
If you are not satisfied with the performance of this bulb, return the proof of purchase seal to the address on the bottom of this package along with your name and address. It will be replaced with a new bulb free of charge.
0 46135 11962 0
PROOF OF PURCHASE
FB.SWES-11962
For Consumer Information:
1-800-LIGHTBULB
GTE Products Corporation
St Marys, PA 15857/Made in USA
4 Soft White
Energy Saver Bulbs
40 watt replacement for 34 watts
4 Bulbs Avg. Life 1500 Hrs./Avg. Lumens 400
GTE
SYLVANIA
4 Soft White
Energy
Saver
Bulbs
40
watt replacement for
34
watts
SAVE $28
in energy costs
Guaranteed Satisfaction 4 Bulbs Avg. Life 1500 Hrs./Avg. Lumens 400
Compare and Save!
Sylvania is committed to conserving the Earth's natural resources with a full line of energy saving products.

EXHIBIT D-3

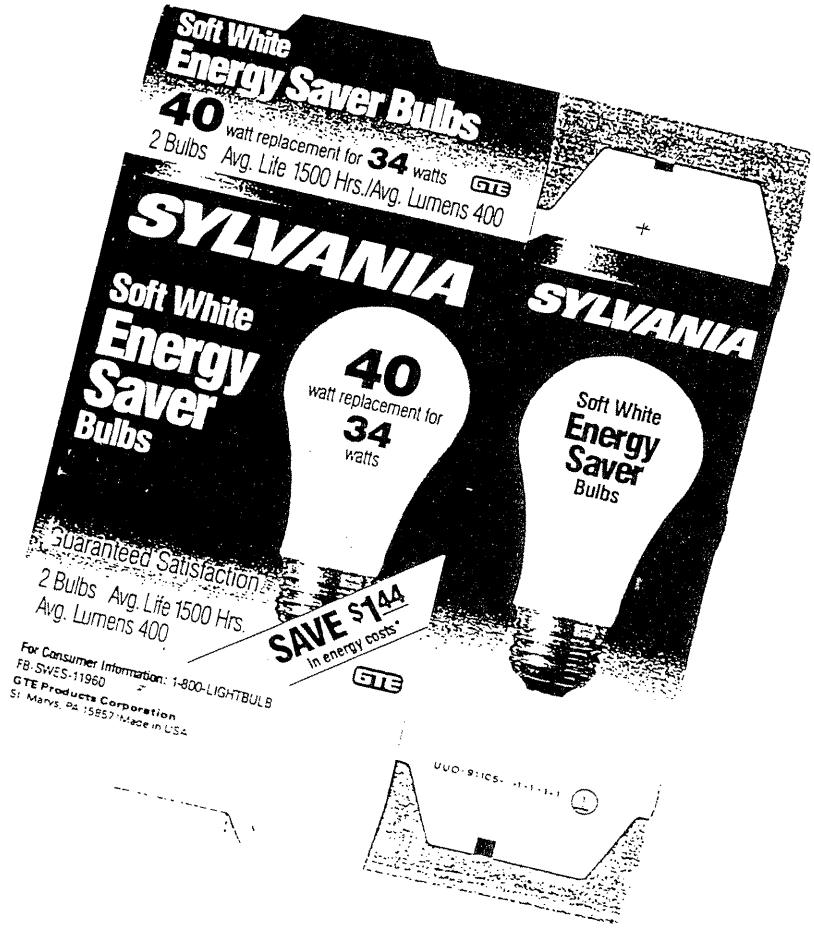

Soft White
Energy Saver Bulbs
40 watt replacement for 34 watts
2 Bulbs Avg. Life 1500 Hrs./Avg. Lumens 400
SYLVANIA
Soft White
Energy
Saver
Bulbs
40
watt replacement for
34
watts
SYLVANIA
Soft White
Energy
Saver
Bulbs
Guaranteed Satisfaction
2 Bulbs Avg. Life 1500 Hrs.
Avg. Lumens 400
SAVE $1.44
In energy costs*
For Consumer Information: 1-800-LIGHTBULB
FB-SWES-11960
GTE Products Corporation
St. Marys, PA 15857 Made in USA

EXHIBIT D-4

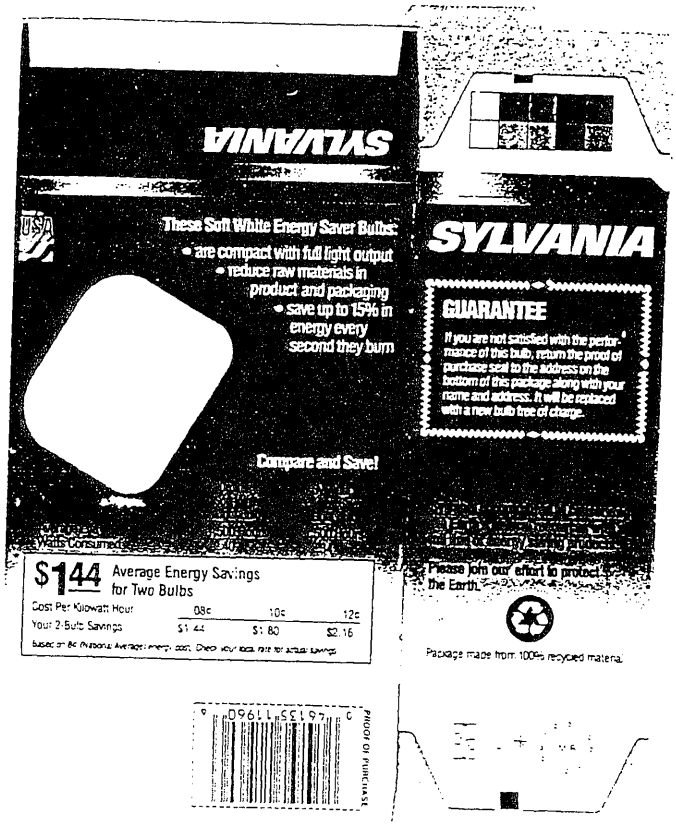

SYLVANIA
These Soft White Energy Saver Bulbs:
• are compact with full light output
• reduce raw materials in product and packaging
• save up to 15% in energy every second they burn
Compare and Save!
Watts Consumed
$1.44 Average Energy Savings for Two Bulbs
Cost Per Kilowatt Hour 08¢ 10¢ 12¢
Your 2-Bulb Savings $1.44 $1.80 $2.16
SYLVANIA
GUARANTEE
If you are not satisfied with the performance of this bulb, return the proof of purchase seal to the address on the bottom of this package along with your name and address. It will be replaced with a new bulb free of charge.
Please join our effort to protect the Earth.
Package made from 100% recycled materia
PROOF OF PURCHASE

EXHIBIT E-1

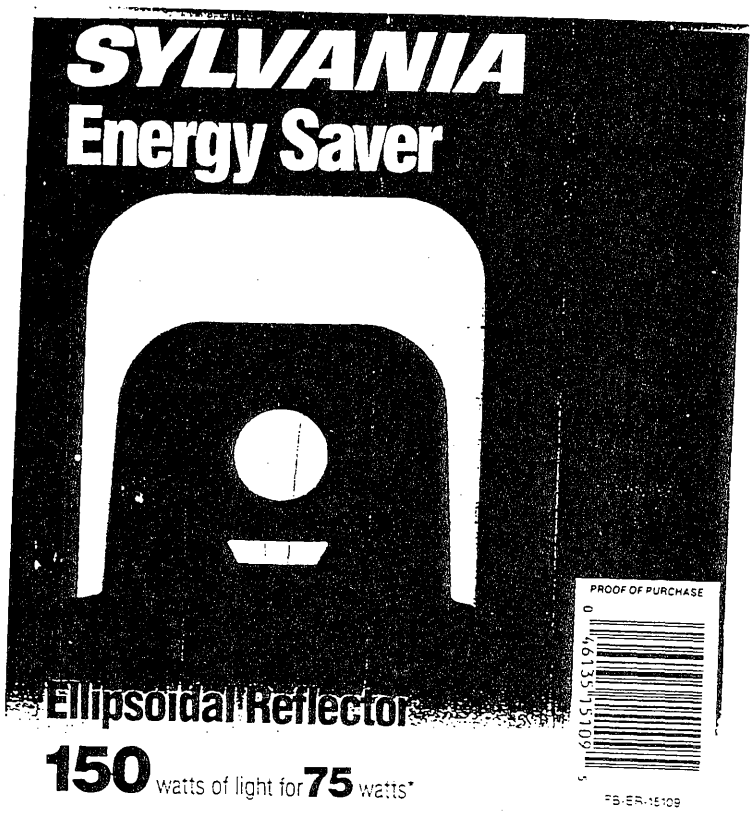

SYLVANIA
Energy Saver
Ellipsoidal Reflector
150 watts of light for 75 watts*
PROOF OF PURCHASE
0 46135 15109 5
FB/ER-15109

EXHIBIT E-2

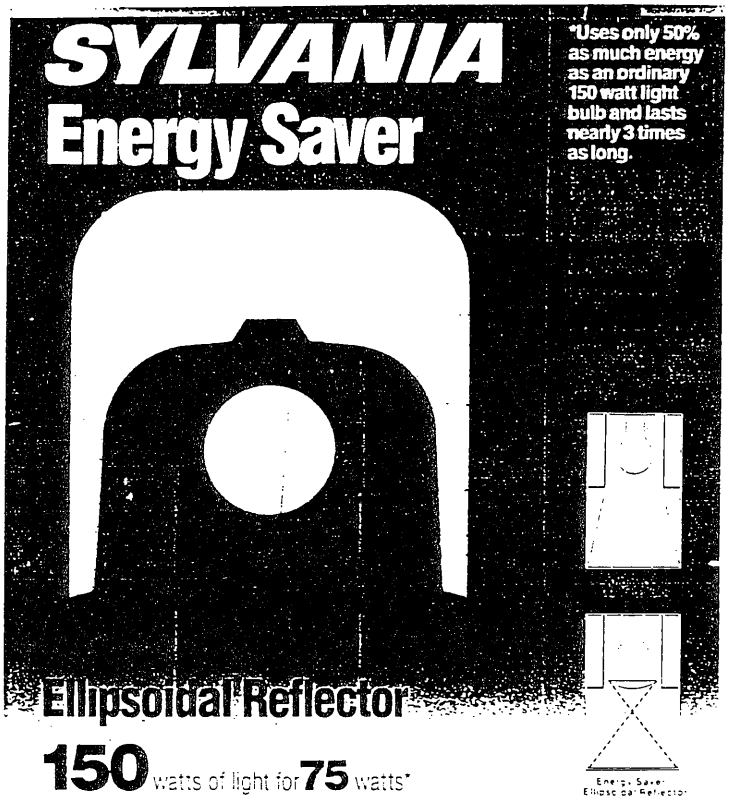

SYLVANIA
Energy Saver
*Uses only 50% as much energy as an ordinary 150 watt light bulb and lasts nearly 3 times as long.
Ellipsoidal Reflector
150 watts of light for 75 watts*
Energy Saver Ellipsoidal Reflector

EXHIBIT F-1

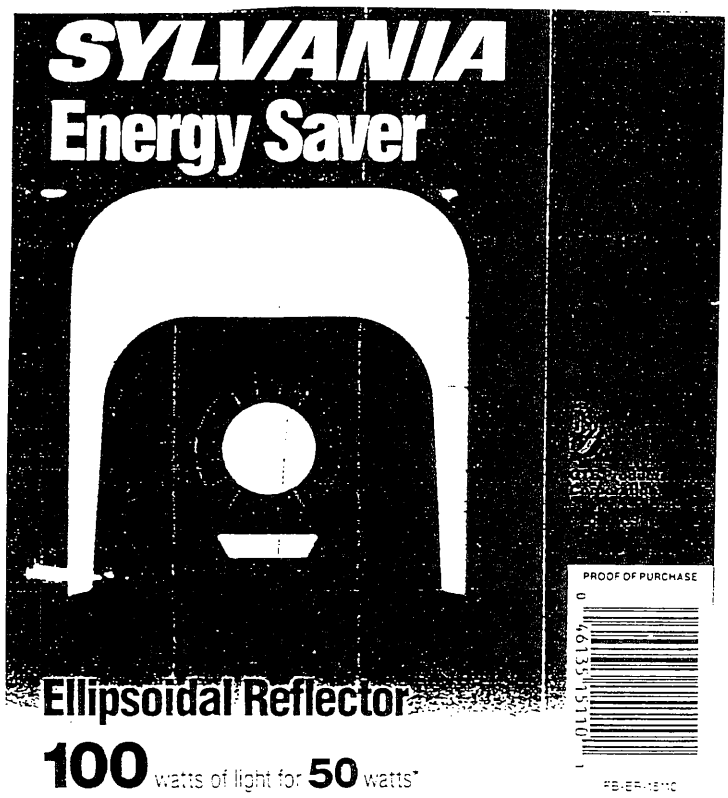
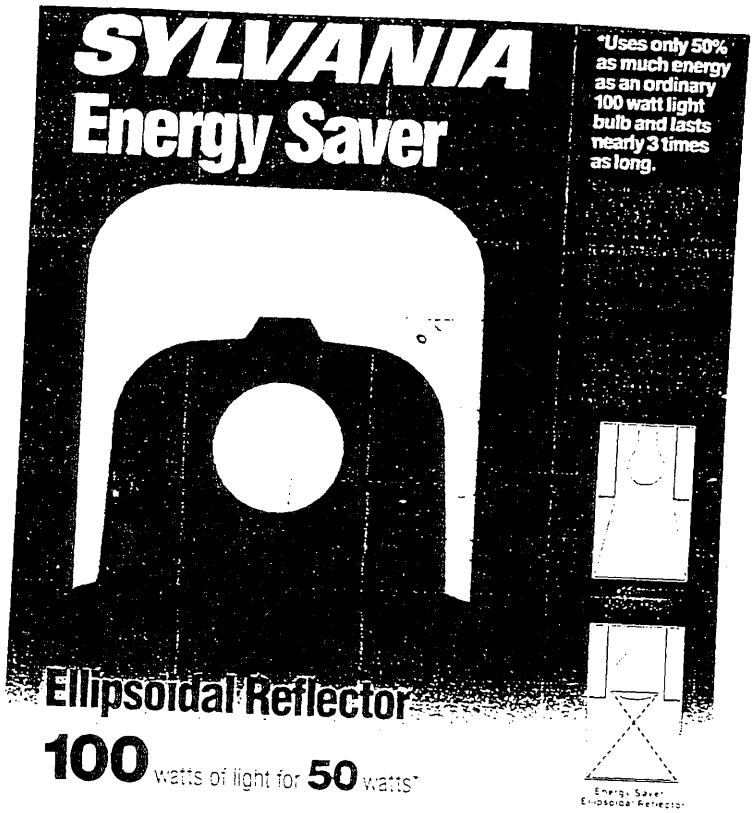

SYLVANIA
Energy Saver
Ellipsoidal Reflector
100 watts of light for 50 watts*
PROOF OF PURCHASE

EXHIBIT F-2


SYLVANIA
Energy Saver
*Uses only 50% as much energy as an ordinary 100 watt light bulb and lasts nearly 3 times as long.
Ellipsoidal Reflector
100 watts of light for 50 watts*

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 respondent having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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 of facts, other than jurisdictional facts, or of violations of law as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules.

