

IN THE MATTER OF

INTERCO INCORPORATED, ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND THE CLAYTON ACTS

*Docket C-2929. Consent Order, Sept. 26, 1978—Set Aside Order, Apr. 22, 1988*¹

The Federal Trade Commission has set aside a portion of the 1978 consent order with Interco Incorporated, (92 FTC 405), by setting aside a sentence in the consent order regarding the preticketing provision.

ORDER REOPENING AND SETTING ASIDE
A PORTION OF ORDER ISSUED SEPTEMBER 26, 1978

On October 26, 1987, respondents Interco Incorporated ("Interco"), Londontown Corporation ("Londontown") and Queen Casuals, Inc. ("Queen Casuals") filed a "Request As Supplemented To Reopen And Set Aside A Portion Of Order" ("Request"), pursuant to section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice. The Request asked that, with respect to raincoats and outerwear sold by Londontown, the Commission reopen the consent order issued on September 26, 1978, and set aside the following sentence in paragraph 4 of Part I of that order:

"A respondent shall not, however, suggest resale prices on any tag, ticket or other marking affixed or to be affixed to any product shipped to a reseller."

On February 23, 1988, the Commission issued its "Order Reopening And Modifying Order Issued September 26, 1978, And Order To Show Cause." The Commission's February 23, 1988, order modified the order of September 26, 1978, in the manner requested by respondents and, in addition, ordered that respondents show cause within 30 days why the provision in question should not be set aside with respect to all other products covered by the order.

On March 14, 1988, respondents filed their "Answer To Order To Show Cause" with the Commission, requesting that the provision "be deleted in its entirety."

Accordingly, *it is ordered*, that this matter be and it hereby is

¹ This matter was inadvertently omitted from the Federal Trade Commission Decisions-Volume 110.

reopened and that the last sentence in paragraph 4 of Part I of the Commission's Decision and Order issued on September 26, 1978, shall be set aside as of the effective date of this order.

Commissioner Bailey not participating.

IN THE MATTER OF
ASSOCIATED MILLS, INC.

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

Docket C-3249. Complaint, Apr. 27, 1989—Decision, Apr. 27, 1989

This consent order requires, among other things, a Chicago, Ill. corporation to have a reasonable basis for any claims of performance characteristics of the Bottled Water Maker or any other water treatment appliance or product. Respondent is also required to have a reasonable basis for claims of the expected life over which any environmental treatment product can treat or remove any contaminant or reduce any health-related risks.

Appearances

For the Commission: *Steven A. Shaffer.*

For the respondent: *Mark Schattner, Pepper, Hamilton & Scheetz,*
Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Associated Mills, Inc., a corporation ("AMI" or "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. AMI is an Illinois corporation, with its office and principal place of business located at 165 N. Canal Street, Chicago, Illinois.

PAR. 2. AMI has advertised, promoted, offered for sale, sold, and distributed home water treatment devices and accessories, including the Pollenex Model WP120 Bottled Water Maker Reverse Osmosis System ("Bottled Water Maker"). The Bottled Water Maker uses both reverse osmosis technology and granulated activated carbon filtration to remove contaminants from tap water.

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

PAR. 4. Typical of respondent's advertisements and promotional materials for the Bottled Water Maker, but not necessarily all-inclusive thereof, are the advertisements attached hereto as Exhibits A, B and C. The aforesaid advertisements contain the following statements and depictions:

(a) "Removes up to 99% of organic chemicals and other contaminants from tap water." (Exhibit A-1)

(b) "Maximum Reduction Rates

* * * * *

Organic Chemicals

* * * * *

THM (Suspected Carcinogen) 98%" (Exhibits A-2, C)

(c) "The heart of the unit is a cellulose acetate membrane that separates molecules of harmful chemicals, hazardous minerals, salt and other contaminants from water." (exhibits A-2, C)

(d) "INNOVATIVE DESIGN ALLOWS SELF-CLEANSING OF MEMBRANE TO ENSURE GREATER EFFECTIVENESS OVER A LONG PERIOD OF USE. UNDER NORMAL CONDITIONS FOR POTABLE WATER, THE MEMBRANE CARTRIDGE SUPPLIED WILL LAST FOR 1 YEAR OR MORE." (Exhibits A-2, C)

(e) Illustration of "Tap Water," consisting of "Water Molecules" represented by white circles and "Contaminants" represented by black dots, shown flowing toward Bottled Water Maker "Membrane." All "Contaminants" are shown being screened out by "Membrane" and all "Water Contaminants" are shown being passed through "Membrane" to become "Pollenex Drinking Water." (Exhibit A-2)

(f) "Even though your water may not look, taste or smell bad it could contain harmful chemicals, and/or hazardous minerals or contaminants that shouldn't be taken into your body. Because you care about the water your family drinks, you'll feel much better owning a Pollenex Bottled Water Maker." (Exhibit A-3, C)

(g) "As you know, many of America's drinking water sources are contaminated. Ordinary carbon-type filters cannot remove some of the nasty chemicals and minerals that may be lurking in your drinking water. But the Pollenex Bottled Water Maker Reverse Osmosis membrane can separate these harmful molecules from tap water.