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

1. OSRAM SYLVANIA Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its offices and principal place of business located at 100 Endicott Street, Danvers, MA.

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

DEFINITION

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

"*Light bulb*" means any incandescent, halogen, fluorescent, par, or ellipsoidal lamp marketed to consumers, excluding lamps designed and promoted primarily for decorative applications, appliances, traffic signals, showcases, projectors, airport equipment, trains, and lamps such as color, rough service, and vibration service.

I.

It is ordered, That respondent OSRAM SYLVANIA Inc., its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any light bulb 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. That any such light bulb will provide the same amount of light as the light bulb to which it is compared;

B. The wattage of any such light bulb; and

C. The energy cost savings consumers can realize through the use of any such light bulb.

II.

It is further ordered, That respondent OSRAM SYLVANIA Inc., its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any light bulb 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 any such bulb will save energy, will lower consumers' energy costs, will conserve natural resources, or has some other benefit or advantage regarding its impact on the environment relative to any other bulb(s), when that benefit or advantage is attributable, in whole or in part, to the fact that such bulb provides fewer lumens than the bulb(s) to which it is compared, unless respondent discloses, clearly and prominently and in close proximity to the representation that such bulb provides less light than the light bulb(s) to which it is compared.

III.

It is further ordered, That with respect to claims covered by 16 CFR 409.1(d), compliance with said provision shall constitute compliance with this order.

IV.

It is further ordered, That, if the Commission makes any changes in its Trade Regulation Rule relating to incandescent lamps, 16 CFR 409.1 *et seq.*, or issues any new regulation with respect to the labeling or marketing of light bulbs (as defined herein) that is in actual conflict with any requirement imposed by paragraphs I and II of this order, compliance by respondent with such regulation will not constitute a violation of any provision of this order. As used herein, "actual conflict" shall mean that it is impossible for respondent to comply with both the regulation(s) and all or any part of paragraphs I or II of this order. This paragraph shall not be deemed to limit respondent's right to petition for modification pursuant to any applicable statute or regulation.

V.

It is further ordered, That the provisions of this order shall not apply to any label or labeling printed prior to the date of service of this order and shipped by respondent to distributors or retailers prior to one hundred twenty (120) days after the date of service of this order.

VI.

It is further ordered, That respondent shall distribute a copy of this order within sixty (60) days after service of this order upon it to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation of labeling or the preparation or placement of advertisements or other such sales or promotional materials covered by this order.

VII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as 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.

VIII.

It is further ordered, That respondent shall, within one hundred eighty (180) days after service of this order upon it, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

REVLON, INC., ET AL.

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

Docket 9231. Amended Complaint, Nov. 17, 1993--Decision, Nov. 17, 1993

This consent order requires, among other things, a New York-based corporation and its subsidiary to have scientific evidence to support any future claims regarding the effectiveness of cellulite treatments or sunscreen products. Respondents also are required to disclose the sun protection factor value in any sunscreen advertisement in which it proclaims the ability of the product to protect against the sun's rays.

Appearances

For the Commission: *Phoebe D. Morse*, *Gary S. Cooper* and *Brinley H. Williams*.

For the respondents: *Irvin Scher* and *Randy Tritell*, *Weil, Gotshal & Manges*, New York, N.Y.

AMENDED COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority invested in it by said Act, the Federal Trade Commission, having reason to believe that Revlon, Inc., and Charles Revson, Inc., corporations (collectively referred to as "respondents"), have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Revlon, Inc., is a Delaware corporation, and Charles Revson, Inc., is a New York corporation, each having its office or principal place of business located at 767 Fifth Avenue, New York, N.Y. Charles Revson, Inc., is a wholly-owned subsidiary of Revlon, Inc.

PAR. 2. Respondents have advertised, offered for sale, sold and distributed (1) Ultima II ProCollagen Anti-cellulite body complex ("Anti-cellulite body complex"); and (2) Photo Aging Shield.

PAR. 3. Anti-cellulite body complex and Photo Aging Shield are "drugs" or " cosmetics" within the meaning of Section 12 of the Federal Trade Commission Act, 15 U.S.C. 52.

PAR. 4. The acts and practices alleged in this complaint constitute the maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for Anti-cellulite body complex and Photo Aging Shield. These advertisements and promotional materials contain the following statements:

a. "Now, thanks to Ultima II Research, no woman has to resign herself to unattractive ripples, bumpy texture, and slackness caused by cellulite."

b. "Massaging Anti-cellulite body complex into the skin attacks your cellulite problems two ways: first, it increases skin circulation to help disperse toxins and excess water that contribute to cellulite pockets, and second, it builds sub-skin tissue strength and tone for smoother support."

c. "You'll see results after just seven to ten days of daily use."

d. "While you can't prevent biological aging, you can prevent Photoaging. That's because now Ultima II Research Laboratories have developed a product designed to prevent Photoaging. This revolutionary product acts as a shield for your skin."

e. "It's called Photo Aging Shield and it's so protective it actually intercepts damaging light waves before they penetrate your skin."

PAR. 6. Through the use of the statements referred to in paragraph five, respondents have represented, directly or by implication, that:

a. Anti-cellulite body complex significantly reduces cellulite;

b. Anti-cellulite body complex reduces skin's bumpy texture, ripples or slackness caused by cellulite;

c. Anti-cellulite body complex helps disperse toxins and excess water from areas where cellulite appears;

d. Anti-cellulite body complex increases sub-skin tissue strength and tone;

e. Photo Aging Shield blocks all of the harmful rays which cause photoaging.

PAR. 7. Through the use of the statements referred to in paragraph five, respondents have represented, directly or by implication, that they possessed and relied upon a reasonable basis for the representations set forth in paragraph six at the time such representations were made.

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

PAR. 9. Respondents' dissemination of the 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 used said false and misleading representations, 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.

DECISION AND ORDER

The Federal Trade Commission having heretofore issued its Complaint charging the respondents named in the caption hereof with violations of Sections 5 and 12 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

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

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

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

1. Respondent Revlon, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 767 Fifth Avenue, New York, New York. Respondent Charles Revson, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 767 Fifth Avenue, New York, New York.

2. Respondents have been served with a copy of the aforesaid complaint issued on September 7, 1989, by the Federal Trade Commission in Docket No. 9231 charging respondents with violations of Sections 5 and 12 of the Federal Trade Commission Act, as amended. Respondents have filed an answer to that complaint denying the charges. Respondents have also been the subject of a separate investigation conducted by the Cleveland Regional Office of the Federal Trade Commission in File No. 882 3110. This decision and order is intended to resolve both the matters contained in the complaint issued on September 7, 1989, and the matters involved in the separate investigation in File No. 882 3110.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents; the proceeding is in the public interest; and respondents admit all the jurisdictional facts set forth in the amended complaint.

ORDER

DEFINITIONS

For purposes of this order:

1. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, consumer surveys, samples or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. "*Sunscreen product*" shall mean any chemical product which, pursuant to applicable federal standards, is entitled to display a Sun Protection Factor (SPF) of 2 or greater, and which is advertised or promoted to be used for prevention of skin damage caused by the sun's harmful rays including, but not limited to, sunburn, premature skin aging and skin cancer.

I.

It is ordered, That Revlon, Inc., and Charles Revson, Inc., corporations (collectively referred to as "respondents"), their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, packaging, offering for sale, sale, or distribution of Anti-cellulite body complex or any other product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication,

A. Regarding the product's ability to reduce or eliminate cellulite;

B. Regarding the product's ability to reduce bumpy texture, ripples, or slackness of the skin caused by cellulite;

C. Regarding the product's ability to disperse toxins or excess water from areas where cellulite appears; or

D. Regarding the product's ability to reduce or eliminate cellulite by increasing sub-skin tissue strength or tone, unless at the time of making such representation, they possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That Revlon, Inc., and Charles Revson, Inc., corporations, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, packaging, offering for sale, sale, or distribution of Photo Aging Shield or any other sunscreen product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, regarding the efficacy, other than identifying the SPF value, of such product in providing protection against all or a specific amount of the sun's harmful rays, unless:

A. At the time of making such representation, they possess and rely upon competent and reliable scientific evidence that substantiates the representation, provided that, with respect to any representation covered by this part, any tentative final or final standard promulgated by the Food and Drug Adrninistration (FDA) which establishes that such representation is supported by scientific evidence acceptable to the FDA, shall (as long as it remains in

effect) also constitute adequate substantiation for such representation; and

B. Respondents disclose, clearly and prominently, the SPF value of the product.

III.

It is further ordered, That, for a period of three (3) years from the date that any representation covered by this order is last disseminated, respondents shall maintain and upon request make available to the Commission for inspection and copying,

A. All materials that were relied upon to substantiate such representation; and

B. All test reports, studies, surveys, demonstrations or other evidence in respondents' possession or control, that contradict, qualify, or call into question such representation or the basis upon which respondents relied for such representation.

IV.

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

V.

It is further ordered, That respondents shall distribute a copy of this order to each of their current operating divisions, to each officer and other person responsible for the preparation or review of advertising or promotional material covered by this order, and to all of respondent Charles Revson, Inc.'s Beauty Advisors.

VI.

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

IN THE MATTER OF

TRANS UNION CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FAIR CREDIT REPORTING ACT

Docket 9255. Complaint, Dec. 15, 1992--Decision, Nov. 18, 1993

This consent order requires, among other things, an Illinois-based consumer reporting agency to require, in its contracts, that those who obtain consumer reports from the company, in the form of lists developed through credit prescreening, make a firm offer of credit to each person on the list, and to take reasonable steps to enforce those contract provisions. In addition, the respondent is required to provide company officials with a copy of the order, and obtain their signature acknowledging receipt.

Appearances

For the Commission: *Arthur B. Levin* and *David Medine.*

For the respondent: *Roger Longtin, Keck, Mahin & Cate,* Chicago, IL.

COMPLAINT

The Federal Trade Commission having reason to believe that Trans Union Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, and alleges as follows:

DEFINITIONS

For the purposes of this complaint, the terms, "person," "consumer," "consumer report," and "consumer reporting agency" are defined as set forth in Sections 603(b), (c), (d), and (f), respectively, of the Fair Credit Reporting Act, 15 U.S.C. 1681a(b), 1681a(c), 1681a(d) and 1681a(f).

"*Credit information*" means the information that respondent maintains bearing on any of the characteristics listed in Section 603(d) of the Fair Credit Reporting Act, 15 U.S.C. 1681a, as amended, with respect to any consumer that respondent obtains from subscribers, court records or any other source and from which respondent creates consumer reports.

"*Permissible purpose*" means any of the purposes listed in Section 604 of the Fair Credit Reporting Act, 15 U.S.C. 168lb, as amended, for which a consumer reporting agency may lawfully furnish a consumer report.

"*Prescreening*" means the process whereby respondent, utilizing credit information, compiles or edits for a client a list of consumers who meet specific criteria and provides this list to the client or a third party (such as a mailing service) on behalf of the client for use in soliciting those consumers for an offer of credit.

"*Subscriber*" means any person who furnishes credit information to respondent or who requests or obtains a consumer report from respondent, excluding consumers.

PARAGRAPH 1. Respondent, Trans Union Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 555 West Adams Street, Chicago, Illinois.

PAR. 2. Respondent is, and has been, regularly engaged in the practice of procuring and assembling information on consumers for

the purpose of furnishing for monetary fees, consumer reports to subscribers and consumers. Respondent furnishes these consumer reports through the means and facilities of interstate commerce. Hence, respondent is a consumer reporting agency, as defined in Section 603(f) of the Fair Credit Reporting Act.

PAR. 3. Respondent regularly provides consumer reports in the form of prescreened lists to credit grantors and fails to require or monitor that credit grantors that receive such lists make a firm offer of credit to each person on the list.

PAR. 4. By and through the acts and practices alleged in paragraphs two and three, and others not specifically set forth herein, respondent has violated Sections 604 and 607 of the Fair Credit Reporting Act by furnishing consumer reports to persons whom respondent did not have reason to believe intended to use the information for a Permissible Purpose under Section 604.

PAR. 5. Respondent regularly compiles, for sale to clients, lists of consumers, based in whole or in part on information contained in its consumer reporting database bearing on the characteristics enumerated in Section 603, thereby creating consumer reports, and provides such consumer reports in the form of target marketing lists to persons that do not intend to make a firm offer of credit to all those consumers on the list and who intend to use the information for purposes not authorized under Section 604 of the Fair Credit Reporting Act.

PAR. 6. By and through the acts and practices alleged in paragraphs two and five, and others not specifically set forth herein, respondent has violated Sections 604 and 607 of the Fair Credit Reporting Act by furnishing consumer reports to persons whom respondent did not have reason to believe intended to use the information for a Permissible Purpose under Section 604.

SUMMARY DECISION

By: Lewis F. Parker, Administrative Law Judge

I. HISTORY OF THE PROCEEDING

On December 15, 1992, the Commission issued a complaint charging respondent Trans Union Corporation ("Trans Union") with violating the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681 *et seq.*

The complaint alleges that Trans Union is a consumer reporting agency as defined in Section 603(f) of the FCRA, that it regularly provides consumer reports in the form of prescreened lists to credit grantors, that it fails to require or monitor that credit grantors that receive such lists make a firm offer of credit to each person on the list (paragraph three), and that it has therefore violated Sections 604 and 607 of the FCRA by furnishing consumer reports to persons it did not have reason to believe intended to use the reports for a Permissible Purpose under Section 604 (paragraph four).

The complaint also alleges that Trans Union illegally furnishes consumer reports in the form of target marketing lists to persons who do not intend to make a firm offer of credit to all those consumers on the list and who intend to use the information for purposes not authorized by Section 604 of the Act (paragraph five).

On June 1, 1993, the portion of this matter relating to Trans Union's prescreening service was certified to the Secretary for withdrawal from adjudication so that the Commission could consider a consent agreement settling the charges in paragraphs three and four of the complaint. The Secretary did so on June 3, 1993.

Complaint counsel have now moved for summary decision as to that portion of the complaint challenging Trans Union's sale of its target marketing lists, and they have filed documents and a memo-

randum in support of their motion.[1] Respondent has filed a response, together with supporting affidavits, in opposition to this motion.

After analyzing the documents filed by the parties, I find that no genuine issue exists with respect to the findings of fact adopted in this decision. Rules of Practice, Section 3.24.

II. FINDINGS OF FACT

A. Trans Union's Business

1. Trans Union is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 555 West Adams Street, Chicago, Illinois. (Cplt paragraph 1, Ans paragraph 1).[2]

2. Trans Union is, and has been, regularly engaged in the practice of procuring and assembling information on consumers for the purpose of furnishing, for monetary fees, consumer reports to subscribers and consumers. Trans Union furnishes these consumer reports through the means and facilities of interstate commerce. Thus, Trans Union is a consumer reporting agency, as defined in Section 603(f) of the FCRA (Cplt paragraph 2; Ans paragraph 2; Botruff Aff., paragraph 4).

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[1] Although the parties have filed *in camera* versions of their memoranda, I have ignored this designation since the parties did not seek, and I did not grant, *in camera* status to any documents. Rules of Practice, Section 3.45(b). *See* Order Adopting Respondent's Protective Order dated April 6, 1993.

[2] Abbreviations used in this decision are:

Cplt:	Complaint
Ans:	Answer
Tr.:	Transcript of testimony given in investigational hearings
HX:	Investigational Hearing Exhibit
Aff.:	Respondent's Affidavits
F.:	Finding

3. Trans Mark is a division of Trans Union and is engaged in the business of target marketing, a field which it entered in 1987 (Frank Tr. 11, 15).

4. In connection with its target marketing business, Trans Mark rents computer tapes for one-time use which contain computerized data on consumers to users who market goods or services through direct mail or telemarketing. The tapes contain coded information on individual consumers which, when translated by a computer, reveal their names and addresses. Trans Mark's customers are not permitted to use the computer tapes and the information contained thereon for any other purpose (Frank Aff., paragraphs 6 and 7).

5. The average computer tape leased by Trans Mark contains the names and addresses of 30,000 customers and Trans Mark will not lease a computer tape unless there are a minimum of 5,000 consumers who meet the criteria selected by its customers (Frank Aff., paragraphs 15 and 17).

6. Trans Mark's target marketing lists do not involve, as does credit reporting, consumer-initiated transactions; rather, these lists are sold to users who do not intend to make a firm offer of credit to all consumers on the lists (Frank Tr. 15; Trans Union's Response to Complaint Counsel's First Request For Admissions ("First Request" No. 8).

B. Trans Union's Credit Reporting Database

7. Trans Union creates and maintains a consumer reporting database named CRONUS for use in its credit reporting business. CRONUS contains numerous individual files on consumers and the information it contains is reported by credit grantors, collection agencies, governmental agencies and utilities, or is obtained from public records (Botruff Aff., paragraph 6).

8. Credit grantors generally provide credit information on individual consumers to Trans Union in the form of accounts receiv-

able tapes which usually contain the name, address, zip code, social security number, account number and account activity for each consumer account (Botruff Aff., paragraph 7).

9. CRONUS compiles identifying information on consumers from multiple files, assigns the information to a new or existing file on the consumer, and adds credit-related information to the file. The account number and credit information appended to this number is called either a "tradeline" or a public record set (Botruff Aff., paragraphs 8, 9, 10).

10. A tradeline is identified in CRONUS by the name of the credit grantor and the account number and has appended to it credit information relating to a particular account; it reveals credit limits, payment patterns, payment history, and the present status of the account, *i.e.*, the balance owing and the amount past due (Botruff Aff., paragraph 11).

11. Trans Union's credit report customers access individual consumer files by providing the name, zip code and address of an individual consumer. Trans Union then transmits the consumer's complete credit report to its customer (Botruff Aff., paragraph 13).

12. A credit report consists of sections containing demographic information (name, address, social security number, etc.), tradeline information, public record information, and inquiries (Botruff Aff., paragraph 14, Ex. A).

13. The tradeline section of the credit report is divided into three parts. The first part includes the following: (a) the credit grantor's name and code; (b) the date the account was opened; (c) the account number; (d) the terms of sale -- number of payments, payment frequency and dollar amount due each payment; (e) ECOA code; and (f) collateral (Botruff Aff., paragraph 16).

14. The second part of the tradeline section of a credit report includes the following information for each tradeline: (a) the high credit amount (highest amount ever owed) and the date it was verified; (b) the maximum amount of credit approved by the credi-

tor; (c) the date the account was closed; (d) the present status of the account, *i.e.*, the balance owing and amount past due; (e) the maximum delinquency - date, amount and manner of payment; (f) remarks; and (g) type of loan (Botruff Aff., paragraph 17).

15. The third portion of the tradeline section of a credit report includes the following information for each tradeline: (a) the payment pattern, *i.e.*, 1-12 months or 13-24 months; (b) the historical status in number of months, *i.e.*, either 30-59, 60-89 or 90+; and (c) the type of account and manner of payment, *e.g.*, current, 30 days past due, bankrupt, etc. (Botruff Aff., paragraph 18).

16. The public record section of a credit report includes the following information for each public record: (a) the location of the court where the public record was recorded; (b) the court type; (c) the date the public record was reported; (d) the ECOA code; (e) any assets or liabilities; (f) the type of public record; (g) the date paid, if applicable; (h) the docket number; and (i) the plaintiff and attorney involved in the case (Botruff Aff., paragraph 19).

17. The inquiry section of a credit report includes the following information for each inquiry on a consumer's credit file: (a) the date of the inquiry; (b) the ECOA code; (c) the Trans Union subscriber inquiry code; and (d) the subscriber short name (Botruff Aff., paragraph 20).

C. Trans Mark's Target Marketing List Databases

18. Trans Mark creates and maintains a number of separate databases for use in its target marketing business ("list databases"). The information contained in the list databases is derived from CRONUS and outside sources (Frank Aff., paragraph 33) and is moved quarterly from these sources to the target marketing database, although certain "hotline" information is moved monthly (Frank Tr. at 22).

19. The accounts receivable tapes provided by credit grantors to Trans Union for use in its credit reporting business are provided under agreements that do not prevent their use for target marketing (Weckman Aff., paragraph 3).

20. Trans Mark creates and maintains the following list databases: (a) Base List; (b) Homeowners; (c) Automobile Owners; (d) Students; (e) Puerto Rico; (f) New Issues; (g) New Homeowners; (h) New Movers; and (i) Reverse Append (consumers who have either a bank card or a travel and entertainment card) (Weckman Aff., paragraphs 5, 54).

21. The Base List database is created by selecting from CRONUS only those consumers who have at least two tradelines. The information extracted from CRONUS is then separated into various segments in the Base List database (Weckman Aff., paragraph 6) .

22. Trans Union promotional material entitled "Direct Marketing Lists" discloses to its clients that it uses two-tradeline selections to compile its target marketing base:

> Consumers on each quarterly updated list must possess a minimum of two tradelines and have activity in past 90 days on one account

(HX 1; *see also* Second Response No. 61).

23. The demographic information extracted from CRONUS reveals: a) the consumer's name, address, social security number, date of birth and telephone number (the "standard segment"); b) whether the consumer is the head of household, his or her ethnic background and marital status (the "household segment"); and, c) the consumer's occupation (the "employment segment") (Weckman Aff., paragraphs 6, 7, 8, 9).

24. The tradeline information extracted from CRONUS is separated into five segments in the Base List database: (a) bank card; (b) premium bank card; (c) retail; (d) upscale retail; and (e) finance loan (Weckman Aff., paragraph 10; First Response Nos. 11-23).

25. The information extracted from CRONUS and included in each of these five segments of the Base List database is: a) a yes or no indication as to whether the consumer has one or more of the type of accounts included in that segment; b) the open date of the oldest tradeline; and c) the open date of the newest tradeline (Weckman Aff., paragraph 11).

26. The Base List database does not include the identity of the credit grantor, the terms, collateral, the high credit amount, the credit limit, the payment status or pattern, delinquency or derogatory information, or any other comparable information included in CRONUS (Weckman Aff., paragraph 13).

27. The Homeowners, Automobile Owners, Students, Puerto Rico, New Issues, New Homeowners, and Reverse Append databases do not include the identity of the credit grantor, the terms, collateral, the payment status or pattern, delinquency or derogatory information, or any other comparable information included in CRONUS (Weckman Aff., paragraphs 24, 31, 39, 44, 48, 53, 69, 74).

28. Trans Mark describes the features of its base list and segments in brochures directed to its customers; it notes that the "Bank card" segment of its base list names 104.4 million consumers who have a bank credit card (HX 2).

29. The "Upscale Retail" segment of the base list, which names 36.2 million consumers, is described in a marketing brochure as offering:

> direct marketers the opportunity to reach America's retail shopping elite. The Upscale file has been developed from Trans Mark's list of retailers that cater to consumers with discriminating taste. These individuals have high discretionary income and are used to paying more than the average consumer to purchase quality products

(HX 2).

30. A customer purchasing a segment can further refine the list by choosing "selects," or additional criteria to select certain characteristics of the consumers on the list (First Response Nos. 26, 34, 43, 51, 59, 68, and 76).

31. Examples of the "selects" offered by Trans Union include: bank card or retailer; "hotline" consumers; age; estimated household income; children; working women; length of residence; zip code; and persons who have responded to mail order solicitations (Kiska Tr. 37, 59-60; HX 2). Much of the information for selects is derived from Trans Union's consumer reporting database (Frank Tr. 40).

32. For each base list segment, there is a brochure which describes its core population, the available "selects," the file size (the number of consumers on the list), a description of the list, and the list's purchase price. The source of all five segments is identified in the brochure as "Trans Union consumer database" (HX 2; First Response Nos. 15, 17, 19, 21, and 23).

33. Trans Union also offers other target marketing lists from more specific databases. These include "new issues," a monthly compilation of consumers who have responded via mail to a credit card solicitation, "Hispanics," "singles," "college students," "homeowners," "new movers," and "automobile owners" (Weckman Tr. 83-84. *See also* Kiska Tr. 37, 59-60; HX 2).

34. One of the selects offered for many of the base lists is labeled "hotline," a compilation of those consumers who have appeared on a credit grantor's tape within the prior 30-90 days (Respondent's Answers to Complaint Counsel's First Set of Interrogatories No. 10).

35. Trans Union has recently introduced additions to its base lists. One is the Trans Mark Income Estimator ("TIE"), which is described in one of its brochures:

> TIE evaluates individual consumer income based upon a mix of credit data from Trans Union's database and census demographic data.

TIE . . . is based on the notion that consumer spending and payment behavior is closely related to income.

(HX 1).

36. The information created by the TIE model is based in whole or in part on information contained in Trans Union's consumer reporting database. TIE contains information on consumers who have at least two tradelines (First Response Nos. 90, 92).

37. Another enhancement recently introduced by Trans Mark is "SOLO," described in a brochure, along with a companion program known as SILHOUETTE (offered only for prescreened lists (Kiska Tr. 51; Frank Tr. 32-33)), as follows:

Both products provide a consistent and effective way to develop qualified prospects based upon similar credit behavior (SILHOUETTE) and credit behavior overlaid with demographic data (SOLO) . . . [T]he products evaluate individual behavior and establish tendencies.

(HX 1).

38. SOLO is based upon information contained in Trans Union's consumer reporting database (First Response No. 96).

39. Trans Mark sends its target marketing lists directly to its clients. Trans Mark does not require its clients to use third party mailers although it sometimes sends the lists to third party mailers on behalf of its clients (First Response Nos. 110, 112).