* * * * *

It also removes up to 99% of these pesticides and suspected cancer-causing chemicals (voice-over accompanied by illustration of bar chart, titled "REMOVES UP TO 99% OF THESE SUSPECTED CANCER CAUSING CHEMICALS," with bar for "THM" shown at 98%)." (Exhibits B-1, B-2)

(h) "Replacement Membrane lasts for one year or more" (Exhibit C)

PAR. 5. Through the use of the statements and depictions referred to in paragraph four, and others in advertisements and promotional materials not specifically set forth herein, respondent has represented, directly or by implication, that the Bottled Water Maker will remove nearly all or most of the trihalomethanes, a class of hazardous organic

chemicals, contained in normal municipal tap water for a year of typical use.

PAR. 6. Through the use of the representation set forth in paragraph five, respondent has represented, directly or by implication, at the time it made the representation, it possessed and relied upon a reasonable basis for that representation.

PAR. 7. In truth and in fact, at the time respondent made the representation set forth in paragraph six, respondent did not possess and rely upon a reasonable basis for that representation. Therefore, respondent's representation, as set forth in paragraph six, was and is false and misleading.

PAR. 8. 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.

Complaint

111 F.T.C.

EXHIBIT A

Pollenex[®]
BOTTLED WATER
MAKER[™]
 Reverse Osmosis System

Especially useful for most low sodium diets
 (Ask Your Doctor)

Provides great tasting "Bottled Water" quality drinking water for just pennies per gallon.

- Removes up to 99% of organic chemicals and other contaminants from tap water. Also effective for reduction of a wide variety of hazardous minerals (see back panel).
- Reduces the salt content of tap water — especially softened water.
- Installs on kitchen or utility sink faucet in seconds — no tools required.

EXHIBIT A - 1

Pollenex[®]
BOTTLED WATER
MAKER[™]
Reverse Osmosis System

Latest technology makes municipally treated water even safer to drink.

"Bottled Water" quality water at just pennies per gallon.

No heavy water bottles to carry home from the store. No costly deliveries. Now with your Pollenex Bottled Water Maker[™] you can make "Bottled Water" quality drinking water right in your home at a fraction of the cost you'd pay for it in a store or from a delivery service. Your whole family will enjoy the taste of fresher, cleaner, better tasting water.

If you buy 10 gallons of bottled drinking water per month at an average cost of \$1.00 per gallon — your annual cost will be \$120.

Maximum Reduction Rates

| Minerals | |
|----------|-----|
| Sodium | 91% |
| Mercury | 90% |
| Lead | 87% |
| Sulphate | 95% |
| Nitrate* | 90% |
| Cadmium | 93% |
| Chloride | 88% |

| Organic Chemicals | |
|----------------------------|-----|
| PCB (Suspected Carcinogen) | 99% |
| Lindane (Pesticide) | 98% |
| TCE (Suspected Carcinogen) | 98% |
| EDB (Pesticide) | 94% |
| THM (Suspected Carcinogen) | 98% |

Mineral reductions are based on chlorinated municipal water at 60 to 90 psi and 70°F using a new membrane. Organic Chemical reductions are based on chlorinated municipal water at 46 psi and 70°F using a new membrane. Efficiencies will vary over time depending on water conditions.

* Children under one year of age should not be exposed to any amount of nitrate in their drinking water.

Note: Water containing high levels of organic chemical contaminants should be prefiltered by installation of a Pollenex under sink carbon filter.

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The Reverse Osmosis Water System

The heart of the unit is a cellulose acetate membrane that separates molecules of harmful chemicals, hazardous minerals, salt and other contaminants from water. This is the same technology used by many bottled water companies and municipal desalination plants. The system requires no energy other than normal line pressure and is quickly attached to your kitchen or utility sink faucet.

INNOVATIVE DESIGN ALLOWS SELF-CLEANSING OF MEMBRANE TO ENSURE GREATER EFFECTIVENESS OVER A LONG PERIOD OF USE. UNDER NORMAL CONDITIONS FOR POTABLE WATER, THE MEMBRANE CARTRIDGE SUPPLIED WILL LAST FOR 1 YEAR OR MORE.