40. Trans Mark advertisements emphasize that its lists are: "Not just ordinary lists but lists of people who are active users of credit." (DM News, May 18, 1992, at p. 12. *See also* Second Response No. 65.) Nevertheless, Mr. Hopfensperger, Trans Mark's Director of Marketing, Central Region, has filed an affidavit asserting that he is familiar with the type of information on consumers which is contained in Trans Mark's list databases and that they do not contain any information upon which a credit grantor can make a judgment as to a consumer's eligibility for credit (Hopfensperger Aff., paragraph 7).

41. The computer tapes leased by Trans Mark are rented for one-time use--to produce mailing labels to mail the customer's material to consumers. Trans Mark's customers are not allowed to put the computerized information into a database to access the information contained on the tape, or use the tape for any other purpose (Frank Aff., paragraphs 6, 7).

42. Trans Mark does not allow access to its list databases to anyone seeking information on identified individual consumers (Frank Aff., paragraph 8).

43. Prior to sending out a computer tape, Trans Mark deletes the name and address of each consumer who satisfies the criteria selected by the customer but whose name and address appears in the Opt Out Database to ensure that each consumer who has chosen not to have his or her name and address used for target marketing purposes does not receive a mail piece (Frank Aff., paragraph 18).

44. The process used to mail the materials of Trans Mark's customers is automated. The computer tape is sent to either an independent mailing house or one run by Trans Mark's customer. Approximately 90% of the computer tapes leased by Trans Mark are sent directly to mail houses that are independent of its customers (Frank Aff., paragraph 20).

45. Trans Mark's customers use the computer tapes to mail offers to consumers to enter into credit, insurance or business transactions. For example, Trans Mark has leased computer tapes to:

(a) Colonial Penn Auto Insurance, to mail consumers material about "The Experienced Driver Program";

(b) Citibank, to mail consumers an offer to apply for home equity financing;

(c) Publishers Clearing House, to mail consumers notification of their Finalist status in its Ten Million Dollar Sweepstakes;

(d) Columbia House, to mail consumers an offer to become a member of the Columbia House Video Club;

(e) Ross-Simons, to mail its catalog to consumers;

(f) Fingerhut, to mail its catalog to consumers; and

(g) Phillips Publishing, to mail consumers the Better Retirement Report.

(Frank Aff., paragraph 21, Exhibits D-J).

46. Trans Mark also leases computer tapes containing names and addresses of consumers to customers who promote their product or services through telemarketing. Approximately 2% of Trans Mark's revenue is derived from the rental of computer tapes for telemarketing purposes. When a customer orders a computer tape for telemarketing purposes from Trans Mark, the tape is sent to a company that provides telemarketing services for Trans Mark's customer. The telemarketing company is not made aware of the criteria chosen by Trans Mark's customer to select the names and addresses appearing on the tape (Frank Aff., paragraph 24).

47. Trans Mark has several competitors such as Donnelley Marketing, Metromail and R.L. Polk, who have generated much more revenue from the rental of consumer lists than has Trans Mark ($4,700,000 in 1992).

Name	Revenue
Donnelley Marketing	$60-100 million
Metromail	$40-60 million
R.L. Polk	$50 million

(Frank Aff., paragraph 26, Exh. K).

III. CONCLUSIONS OF LAW

A. Summary Decision Is Appropriate In This Case

The Rules of Practice, Section 3.24(2), authorize summary decision when "there is no genuine issue as to material fact and . . . the moving party is entitled to such decision as a matter of law."

The existence of unimportant or peripheral disputed issues of fact does not rule out summary disposition as long as material facts are not seriously challenged. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49 (1986).

Trans Union's response to the motion for summary decision does not challenge the accuracy of those facts which complaint counsel offer in support of their motion for summary decision, nor does it point to substantial unresolved factual disputes; rather, Trans Union cites other facts--unchallenged by complaint counsel--which it claims support its argument that its target marketing operation does not violate the FCRA.

Thus, there is no genuine issue of material fact presented in the motion and response thereto; only legal disputes remain and summary decision is therefore appropriate.

B. The Purpose Of The FCRA

In enacting the FCRA, Congress found that "there is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy" Sec. 602(a)(4), and, in Section 602(b) of the Act, it required consumer reporting agencies [to] adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information ....

C. The Complaint Allegations

There is no dispute that Trans Union is a consumer reporting agency as defined in Section 603(f) of the FCRA (F. 2). The remaining issues raised by the complaint in this proceeding are whether its target marketing lists are "consumer reports" under the

FCRA[3] and, if so, whether those reports are sold to its customers for a permissible purpose under Section 604.[4]

D. Trans Union's Target Marketing Lists Are Consumer Reports Under Section 603 of The FCRA

Section 603(d) of the FCRA defines a consumer report as the communication of any information by a consumer reporting agency such as Trans Union bearing on "a consumer's credit worthiness credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living."

In January 1993, the Commission approved a consent order with TRW Inc. which allowed it to use only the following identifying information from its consumer reporting database to compile target marketing lists of consumers for sale to its customers: name, telephone number, mother's maiden name, address, zip code, year

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[3] Section 603(d) of the FCRA defines a consumer report as: any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes or (3) other purposes authorized under Section 604.

[4] Section 604. Permissible purposes of reports: A consumer reporting agency may furnish a consumer report under the following circumstances and no other:
(1) In response to the order of a court having jurisdiction to issue such an order
(2) In accordance with the written instructions of the consumer to whom it relates.
(3) To a person which it has reason to believe--

(A) Intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
(B) Intends to use the information for employment purposes; or
(C) Intends to use the information in connection with the underwriting of insurance involving the consumer; or
(D) Intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or
(E) Otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

of birth, age, any generational designation, social security number, or substantially similar identifiers, or any combination thereof.

Since TRW can use only the listed identifying information to create its target marketing lists, the Commission, by accepting the TRW consent agreement, has established a standard for determining what types of information are not credit-related for the purposes of defining a consumer report under the FCRA.

Trans Union's target marketing lists reveal much more information about the consumer in its database than is allowed under the TRW standard.

When Trans Union generates its target marketing database and lists, it lists only those consumers from its credit reporting database who have two or more tradelines (F. 21). Since tradelines are reports of accounts by credit grantors (F. 8, 9, 10), they reveal to Trans Union's customers that at least two credit grantors found consumers on the list to be credit worthy (F. 22), and this information therefore bears on the consumer's "credit worthiness, credit standing, [or] credit capacity" (Sec. 603(d), FCRA). Even the fact that a consumer possesses a credit card (F. 24, 28) reveals, to some extent, a consumer's credit worthiness, credit standing, or credit capacity because it "conveys the information that each consumer named meets certain criteria for credit worthiness." *FTC Commentary on the FCRA,* 55 Fed. Reg. 18804 at 18815 (1990) ("FCRA" Commentary) (*re* prescreened lists).

Other Trans Union lists such as "Upscale Retail" (F. 29) or its "selects" (F. 30) bear on a customer's credit worthiness, credit standing or capacity. Indeed, the implication of Trans Union's description of "Upscale Retail" is that consumers on this list are credit worthy (F. 29).

I reject Trans Union's claim that if the information in its target marketing lists is not, as the complaint alleges, used for permissible purposes, it is therefore not credit-related. *See St. Paul Guardian Insurance Co. v. Johnson*, 884 F.2d 881, 884-85 (5th Cir. 1989):

One of the central purposes of the FCRA was to restrict the purposes for which consumer reports may be used, for the simple reason that such reports may contain sensitive information about consumers that can easily be misused...

...the purpose for which the information contained in a credit report is collected determines whether the report is a consumer report as defined by the FCRA.

The purpose for which the information contained in Trans Union's files is collected is credit related and its target marketing lists are derived from this information. These lists are therefore "consumer reports" as defined in the FCRA regardless of their ultimate use by Trans Union's customers.

I also reject Trans Union's argument that only information which is "judgmental" or which provides a consumer's "credit rating" is protected by the FCRA. The phrase "bearing on" in Section 603 indicates that the definition of "consumer report" is not as restricted as Trans Union claims. Thus, Mr. Hopfensperger's belief that Trans Mark's list databases do not contain enough information to support a credit grantor's judgment as to credit eligibility (F. 40) is irrelevant.

E. Trans Union Communicates The Information Taken From Its Consumer Reporting Database To Its Customers

Trans Union furnishes credit-related information through its target marketing lists either directly to its clients or to third-party mailers on behalf of its clients (F. 39). In either case, this is a statutory "communication" of credit-related information:

Some public commentators also suggested that prescreened lists are not consumer reports if they are furnished solely to third parties (*e.g.*, mailing services) rather than directly to the customer that ordered them. Comment 6 has been revised to reflect the Commission's view that this procedure is not a means by which a consumer reporting agency can avoid application of the FCRA to such lists.

FCRA Commentary at 18807.

Its target marketing lists are not, as suggested by Trans Union, akin to a coded credit guide because a credit guide is not useful until the key is given, whereas a target marketing list is immediately useful to its recipient.

F. Trans Union's Clients Have No Permissible Purpose To Receive Consumer Reports In The Form Of Target Marketing Lists

The Commission has taken the position that all of the permissible purposes for obtaining a consumer report listed in Section 604 of the FCRA relate to transactions initiated by the consumer by applying for credit, employment, insurance, government benefits, a lease, or check cashing privileges.

For example, the Commission has interpreted Section 604(3)(A) of the FCRA as allowing creditors to obtain prescreened lists of consumers; however, it has done so only with the understanding that consumers on the list would be given credit as a result.

> Prescreening is permissible under the FCRA if the client agrees in advance that each consumer whose name is on the list after prescreening will receive an offer of credit. In these circumstances, a permissible purpose for the prescreening service exists under this section, because of the client's present intent to grant credit to all consumers on the final list, with the result that the information is used "in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to . . . the consumer."

FCRA Commentary at 18815.

On the other hand, the Commission has recently rejected the claim that target marketing is legal under the FCRA:

> List sellers and those who sell consumer goods and services are always eager to obtain personal information about consumers' finances and lifestyles for

marketing purposes. When they obtain such information from sources other than consumer reporting agencies, the FCRA is inapplicable. When credit bureaus supply such information on consumers from their consumer reporting data bases, however, the privacy protections of Section 604 come into play because the Commission views such lists as a series of consumer reports.

Prepared Statement of the FTC before the Senate Banking Committee (May 27, 1993) at 16.

Another Commission statement to Congress took the same position:

There is no apparent legal rationale for this [the industry] position under the existing law. The desire to market goods or service to consumers does not constitute a permissible purpose for obtaining a consumer report under any of the provisions of Section 604, and the Commission has never interpreted the Act to permit reports to be obtained for such purposes, whether in their entirety or in the form of prescreened lists.

See prepared Statement of the Federal Trade Commission Before the Subcommittee on Consumer Affairs and Coinage of the House Banking, Finance and Urban Affairs Committee (Oct. 24, 1991) at 14-15. This statement also denied that Section 604(3)(E) of the FCRA might be interpreted as permitting target marketing:

The Commission has interpreted Section 604(3)(E) to apply only to a limited category of consumer-initiated transactions, such as applications for residential leases or for check cashing privileges. A narrow construction of Section 604(3)(E) is critical to the privacy protections of the Act.

1991 Prepared statement, footnote 12 at 12.

The legislative history of the FCRA supports complaint counsel's claim that target marketing is not a permissible purpose under Section 604.

In introducing his version of the statute, Senator Proxmire, the author of the FCRA, stated:

> Credit reporting agencies would furnish information on individuals only to persons with a legitimate business need for the information. . . . This would preclude the furnishing of information . . . to market research firms or to other business firms who are simply on fishing expeditions.

115 Cong. Rec. 2415 (Jan. 31, 1969).

And, in a letter to the Commission dated October 8, 1971, he wrote:

> While Section 604(3)(E) permits the furnishing of credit information to persons who have "a legitimate business need for the information in connection with a business transaction involving the consumer," I do not believe the sale of credit information for compiling a mailing list would qualify as a transaction involving the consumer. The legislative history is not definitive on this point, but I believe it is reasonable to interpret a transaction "involving the consumer" as one in which the consumer himself is aware of the proposed transaction. Indeed, this was the position taken by your staff in their interpretation dated May 25, 1971. Under this interpretation, credit information could not be furnished by a consumer reporting agency for the purpose of compiling a mailing list if the individuals on the list have not specifically applied for credit or are otherwise unaware of the proposed transaction.

Thus, while the language of Section 604(3)(E) could be construed as supporting Trans Union's position, congressional history suggests otherwise as does the Commission's opinion that target marketing is not a permissible purpose. This opinion, which is not unreasonable in view of the reasons for passage of the FCRA, is persuasive. *See Cochran v. Metropolitan Life Ins. Co.*, 472 F. Supp. 827, 831 (N.D. Ga. 1979):

> the FTC has declared that [claim reports] are not regulated by the Act. The court has no cause to deviate from the agency.

Id. at 832.

Since Trans Union's target marketing lists are consumer reports which are not consumer-initiated (F. 4, 6), they are not furnished to its clients for a permissible purpose under the FCRA.

G. There Are No Constitutional Impediments To This Proceeding

Trans Union claims that prohibiting the use of its target marketing lists would violate First Amendment and Equal Protection rights guaranteed to it by the U.S. Constitution.

Trans Union argues that since its target marketing lists do no more than propose a commercial transaction, they are protected by the First Amendment guarantee of freedom of speech. *See Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Trans Union also claims that its equal protection rights would be denied if it were barred from using target marketing lists while its competitors who are not covered by the FCRA would be allowed to do so. *See Sullivan v. Stroop*, 496 U.S. 478, 485 (1990).

In *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980), the Court applied a four part test to determine whether restrictions on commercial speech are constitutional:

1. Is the speech lawful and neither deceptive or misleading?;
2. If the speech is lawful, is the government's interest in regulating it substantial?;
3. If the answer to the first two questions is yes, does regulation directly advance some governmental interest?;
4. Is the regulation no more extensive than is necessary to serve the governmental interest?

Assuming that Trans Union is correct in its assertion that its target marketing lists do not transmit deceptive or misleading information, there is nevertheless a substantial government interest in protecting a consumer's right to privacy, and the FCRA directly advances this interest in a manner which is not unduly restrictive.

I also reject Trans Union's equal protection argument because the FCRA applies equally to all consumer reporting agencies.

Furthermore, Congress' conclusion that consumer reporting agencies presented unique problems with respect to consumer privacy which required some regulation of their activities was not unreasonable and its decision to regulate these agencies furthers a legitimate public interest. *See FCC v. Beach Communications, Inc* , 113 S. Ct. 2096 (1993); *Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

H. Conclusion

I conclude that Trans Union's target marketing lists are consumer reports under Section 603(d) of the FCRA, and that its sale of such lists to persons whom it does not have reason to believe have a permissible purpose to obtain such lists violates Sections 604 and 607 of the FCRA. Therefore, the following cease and desist order is appropriate:

ORDER

It is hereby ordered, That respondent, Trans Union Corporation:

a) Cease and desist from compiling and/or selling consumer reports in the form of target marketing lists to any person unless respondent has reason to believe that such person either intends to make a firm offer of credit to all consumers on the lists or to use such lists for purposes authorized under Section 604 of the FCRA.

b) Maintain for at least five (5) years from the date of service of this order and upon request, make available to the Federal Trade Commission for inspection and copying, all records and documents necessary to demonstrate fully its compliance with this order.

c) Deliver a copy of this order to all present and future management officials having administrative, sales, advertising, or policy responsibilities with respect to the subject matter of this order.

d) For the five (5) year period following the entry of this order, notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that might affect compliance obligations arising out of this order.

e) Within one hundred and eighty (180) days of service of this order, deliver to the Commission a report, in writing, setting forth the manner and form in which it has complied with this order as of that date.

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 served thereafter with a copy of a Complaint that the Commission issued on December 15, 1992, that charged the respondent with violations of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order on those portions of the matter alleged in sections four and five of the complaint, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid 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 the aforesaid portions of 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 Trans Union Corporation is a corporation organized, existing and doing business by virtue of the laws of the State of Delaware, with its office and principal place of business located at 555 West Adams Street, Chicago, Illinois.

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

ORDER

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

a. "*Trans Union*" means Trans Union Corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device.

b. The Fair Credit Reporting Act ("FCRA") refers to 15 U.S.C. 1681-1681t, as amended or as it may hereinafter be amended.

c. The terms, "*Person*," "*Consumer*," "*Consumer Report*," and "*Consumer Reporting Agency*," are defined as set forth in Sections 603(b), (c), (d), (f), respectively, of the FCRA, 15 U.S.C. 1681a(b), 1681a(c), 1681a(d), and 1681a(f).

d. "*Credit Information*" means the information Trans Union maintains bearing on any of the characteristics listed in Section 603(d) of the FCRA with respect to any Consumer that Trans Union obtains from Subscribers, court records or any other source and from which Trans Union creates Consumer Reports.

e. "*Credit Prescreening*" means the process whereby Trans Union, utilizing Credit Information, compiles or edits for a client a list of Consumers who meet specific criteria and provides this list to the client or a third party (such as a mailing service) on behalf of the client for use in soliciting those consumers for an offer of credit.

I.

It is ordered, That respondent Trans Union, in connection with the furnishing of consumer reports, does cease and desist from failing:

1. Within ninety (90) days of the date of this order, to require in Trans Union's contracts that those who obtain Consumer Reports from Trans Union in the form of lists developed through Credit Prescreening make a firm offer of credit to each person on the lists and take reasonable steps to enforce those contracts.

II.

It is further ordered, That respondent shall distribute a copy of this order to all present and future management officials having supervisory responsibilities for administration, sales, advertising or policy with respect to the subject matter of this order in each of its subsidiaries and operating divisions dealing with credit prescreening, and shall secure from each such individual a signed statement acknowledging receipt of this order.

III.

It is further ordered, That for the five (5) year period following entry of this order, respondent, its successors and assigns shall notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in respondent which may affect compliance obligations arising out of the order.

IV.

It is further ordered, That respondent shall maintain and upon request make available to the Federal Trade Commission all records that will demonstrate compliance with the requirements of this order.

V.

It is further ordered, That respondent shall, within sixty (60) days after the date of service of this order, file with the Commission a report, in writing, signed by the respondent and setting forth in detail the manner and form of its compliance with this order.

VI.

If the FCRA is amended (or other similar federal legislation enacted) or the FTC issues any interpretation of the FCRA, relating to any obligation imposed onTrans Union herein, which creates any new requirement that directly conflicts with any obligation imposed on Trans Union by this order, Trans Union may conform the manner in which it conducts its business as a Consumer Reporting Agency or its use of Credit Information to the requirements of such new statutory provision or interpretation; provided however that, Trans Union shall notify the Commission promptly if it intends to change its conduct as provided for in this Section, and provided further that nothing in this provision shall limit the right of the FTC to challenge Trans Union's actions hereunder and to seek enforcement of Trans Union's obligations under this order. For purposes of this order, and by way of example only, a "direct conflict" between this order and a new statutory amendment or interpretation shall include a requirement in any such amendment or interpretation that a Credit Reporting Agency complete a task or obligation addressed in this order in a greater period of time than is specified in the order.

VII.

This order does not address the current practice engaged in by Trans Union of compiling, for sale to clients, lists of consumers with certain credit-related characteristics, based in whole or in part on credit information, which lists are not developed through Credit Prescreening and it does not in any way limit the right of the Federal Trade Commission to take any appropriate action after entry of this order pursuant to the FCRA relating to this practice, nor does it limit in any way Trans Union's defense of any such action.

IN THE MATTER OF

COLUMBIA HOSPITAL CORPORATION, ET AL.

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

Docket C-3472. Complaint, Nov. 19, 1993--Decision, Nov. 19, 1993

This consent order requires, among other things, the respondents to divest Kissimmee Memorial Hospital, and this divestiture has been consummated. In addition, it prohibits, among other things, the respondents from acquiring, for 10 years, any acute care hospital in Osceola County, Florida without prior Commission approval. The prior approval requirement also is to be met before respondents permit any acute care hospital they operate in the county to be acquired by any entity that already operates a hospital there.

Appearances

For the Commission: *Mark J. Horoschak* and *David M. Narrow*.

For the respondents: *Ky Ewing, Vinson & Elkins*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents, Columbia Hospital Corporation ("Columbia") and Galen Health Care, Inc. ("Galen"), corporations subject to the jurisdiction of the Commission, have entered into an agreement whereby Columbia will acquire 100 percent of the voting stock of Galen; that the acquisition agreement violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended; that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and it appearing to the

Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint, pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

DEFINITIONS

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

a. "*Columbia*" means Columbia Hospital Corporation, a corporation organized, existing, and doing business under the laws of Nevada, with its principal place of business at 777 Main Street, Suite 2100, Fort Worth, Texas.

b. "*Galen*" means Galen Health Care, Inc., a corporation organized, existing, and doing business under the laws of Delaware, with its principal place of business at 201 West Main Street, Louisville, Kentucky

c. "*Acute care hospital*" means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized medical staff, that provides 24-hour inpatient care, as well as outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

d. "*Acute care inpatient hospital services*" means 24-hour inpatient health care, and related medical or surgical diagnostic and treatment services, for physically injured or sick persons with short-term or episodic health problems or infirmities. In Florida, acute care inpatient hospital services are provided only by health care institutions licensed as hospitals, in facilities thereof licensed or certified to provide acute care (as opposed to other types of hospital care, such as psychiatric, substance abuse, rehabilitation or subacute skilled nursing care).

THE PARTIES

PAR. 2. As of December 31, 1992, Columbia owned and operated 24 hospitals in Florida, Texas, Alabama, and Georgia. In 1992, Columbia had revenues of more than $819 million. Respondent Columbia owns and operates, through a wholly-owned subsidiary, Kissimmee Memorial Hospital ("KMH"), an acute care hospital in Kissimmee, Osceola County, Florida.

PAR. 3. Galen owns and operates approximately 70 hospitals in 18 states. In fiscal year 1992, Galen's hospitals had total net revenues of more than $3.8 billion. Respondent Galen owns and operates Osceola Regional Medical Center ("Osceola Regional"), an acute care hospital in Kissimmee, Osceola County, Florida.

JURISDICTION

PAR. 4. Columbia and Galen, at all times relevant herein, have been and are now engaged in or affecting commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12. The businesses of Columbia and Galen, at all times relevant herein, have been and are now in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

THE PROPOSED ACQUISITION

PAR. 5. On or about June 10, 1993, Columbia and Galen entered into an agreement whereby Columbia will acquire 100 percent of the voting stock of Galen, and Galen stockholders will receive in exchange Columbia voting stock. The total value of the Galen stock to be acquired by Columbia is in excess of $3.2 billion.

NATURE OF TRADE AND COMMERCE

PAR. 6. The relevant line of commerce in which to analyze the proposed acquisition is the production and sale of acute care

inpatient hospital services and or any narrower group of services contained therein.

PAR. 7. The relevant section of the country is Osceola County, Florida.

MARKET STRUCTURE

PAR. 8. The relevant market is highly concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI") or by four-firm concentration ratios.

ENTRY CONDITIONS

PAR. 9. Entry into the relevant market is difficult due to certificate-of-need regulation of entry by the State of Florida, substantial lead times required to establish a new hospital, and other factors.

COMPETITION

PAR. 10. KMH and Osceola Regional are actual and potential competitors in the relevant market.

EFFECTS

PAR. 11. The effects of the aforesaid acquisition, if consummated, may be substantially to lessen competition in the relevant market in the following ways, among others:

(a) It would eliminate actual and potential competition between KMH and Osceola Regional, and between Osceola Regional and others;

(b) It would significantly increase the already high levels of concentration;

(c) It may create a firm whose market share is so high as to lead to unilateral anticompetitive effects;

(d) It would eliminate Osceola Regional as a substantial independent competitive force;

(e) It may enhance the possibility of collusion or interdependent coordination by the remaining firms in the relevant market; and

(f) It may deny patients, physicians, third-party payers, and other consumers of hospital services the benefits of free and open competition based on price, quality, and service.

VIOLATIONS CHARGED

PAR. 12. The acquisition agreement described in paragraph five above violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 13. The acquisition described in paragraph five, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation into the proposed acquisition of Galen Health Care, Inc. by Columbia Hospital Corporation, including as a proposed respondent Columbia Healthcare Corporation (a corporation into which Columbia Hospital Corporation is proposed to be merged immediately preceding its acquisition of Galen Health Care, Inc.), and the respondents, having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission would charge respondents with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended; 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 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 Columbia Hospital Corporation is a corporation organized, existing and doing business under the laws of the State of Nevada, with its principal place of business at 777 Main Street, Suite 2100, Fort Worth, Texas. Respondent Columbia Healthcare Corporation is a corporation organized, existing and doing business under the laws of the State of Delaware, with the same principal place of business as Columbia Hospital Corporation.

2. Respondent Galen Health Care, Inc. is a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal place of business at 201 West Main Street, Louisville, Kentucky.

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.

I.

For the purposes of this order:

A. "*Columbia*" means Columbia Hospital Corporation, a corporation organized, existing and doing business under the laws of Nevada, with its principal place of business at 777 Main Street,

Suite 2100, Fort Worth, Texas, as well as its officers, employees, agents, parents, divisions, subsidiaries, affiliates, successors and assigns (including specifically, but not limited to, Columbia Healthcare Corporation, the corporation into which Columbia Hospital Corporation is proposed to be merged), and the officers, employees, or agents of Columbia's divisions, subsidiaries, affiliates, successors and assigns.

B. "*Galen*" means Galen Health Care, Inc., a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal place of business at 201 West Main Street, Louisville, Kentucky, as well as its officers, employees, agents, parents, divisions, subsidiaries, affiliates, successors assigns, and the officers, employees, or agents of Galen's divisions, subsidiaries, affiliates, successors and assigns

C. "*Respondents*" means Columbia and Galen, collectively and individually.

D. "*Acute care hospital*" means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized medical staff, that provides 24-hour inpatient care, as well as outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

E. To "*acquire an acute care hospital*" means to directly or indirectly acquire the whole or any part of the assets of an acute care hospital; to acquire the whole or any part of the stock or share capital of, the right to designate directly or indirectly directors or trustees of, or any equity or other interest in, any person which operates an acute care hospital; or to enter into any other arrangement to obtain direct or indirect ownership, management or control of an acute care hospital or any part thereof, including but not limited to a lease of or management contract for an acute care hospital.

F. To "*operate an acute care hospital*" means to own, lease, manage, or otherwise control or direct the operations of an acute care hospital, directly or indirectly.

G. "*Affiliate*" means any entity whose management and policies are controlled in any way, directly or indirectly, by the person with which it is affiliated.

H. "*Person*" means any natural person, partnership, corporation, company, association, trust, joint venture or other business or legal entity, including any governmental agency.

I. "*Kissimmee Memorial Hospital*" means the general acute care hospital currently owned and operated by Columbia in Osceola County, Florida at 200 Hilda Street, Kissimmee, Florida, and all of its assets, title, properties, interests, rights and privileges, of whatever nature, tangible and intangible, including without limitation all buildings, machinery, equipment, and other property of whatever description, except for accounts receivable and cash.

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

II.

It is ordered, That:

A. Within six (6) months after the date this order becomes final, respondents shall divest, absolutely and in good faith, Kissimmee Memorial Hospital. Kissimmee Memorial Hospital shall be divested only (1) to Adventist Health System/Sunbelt Health Care Corporation and/or its affiliates, pursuant to the acquisition agreement attached hereto as Exhibit A, or otherwise (2) to an acquirer or acquirers, and only in such manner, that receives the prior approval of the Commission. The purpose of the divestiture required by this order is to ensure the continuation of Kissimmee Memorial Hospital as an ongoing, viable acute care hospital and to remedy the lessening of competition alleged in the Commission's complaint.

B. Respondents shall comply with all terms of the Agreement to Hold Separate, attached hereto and made a part hereof as

Appendix I. Said Agreement shall continue in effect until such time as respondents have divested Kissimmee Memorial Hospital or until such other time provided in the Agreement to Hold Separate.

C. Pending divestiture, respondents shall take such action as is necessary to maintain the viability and marketability of Kissimmee Memorial Hospital and shall not cause or permit the destruction, removal or impairment of any assets or businesses of Kissimmee Memorial Hospital, except in the ordinary course of business and except for ordinary wear and tear.

III.

It is further ordered, That:

A. If respondents have not divested Kissimmee Memorial Hospital as required by paragraph II of this order within six (6) months after the date this order becomes final, respondents shall consent to the appointment of a trustee by the Commission to divest Kissimmee Memorial Hospital. In the event the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, respondents shall similarly consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondents to comply with this order.

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

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures of acute care hospitals.

2. The trustee shall have the exclusive power and authority, subject to the prior approval of the Commission, to divest Kissimmee Memorial Hospital

3. The trustee shall have eighteen (18) months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the eighteen-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission, or by the Court for a court-appointed trustee; *provided, however*, that the Commission or Court may only extend the divestiture period two (2) times.

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

5. Subject to respondents' absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in paragraph II of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each acquiring entity for the divestiture of Kissimmee Memorial Hospital. The divestiture shall be made in the manner set out in paragraph II of this order; *provided, however,* that if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve

more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondents from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a Court may set. The trustee shall have authority to employ, at the cost and expense of respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, or other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the Court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondents and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting Kissimmee Memorial Hospital.

7. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order.

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

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A. of this order.

10. The Commission or, in the case of a court-appointed trustee, the Court may on its own initiative or at the request of the trustee issue such additional orders or directions as may be nec-

essary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain Kissimmee Memorial Hospital.

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

IV.

It is further ordered, That for a period of ten (10) years from the date this order becomes final, no respondent shall, without the prior approval of the Federal Trade Commission:

A. Acquire any acute care hospital in Osceola County, Florida; or

B. Permit any acute care hospital it operates in Osceola County, Florida to be acquired by any person that operates, or will operate immediately following such acquisition, any other acute care hospital in Osceola County, Florida.

Provided, however, that no acquisition shall be subject to this paragraph IV of this order if the fair market value of (or, in case of a purchase acquisition, the consideration to be paid for) the acute care hospital or part thereof to be acquired does not exceed one million dollars ($1,000,000).

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not permit all or any substantial part of any acute care hospital they operate in Osceola County, Florida to be acquired by any other person (except pursuant to the divestiture required by paragraph II of this order) unless the acquiring person files with the Commission, prior to the closing of such acquisition, a written agreement to be bound by the

provisions of this order, which agreement respondents shall require as a condition precedent to the acquisition.

VI.

It is further ordered, That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondents made at their principal offices, respondents shall permit any duly authorized representatives of the Commission:

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

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

VII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully satisfied the divestiture obligations of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of all contacts or negotiations with prospective acquirers for the divestitures required by this order, including the identity of all parties contacted. Respondents also shall include in their compliance reports copies of all written communications to and from such parties, and all

internal memoranda, reports, and recommendations concerning the required divestitures.

B. Annually beginning on the first anniversary of the date this order becomes final and continuing for nine (9) years thereafter, respondents shall submit a verified report demonstrating the manner in which they have complied and are complying with this order.

VIII.

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

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by among Columbia Hospital Corporation, a corporation organized, existing and doing business under the laws of the State of Nevada, and Columbia Health Care Corporation, a corporation, organized, existed and doing business under the laws of the State of Delaware, both with their principal place of business at 777 Main Street, Suite 2100, Forth Worth, Texas (collectively referred to as "Columbia"); and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

Whereas, on or about June 10, 1993, Columbia entered into an agreement to acquire all of the voting stock of Galen Health Care, Inc. (hereinafter the "Acquisition"); and

Whereas, the Commission is now investigating the Acquisition to determine if it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the attached Agreement Containing Consent Order ("Consent Order"), which would require divestiture of Columbia's Kissimmee Memorial Hospital in Osceola County, Florida ("KMH"), the Commission must place it on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of KMH's assets and businesses during the period prior to the final acceptance of the Consent Order by the Commission (after the 60-day public notice period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of KMH as described in paragraph II of the Consent Order, and the Commission's right to seek to restore KMH as a viable competitor; and

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

(i) Preserve KMH as a viable independent acute care hospital pending its divestiture, and

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

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

Whereas, Columbia understands that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

Now, therefore, the parties agree, upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, it will not seek further relief from Columbia with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order to which it is annexed and made a part thereof, and in the event the required divestiture is not accomplished, to seek divestiture of KMH as held separate pursuant to this Agreement, as follows:

1. Columbia agrees to execute and be bound by the attached Consent Order.

2. Columbia agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 2.a - 2.c, it will comply with the provisions of paragraph 3 of this Agreement:

a. Three business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules;

b. 120 days after publication in the Federal Register of the Consent Order, unless by that date the Commission has finally accepted such Order; or

c. The day after the divestitures required by the Consent Order have been completed.

3. Columbia will hold KMH's assets and businesses as they are presently constituted separate and apart on the following terms and conditions:

a. KMH, as it is presently constituted, shall be held separate and apart and shall be operated independently of Columbia (meaning here and hereinafter, Columbia excluding KMH) except to the extent that Columbia must exercise direction and control over KMH to assure compliance with this Agreement.

b. Columbia shall not exercise direction or control over, or influence directly or indirectly, KMH or any of its operations or businesses; *provided, however*, that Columbia may exercise only such direction and control over KMH as is necessary to assure compliance with this Agreement.

c. Columbia shall maintain the viability and marketability KMH and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair its marketability or viability.

d. Except for the single Columbia director, officer, employee, or agent serving on the "New Board" or "Management Committee" (as defined in subparagraph 3.h), Columbia shall not permit any director, officer, employee, or agent of Columbia to also be a director, officer or employee of KMH.

e. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations litigation, or negotiating agreements to dispose of assets, Columbia shall not receive or have access to, or use or continue to use, any of KMH's "material confidential information" not in the public domain. Any such information that is obtained pursuant to this subparagraph shall only be used for the purpose set out in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to Columbia from sources other than KMH, and includes but is not limited to customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets).

f. Columbia shall not change the composition of the management of KMH except that the KMH directors or agreement to hold members serving on the New Board or Management Committee (as defined in subparagraph 3.h) shall have the power to remove employees for cause.

g. All material transactions, out of the ordinary course of business and not precluded by subparagraphs 3.a - 3.f hereof, shall be subject to a majority vote of the New Board or Management Committee (as defined in subparagraph 3.h).

h. Columbia shall either separately incorporate KMH and adopt new Articles of Incorporation and By-laws that are not inconsistent with other provisions of this Agreement or shall establish a separate business venture with articles of agreement covering the conduct of KMH in accordance with this Agreement. Columbia shall also elect a new three person board of directors of KMH ("New Board") or Management Committee of KMH ("Management Committee"). Columbia may elect the directors to the New Board or select the members of the Management Committee; *provided, however,* that such New Board or Management Committee shall include no more than one Columbia director, officer, employee, or agent. Except as permitted by this Agreement, the director of the New Board or member of the Management Committee who is also a Columbia director, officer, employee or agent, shall not receive in his or her capacity as a New Board director or Management Committee member material confidential information and shall not disclose any such information received under this Agreement to Columbia or use it to obtain any advantage for Columbia. Said director of the New Board or member of the Management Committee who is also a Columbia director, officer, employee or agent, shall enter a confidentiality agreement prohibiting disclosure of material confidential information (as that term is defined in subparagraph 3.e.). Such New Board director or Management Committee member shall participate in matters which come before the New Board or Management Committee only for the limited purpose of considering a capital investment or other transactions exceeding $1,000,000 and carrying out Columbia's responsibility to assure that KMH is maintained in such manner as will permit its divestiture as an ongoing, viable acute care hospital. Except as permitted by this Agreement, such New Board director or Management Committee member shall not participate in any matter, or attempt to influence the votes of the other directors or Management Committee members with respect to matters that would involve a conflict of interest if Columbia and KMH were separate and independent entities. Meetings of the New Board or Management Committee during the term of this Agreement shall be

stenographically transcribed and the transcripts retained for two (2) years after the termination of this Agreement.

i. All earnings and profits of KMH shall be retained separately in KMH. If necessary, Columbia shall provide KMH with sufficient working capital to operate at its current rate of operation, and to carry out any capital improvement plans for KMH which have already been approved by Columbia.

j. Should the Federal Trade Commission seek in any proceeding to compel Columbia (meaning here and hereinafter Columbia including KMH) to divest itself of KMH, or to seek any other injunctive or equitable relief, Columbia shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Columbia also waives all rights to contest the validity of this Agreement.

4. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to Columbia made to its principal office, Columbia shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Columbia 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 Columbia relating to compliance with this Agreement;

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

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

IN THE MATTER OF

IMPERIAL CHEMICAL INDUSTRIES PLC, 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-3473. Complaint, Nov. 29, 1993--Decision, Nov. 29, 1993

This consent order allows, among other things, the respondents to proceed with the proposed acquisition of certain Du Pont assets, but it requires the respondents to divest, within 15 months, a predetermined acrylic-plastic manufacturing capacity by selling one of their U.S. plants to a Commission-approved purchaser, and to provide the buyer with technical assistance for 18 months, if necessary. In addition, if the divestiture is not accomplished in the specified time-frame, the respondents agree to a Commission-appointed trustee to complete the transaction.

Appearances

For the Commission: *Rhett R. Krulla, Steven Newborn* and *Robert Tovsky.*

For the respondents: *William Rosoff, Davis, Polk & Wardwell,* New York, N. Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Imperial Chemical Industries PLC, a corporation, ICI Americas Inc., a corporation, and ICI Acrylics Inc., a corporation, have entered into an agreement with E.I. du Pont de Nemours and Company ("Du Pont"), that violates said Acts, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

DEFINITIONS

PARAGRAPH 1. For purposes of this complaint, "*methyl methacrylate*" means the chemical intermediate product, used to produce acrylic resins and plastics.

PAR. 2. For purposes of this complaint, "*polymethyl methacrylate*" means a homopolymer of methyl methacrylate monomer or a copolymer containing more than 50% by weight methyl methacrylate monomer as a constituent monomer. Polymethyl methacrylate does not include acrylic resin for use in the manufacture of latex coatings or acrylic coatings.

PAR. 3. For purposes of this complaint, "*acrylic plastic*" means polymethyl methacrylate or acrylic sheet produced by a continuous-casting manufacturing process.

PAR. 4. For purposes of this complaint, "*acrylic sheet*" means sheet or plate containing more than 50% by weight methyl methacrylate, as produced by cell casting, continuous casting, continuous-process extrusion, or extrusion.

THE RESPONDENTS

PAR. 5. Respondent Imperial Chemical Industries PLC is a public limited company, organized, existing and doing business under and by virtue of the laws of The United Kingdom, with its principal office and place of business at 9 Millbank, London, England. Respondents ICI Americas Inc. and ICI Acrylics Inc. are wholly-owned subsidiaries of Imperial Chemical Industries PLC. (Hereinafter all three respondents are referred to as "ICI")

PAR. 6. Imperial Chemical Industries PLC is a major worldwide producer of commodity and specialty chemicals.

PAR. 7 Imperial Chemical Industries PLC's net income in 1991 was $1,583 million on sales of $18.3 billion.

PAR. 8. ICI Americas Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at Concord Pike and New Murphy Road, Wilmington, Delaware.

PAR. 9. ICI Acrylics Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business at 10091 Manchester Road, St. Louis, Missouri.

PAR. 10. At all times relevant herein, each of the respondents or their predecessors have been engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12; and have been corporations whose business is in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

THE ACQUISITION

PAR. 11. On April 23, 1992, ICI entered into an agreement with Du Pont for the acquisition by ICI of Du Pont's acrylic plastic assets and businesses ("the Acquisition"). The Acquisition is structured as an exchange of assets between ICI and Du Pont: ICI is selling to Du Pont its nylon and nylon intermediates assets and businesses in exchange for Du Pont's methyl methacrylate and acrylic plastic assets and businesses plus additional cash consideration.

THE RELEVANT MARKETS

PAR. 12. For purposes of this complaint, the relevant line of commerce in which to evaluate the effects of the Acquisition is the manufacture and sale of acrylic plastic.

PAR. 13. For purposes of this complaint, the relevant geographic market is the United States.

PAR. 14. In 1991, about 600 million pounds of acrylic plastic were produced in the United States. The market is highly concentrated.

PAR. 15. It is difficult to enter into the manufacture and sale of acrylic plastic.

PAR. 16. At the time of the Acquisition described above, ICI and Du Pont were actual competitors in the manufacture and sale of acrylic plastic in the United States.

THE EFFECTS OF THE ACQUISITION

PAR. 17. The effect of the Acquisition may be substantially to lessen competition in the relevant market in the United States, 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, because, among other things, the Acquisition eliminates substantial actual competition, between ICI and Du Pont and between Du Pont and others, in the manufacture and sale of acrylic plastic in the United States and significantly enhances the likelihood of collusion or interdependent coordination among the remaining firms in the relevant market.

THE VIOLATIONS CHARGED

PAR. 18. The Acquisition of the acrylic plastic assets and businesses of Du Pont by ICI, would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

PAR. 19. The Acquisition agreement described in paragraph eleven violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 20. The Acquisition of the acrylic plastic assets and businesses of Du Pont by ICI, would, if consummated, violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the proposed acquisition of assets by Imperial Chemical Industries PLC, ICI Americas Inc., and ICI Acrylics Inc. (collectively "ICI") from E. I. du Pont de Nemours

and Company (hereinafter "Du Pont"), which acquisition is more fully described at paragraph I.(A) below, and ICI having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration and which, if issued by the Commission, would charge ICI with violations of the Clayton Act and Federal Trade Commission Act; and

Respondents ICI, their attorneys, and counsel for the Commission having thereafter executed an agreement containing consent order, an admission by 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 Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested 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. Imperial Chemical Industries PLC is a public limited company organized, existing and doing business under and by virtue of the laws of The United Kingdom, with its principal office and place of business at 9 Millbank, London, England.

2. ICI Americas Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at Concord Pike and New Murphy Road, Wilmington, Delaware.

3. ICI Acrylics Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business at 10091 Manchester Road, St. Louis, Missouri.

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

ORDER

I.

As used in this order, the following definitions shall apply:

(A) "*Acquisition*" means the Letter of Intent entered into on April 23, 1992, by which ICI agreed to acquire and Du Pont agreed to convey certain rights and interests in, and title to, certain of the properties, businesses and other assets of Du Pont.

(B) "*ICI*" means Imperial Chemical Industries PLC, ICI Americas Inc., and ICI Acrylics Inc., all of their predecessors, all subsidiaries, divisions, groups and affiliates (including the Properties to Be Divested as hereinafter defined) controlled by any of the foregoing, all of their respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing.

(C) "*Control*" means control as defined in 16 CFR 801.1(b).

(D) "*Du Pont*" means E.I. du Pont de Nemours and Company, all of its predecessors, all subsidiaries, divisions, groups and affiliates controlled by any of the foregoing, all of their respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing.

(E) "*Properties to Be Divested*" means all Assets and Businesses at any one of the following facilities in the United States, provided that, at the time of divestiture, the facility shall have PMMA manufacturing capacity of no less than 30 million

pounds per annum and acrylic sheet manufacturing capacity of no less than 12 million pounds per annum:

1. ICI's Memphis, Tennessee, PMMA and acrylic sheet manufacturing facility;
2. ICI's Olive Branch, Mississippi, PMMA and acrylic sheet manufacturing facility; or
3. ICI's Compton, California, PMMA manufacturing facility (excluding, at ICI's option, those tangible and intangible assets currently used by ICI in the research and development of its acrylic plastics products and not required by the acquirer to compete in the manufacture and sale of PMMA and acrylic sheet) together with the Compton Expansion.

(F) "*Compton Expansion*" means such improvements, additions and expansions to ICI's Compton, California manufacturing facility, or, in the sole discretion of the Commission, at such other location as the acquirer may request, as shall accomplish all of the following:

1. Increase to no less than 30 million pounds per annum the capacity of the Properties to Be Divested as defined in paragraph I.(E)3 above for the production of PMMA;
2. Add to the Properties to Be Divested as defined in paragraph I.(E)3 above capacity of no less than 12 million pounds per annum to extrude acrylic sheet by installation of one or more Reifenhauser extruders heretofore located at ICI's Memphis facility or by installation of comparable extruders that would render the acquirer competitive in the sale of 48-inch by 96-inch acrylic sheet to industrial distributors; and
3. Provide sufficient feedstock storage, PMMA storage, acrylic sheet warehouse space and related facilities, as appropriate to enable the Properties to Be Divested as defined in paragraph I.(E)3 above to operate efficiently at sustained levels of output no less than the above stated capacities.

(G) "*Assets and Businesses*" include but are not limited to all assets, properties, businesses and goodwill, tangible and intangible, utilized in the production, distribution or sale of acrylic plastic and acrylic sheet, including, without limitation, the following:

1. All plant facilities, machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property;
2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, rights to software, trademarks, patents, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes and quality control data;
3. Raw material and finished product inventories and goods in process;
4. All right, title and interest in and to real property, together with appurtenances, licenses and permits;
5. All right, title and interest in and to the contracts entered into in the ordinary course of business with customers (to the extent assignable) (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;
6. All rights under warranties and guarantees, express or implied;
7. All separately maintained, as well as relevant portions of not separately maintained books, records and files; and
8. All items of prepaid expense.

(H) "*Commission*" means the Federal Trade Commission.

(I) "*Rohm and Haas*" means Rohm and Haas Company, all of its predecessors, all subsidiaries, divisions, groups and affiliates controlled by any of the foregoing, all of their respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing.

(J) "*CYRO*" means CYRO Industries, all of its predecessors, all subsidiaries, divisions, groups and affiliates controlled by any of the foregoing, all of their respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing.

(K) "*Polymer Technology*" means Polymer Technology, Inc., all of its predecessors, all subsidiaries, divisions, groups and affiliates controlled by any of the foregoing, all of their respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing.

(L) "*MMA*" means methyl methacrylate.

(M) "*PMMA*" means polymethyl methacrylate, a homopolymer of MMA or a copolymer containing more than 50% by weight MMA as a constituent monomer. PMMA does not include acrylic resin for use in the manufacture of latex coatings or acrylic coatings.

(N) "*Acrylic sheet*" means sheet or plate containing more than 50% by weight MMA as produced by cell casting, continuous casting, extrusion, or continuous manufacturing.

(O) "*Acrylic plastic*" means PMMA or acrylic sheet produced by a continuous-casting manufacturing process.

(P) "*MMA Entrant*" means any person other than ICI, Rohm and Haas or CYRO who has commenced construction of a facility for the manufacture of MMA in North America.

(Q) "*Capacity*" means actual operating capacity, calculated on the basis of a 7-day, 24-hour operation allowing for normal outages for maintenance and repair.

(R) "*Viability and Competitiveness*" of the Properties to Be Divested means that such properties are capable of operating independently of ICI at an annual output of at least 30 million pounds of acrylic plastic and at least 12 million pounds of acrylic sheet and are capable of functioning independently and competitively in the acrylic plastic business and the acrylic sheet business.

II.

It is ordered, That:

(A) Within fifteen (15) months of the date this order becomes final, ICI shall divest, absolutely and in good faith, the Properties to Be Divested to an acquirer that intends to operate the facilities at or near capacity and shall also divest such additional ancillary Assets and Businesses and effect such arrangements that are necessary to assure the Viability and Competitiveness of the Properties to Be Divested. *Provided, however*, that if ICI elects to divest the paragraph I.(E)3. Properties to Be Divested, ICI shall, prior to such divestiture, have either (i) completed the Compton Expansion, or (ii) made such progress toward the completion of the Compton Expansion that the Commission determines that the expansion will be completed without undue delay, in which case the contract between ICI and the acquirer shall contain a provision to that effect.

(B) ICI shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Appendix I. Said Agreement shall continue in effect until such time as ICI has divested all the Properties to Be Divested or until such other time as the Agreement to Hold Separate provides.

(C) ICI shall divest the Properties to Be Divested only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. ICI shall demonstrate the Viability and Competitiveness of the Properties to Be Divested in its application for approval of a proposed divestiture. The purpose of the divestiture of the Properties to Be Divested is (1) to ensure the continuation of the assets as ongoing, viable businesses engaged in the manufacture and sale of acrylic plastic and acrylic sheet at or near capacity, and (2) to remedy any lessening of competition in the acrylic plastic market resulting from the Acquisition as alleged in the Commission's complaint.

(D) ICI shall take such action as is necessary to maintain the Viability and Competitiveness and the marketability of the Properties to Be Divested and shall not cause or permit the destruction, removal or impairment of the Properties to Be Divested except (i) in the ordinary course of business, (ii) for ordinary wear and tear, and (iii) to the extent necessary (a) to implement ICI's plans already in place to move certain acrylic sheet assets from its Memphis facility to its Olive Branch facility, or (b) to move from its Compton facility to another one of its facilities the tangible and intangible assets currently used by ICI in the research and development of its acrylic plastic products.

III.

It is further ordered, That, for a period of eighteen (18) months following the divestiture of the Properties to Be Divested, ICI shall provide to the acquirer as requested by the acquirer, at no cost to the acquirer, such rights to technology, know-how, and technical assistance regarding PMMA and acrylic sheet process and applications technology as may be necessary for the acquirer of the Properties to Be Divested to utilize the Properties to Be Divested and to ensure the continuation of the assets as ongoing, viable businesses capable of operating at or near capacity. *Provided, however,* ICI may, pursuant to its divestiture agreement with the acquirer, require that the acquirer reimburse ICI at a reasonable hourly rate, not to exceed ICI's actual hourly expense for employment of such personnel, for consultation and instruction provided by ICI personnel to the acquirer.

IV.

It is further ordered, That,

(A) For a period of ten (10) years from the date of the divestiture required by this order, ICI shall, at the request of the acquirer of the Properties to Be Divested, contract with such acquirer to

supply MMA to the acquirer, in such quantities as the acquirer may request for use in the Properties to Be Divested, subject only to the capacity constraints of ICI's MMA production facilities in the United States and preexisting contractual obligations to third parties; and

(B) For a period commencing on the date this order becomes final and continuing for ten (10) years, ICI shall, at the request of any person who, after the date this order becomes final, is granted a license to manufacture PMMA in the United States using any of the technology identified in paragraph VI of this order, contract with such licensee to supply MMA to the licensee, in such quantities as the licensee may request for use in the facilities covered by such license, subject only to the capacity constraints of ICI's MMA production facilities in the United States and preexisting contractual obligations to third parties.

(C) The price, terms, and conditions at which ICI shall supply MMA to such acquirer of the Properties to Be Divested, or to any such licensee(s) of the technology identified in paragraph VI of this order, shall be no less favorable to the acquirer, or to the licensee(s), than the price, terms, and conditions at which ICI supplies MMA to any other person engaged in the manufacture of acrylic plastics or acrylic sheet in the United States, including its territories and possessions.

V.

It is further ordered, That, notwithstanding any provision to the contrary, in any contract between ICI and the acquirer of the Properties to Be Divested, or in any contract(s) between ICI and the licensee(s) of the technology identified in paragraph VI of this order, for a period commencing four (4) years after the date of the divestiture required by this order, and continuing for six (6) years, ICI shall permit the acquirer or licensee(s), without penalty or forfeiture of any kind, to purchase or otherwise receive any or all of its MMA requirements in the United States, including its territories and possessions, from any MMA Entrant; and, to the

extent of any such purchases or receipts of MMA by the acquirer ICI shall relieve the acquirer or licensee(s) of any contractual obligation to purchase such quantities of MMA from ICI.

VI.

It is further ordered, That ICI shall relinquish its right to require that Polymer Technology obtain ICI's consent before granting any license for use in the United States, including its territories and possessions, of the Project Technology, as defined in the agreement between Polymer Technology and K-S-H, Inc. dated October 5, 1979.

VII.

It is further ordered, That:

(A) If ICI has not divested, absolutely and in good faith and with the Commission's approval, the Properties to Be Divested within fifteen (15) months of the date this order becomes final, ICI shall consent to the appointment by the Commission of a trustee to divest the Properties to Be Divested and also to divest such additional ancillary Assets and Businesses and to effect such arrangements that are necessary to assure the Viability and Competitiveness of the Properties to Be Divested. In the event the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45 (1), or any other statute enforced by the Commission, ICI shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by ICI to comply with this order.

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

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

2. The trustees shall, subject to the prior approval of the Commission, have the exclusive power and authority to divest any of the Properties to be Divested and to divest such additional ancillary Assets and Businesses of ICI and to effect the additional obligations set out in paragraph II.(A) of this order. The trustees shall additionally have the authority to divest such additional assets of ICI in the United States as the trustee and the Commission determine is necessary to assure the Viability and Competitiveness of the Properties to Be Divested and to comply with the purpose of the order as stated in paragraph II.(C).

3. The trustees shall have eighteen (18) months from the date of appointment to accomplish divestiture. If, however, at the end of the eighteen-month period the trustee has submitted plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission. *Provided, however,* the Commission may only extend the divestiture period two (2) times.

4. Subject to an appropriate confidentiality agreement, the trustee shall have full and complete access to the personnel, books, records and facilities related to all of the Properties to Be Divested, or any other relevant information, as the trustee may reasonably request. ICI shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. ICI shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by ICI shall extend the time for divestiture under this paragraph in an amount equal the delay,

as determined by the Commission or the court for a court-appointed trustee.

5. Subject to ICI's absolute and unconditional obligation to divest at no minimum price, and the purpose of the divestiture as stated in paragraph II.(C) of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available for the divestiture of the Properties to Be Divested. The divestiture shall be made in the manner set out in paragraph II, provided, however, if the trustee receives bona fide offers from more than one acquiring entity or entities, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by ICI from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of ICI, on such reasonable and customary terms and conditions as the Commission or a court may set. Subject to he consent of ICI, which consent shall not be unreasonably withheld, the trustee shall have authority to employ, at the cost and expense of ICI, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants (all of whom shall be subject to appropriate confidentiality agreements) as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of ICI and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Properties to Be Divested.

7. Except in the case of reckless disregard of his or her duties or intentional wrongdoing, ICI shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order.

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

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

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

11. The trustee shall have no obligation or authority to operate or maintain the Properties to Be Divested.

12. The trustee shall report to the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture.

VIII.

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

IX.

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for ten (10) years, ICI shall not acquire, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise:

(A) Assets located in the United States, including its territories and possessions, used for or previously used for (and still suitable for use for) the production of acrylic plastic or acrylic sheet;

(B) More than one percent of the total outstanding stock or share capital of, or any other interest in, any entity (other than an entity included within ICI under paragraph I.(B) of this order as of the date the Agreement Containing Consent Order was signed) that owns or operates assets located in the United States, including its territories and possessions, engaged in the production of acrylic plastic or acrylic sheet.

Provided, however, these prohibitions shall not relate to the construction of new facilities, the acquisition of new equipment, or the acquisition of used equipment for less than two million dollars from a single party in a six-month period.

X.

It is further ordered, That, one year from the date this order becomes final and annually for nine years thereafter, ICI shall file with the Commission a verified written report of its compliance with this order.

XI.

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 ICI, made to its principal office, ICI shall permit any duly authorized representatives of the Commission:

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

(B) Upon ten (10) days notice to ICI, and without restraint or interference from ICI, to interview officers or employees of ICI, who may have counsel present, regarding such matters.

XII.

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

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and among Imperial Chemical Industries PLC, a corporation organized and existing under the laws of The United Kingdom, with its principal office and place of business located at 9 Millbank, London, England, ICI Americas Inc., a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at Concord Pike and New Murphy Road, Wilmington, Delaware, ICI Acrylics Inc., a corporation organized and existing under the laws of the State of Missouri, with its principal place of business located at 10091 Manchester Road, St. Louis, Missouri (collectively "ICI"), and the Federal

Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

1. Premises

Whereas, on April 23, 1992, ICI entered into an Asset Purchase Agreement providing for the acquisition (hereinafter the "Acquisition") of certain properties, businesses and other assets (hereinafter "the Acquired Assets") of E.I. du Pont de Nemours and Company ("Du Pont") including the continuous cast sheet facility at Memphis (the "Memphis Cast Sheet Facility"); and

Whereas, Du Pont manufactures and sells methyl methacrylate ("MMA") and acrylic sheet; and

Whereas, the Commission is now investigating the Acquisition to determine if it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the attached Agreement Containing Consent Order ("Consent Order"), the Commission will place it on the public record for a period of at least sixty (60)-days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the Acquired Assets during the period prior to the final acceptance of the Consent Order by the Commission (after the 60-day public notice period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Properties to Be Divested as described in paragraph I of the Consent Order and the Commission's right to seek a viable competitor to ICI; and

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

(i) Preserve the Acquired Assets as a viable business, independent of ICI, pending final acceptance or withdrawal of acceptance of the Consent Order by the Commission pursuant to the provisions of Section 2.34 of the Commission's Rules,

(ii) Preserve the Memphis Cast Sheet Facility as a viable business independent of ICI, engaged in the manufacture and sale of acrylic plastics pending the divestiture of the Properties to Be Divested as viable and ongoing enterprises, and

(iii) Remedy anticompetitive effects of the Acquisition in the acrylic plastic market; and

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

Whereas, ICI understands that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

Now, therefore, the Parties agree, upon understanding that the Commission has determined that it has reason to believe the Acquisition may substantially lessen competition in the market for acrylic plastic and in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent order it will not seek a temporary restraining order, preliminary injunction, or permanent injunction with respect to the Acquisition, except that the Commission may further investigate the Acquisition, and may issue an administrative complaint concerning the acquisition by ICI of Du Pont's MMA properties, businesses and other assets, and except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order to which it is annexed and made a part thereof, and, in the event the required divestitures are not accomplished, to seek divestiture of the Properties to Be Divested, and other relief, as follows:

1. ICI agrees to execute and be bound by the attached Consent Order.

2. ICI agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 2. a or 2. b, it will comply with the provisions of paragraph 4 of this Agreement with respect to the Acquired Assets:

a. Ten days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The day after the Commission accepts as final the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules.

3. ICI agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 3.a or 3.b, it will comply with the provisions of paragraph 4 of this Agreement with respect to the Memphis Cast Sheet Facility:

a. Ten days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The day after the divestiture required by the Consent Order has been completed.

4. ICI will hold the Acquired Assets or the Memphis Cast Sheet Facility, as applicable pursuant to paragraphs 2 and 3, as they are presently constituted (hereafter the "Held-Separate Assets") separate and apart on the following terms and conditions:

a. The Held-Separate Assets shall be held separate and apart and shall be operated independently of ICI (meaning here and hereinafter, ICI excluding the Held-Separate Assets and excluding all personnel connected with the Held-Separate Assets as of the date this Agreement was signed) except to the extent that ICI must

exercise direction and control over the Held-Separate Assets to assure compliance with this Agreement or the Consent Order.

b. ICI shall not exercise direction or control over, or influence directly or indirectly, the Held-Separate Assets; *provided, however*, that ICI may exercise only such direction and control over the Held-Separate Assets as is necessary to assure compliance with this Agreement or with the Consent Order.

c. ICI shall not cause or permit any destruction, removal, wasting, deterioration or impairment of the Held-Separate Assets, except for ordinary wear and tear. ICI shall also maintain the viability and marketability of the Held-Separate Assets and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair their marketability or viability.

d. Except for the single ICI director, officer, employee, or agent serving on the "New Board" or "Management Committee" (as defined in subparagraph 4.I), ICI shall not permit any director, officer, employee, or agent of ICI to also be a director, officer or employee of the Held-Separate Assets. In the event any members of the existing management of the Held-Separate Assets should choose not to accept employment with the Acquired Assets or with the Memphis Cast Sheet Facility, respectively, or retire or otherwise leave their management positions, the non-ICI (as ICI is defined in subparagraph 4.a hereof) directors or members serving on the New Board or Management Committee (as defined in subparagraph 4.i hereof) shall have the power to replace such members of management.

e. Except as required by law or as reported by the auditor (provided for in subparagraph 4.f) and except to the extent that necessary information is exchanged in the course of evaluating and consulting the Acquisition, defending investigations or litigation, obtaining legal advice, acting to assure compliance with this Agreement or the Consent Order (including accomplishing the divestitures), or negotiating agreements to dispose of assets, ICI shall not receive or have access to, or the use of, any "material confidential information" of the Held-Separate Assets, as applicable, not in the public domain, except as such information would be available to

ICI in the normal course of business if the Acquisition had not taken place. Any such information that is obtained pursuant to this subparagraph shall only be used for the purposes set out in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to ICI from sources other than Du Pont or the Held-Separate Assets, as applicable, and includes but is not limited to customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets). *Provided, however*, that ICI may assign ICI personnel to perform the accounting and tax functions for the Held-Separate Assets provided that such ICI personnel shall enter into confidentiality agreements in accordance with the provisions of paragraph 4.j hereof and provided further that those ICI personnel working with sales and credit information shall not be involved in ICI's PMMA or acrylic sheet business, as defined in paragraph I. of the Consent Order for the period that ICI must comply with paragraph 4 hereof. *Provided further,* that the New Board or Management Committee, as defined in subparagraph 4.i hereof, may designate and contract with ICI, excluding ICI Acrylics Inc. and excluding further ICI Americas Inc., as a non-exclusive sales agent for sales by the Held-Separate Assets outside the United States, provided that all ICI personnel with access to material confidential information of the Held-Separate Assets in connection with such contract or agency shall, prior to gaining such access, enter into confidentiality agreements in accordance with the provisions of paragraph 4.j hereof.

f. ICI may retain an independent auditor to monitor the operation of the Held-Separate Assets. Said auditor may report to ICI on all aspects of the operation of the acquired assets other than information on customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets.

g. ICI shall not change the composition of the management of the Held-Separate Assets except that the non-ICI (as ICI is defined in subparagraph 4.a hereof) directors or members serving on the

New Board or Management Committee (as defined in subparagraph 4.i hereof) shall have the power to remove any employee for cause.

h. All material transactions, out of the ordinary course of business and not precluded by subparagraphs 4.a through 4.g hereof, shall be subject to a majority vote of the New Board or Management Committee (as defined in subparagraph 4.i hereof).

i. ICI shall either (1) separately incorporate the Held-Separate Assets and adopt new Articles of Incorporation and By-laws for each that are not inconsistent with other provisions of this Agreement or (2) establish a separate business venture with articles of agreement covering the conduct of the Held-Separate Assets, in accordance with this Agreement. ICI shall also elect a new three-person board of directors of the Held-Separate Assets ("New Board") or Management Committee of the Held-Separate Assets ("Management Committee") once it obtains title to the Held-Separate Assets. ICI may elect the directors to the New Board or select the members of the Management Committee; *provided, however,* that such New Board or Management Committee shall consist of at least two non-ICI directors, officers, or employees and no more than one ICI (but not ICI Acrylics, Inc.) director, officer, employee, or agent, *provided, however,* that such ICI director, officer, employee, or agent shall enter into a confidentiality agreement in accordance with the provisions of paragraph 4.j hereof and shall not be a person involved in ICI's PMMA or acrylic sheet business, as defined in paragraph I. of the director or Management Committee member who is also an ICI director, officer, employee, or agent shall participate in matters that come before the New Board of Management Committee only for the limited purpose of considering a capital investment or other transactions exceeding $500,000 and carrying out ICI's and the Held-Separate Assets' responsibilities under this Agreement or under the Consent Order. Except as permitted by this Agreement, such Director or Management Committee member shall not participate in any matter, or attempt to influence the votes of the other directors or Management Committee members with respect to matters that would involve a conflict of interest if ICI and the Held-Separate Assets were

separate and independent entities. Meetings of the New Board or Management Committee during the term of this Agreement shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Agreement.

j. Any ICI director, officer, employee, or agent who obtains or may obtain confidential information under this Agreement shall enter a confidentiality agreement prohibiting disclosure of confidential information until the day after the divestitures required by the Consent Order have been completed.

k. All earnings and profits of the Held-Separate Assets shall be retained separately in the Held-Separate Assets, and separate financial and operating records shall be prepared for the Memphis Cast Sheet Facility and for the remainder of the Acquired Assets, respectively. If necessary, ICI shall provide the Held-Separate Assets with sufficient working capital to operate at current rates of operation.

l. Should the Federal Trade Commission seek in any proceeding to compel ICI (meaning here and hereinafter ICI including the Held-Separate Assets) to divest itself of the Acquired Assets or to compel ICI to divest any assets or businesses of the Acquired Assets that it may hold, or to seek any other injunctive or equitable relief, ICI shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. ICI also waives all rights to contest the validity of this Agreement.

5. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to ICI made to its principal office, ICI shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of ICI 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 ICI or the Held-Separate Assets relating to compliance with this Agreement;

b. Upon ten (10) days notice to ICI, and without restraint or interference from it, to interview officers or employees of ICI or the Held-Separate Assets, who may have counsel present, regarding any such matters.

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

DISSENTING STATEMENT OF COMMISSIONER DEBORAH K. OWEN

I agree that there is reason to believe that the proposed acquisition by Imperial Chemical Industries PLC of the acrylic plastics business of E. I. Du Pont de Nemours and Company may substantially lessen competition in the relevant market. I am concerned, however, that the somewhat novel remedy adopted by the Commission in this matter may constitute undue government involvement in the workings of the market.

In order to assure that competition is not diminished, the consent order requires ICI to divest (at its discretion) any one of three manufacturing facilities. The two larger facilities identified in the order (those located in Memphis, Tennessee and Olive Branch, Mississippi) may be divested essentially "as is." Alternatively, ICI may elect to divest its smaller plant in Compton, California -- subject to the proviso that it, first, more than double that facility's capacity to produce polymethyl methacrylate ("PMMA"), and add to that facility the capacity to manufacture no less than 12 million pounds of acrylic sheet per annum.[1]

If there were a need for additional capacity in this market, then the expansion of Compton contemplated by the Commission's proposed order would perhaps be a socially useful expenditure of resources. However, at the present time, capacity in the PMMA industry is significantly under-utilized, one factor that we tradition-

[1] Alternatively, the acquirer may elect to have ICI construct this new production capacity at some location other than Compton.

ally view as a deterrent to new entry. The new, additional capacity generated by the Commission's order appears to exacerbate this problem, may diminish the ability of Compton's acquirer to become an efficient competitor, and may ultimately prove to be a wasted investment. I do not think that the Commission is the best, or the appropriate, judge of whether and when additional resources should be invested in a market.

Accordingly, I would prefer a consent that limits the divestiture alternatives to the Tennessee and Mississippi plants.[2]

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[2] During the public comment period, the Commission received and placed on the public record two letters from acrylic producers that, *inter alia*, objected to the order provision requiring the addition of new capacity. Letter from Plaskolite, Inc. (Sept. 10, 1993) (The expansion of the Compton facility "will further contribute to a market in which there is over- capacity of PMMA and Acrylic Sheet currently and in the near future. This will make it unattractive to a purchaser."); Letter from CYRO Industries (Sept. 10, 1993) ("We believe the government inspired creation of a new acrylic molding compound producer represents an unwise intervention of government in the business sector and specifically applies a remedy in an area that is both already overburdened with excess capacity and intensely competitive.").