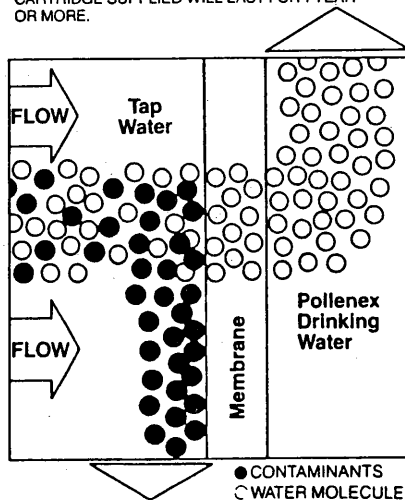


EXHIBIT A - 2

Complaint

111 F.T.C.

Pollenex™
BOTTLED
 **WATER**
MAKER™
 Reverse Osmosis System

Because you
 care about
 the water
 your family
 drinks.

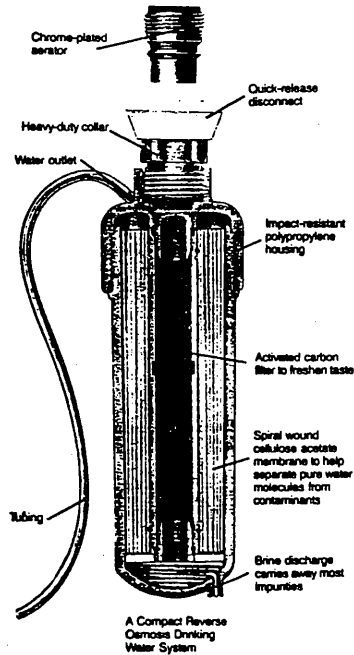


Even though your water may not look, taste or smell bad it could contain harmful chemicals, and/or hazardous minerals or contaminants that shouldn't be taken into your body. Because you care about the water your family drinks, you'll feel much better owning a Pollenex® Bottled Water Maker™. Besides high quality drinking and cooking water, your family will also enjoy better tasting coffee, tea, soups, and ice cubes. Other household uses include steam irons, humidifiers and aquariums. Takes just seconds to install. And it is the latest in water cleaning technology.

EXHIBIT A - 3

Complaint

Pollenex®
BOTTLED
 **WATER**
MAKER™
 Reverse Osmosis System



Contents: One Reverse Osmosis System consisting of cellulose acetate membrane and housing, aerator, product water tubing and storage bag.

For use with chlorinated or municipal water.

Note: This product is not designed to kill bacteria.

Complaint

111 F.T.C.

EXHIBIT B

Exhibit B - 1

"POLLENEX BOTTLED WATER MAKER" In-Store Video - 1:50 - 2/18/87 -APPROVED
Wallace & Curfman, Inc. AM702

| | | |
|--|--|----|
| 1) MOTHER ENTER KITCHEN LUGGING GROCERY SACKS & JUGS OF DRINKING WATER - DAUGHTER GREETES HER & TAKES THE JUGS. | ANNCR (VO): Now if you're buying and lugging lots of jugs of water to solve your drinking water problem -- | 5 |
| SCENE FREEZES - MATTE "X" OVER SCENE | Forget it! Here's a better solution: | 2 |
| 2) CUT TO HER HANDS SETTING DOWN BOTTLED WATER MAKER CARTON - SLOW ZOOM IN AS SHE OPENS TOP FLAP AND SLIDES OUT UNIT. | Make your own bottled water with this marvel of modern technology: The Pollenex Bottled Water Maker. | 6 |
| 3) DISSOLVE TO PRE-MIX OF POLLUTED STREAM (3/4") WITH POLLUTION HEADLINES MOVING ACROSS SCREEN. | As you know, many of America's drinking water sources are contaminated. Ordinary carbon-type filters cannot remove some of the nasty chemicals and minerals that may be lurking in your... drinking water. | 10 |
| 4) DISSOLVE BACK TO SAME BOTTLED WATER MAKER BOX AS CAMERA CONTINUES TO ZOOM INTO "REVERSE OSMOSIS" TYPE PANEL | But the Pollenex Bottled Water Maker Reverse Osmosis membrane can separate these harmful molecules from water. | 6 |
| 5) DISSOLVE TO MS KITCHEN SINK - HAND ENTERS & SCREWS IN ADAPTER RING, THEN SNAPS ON FILTER (TO DEMONSTRATE - SHE SNAPS IT OFF & ON AGAIN) | It can make "bottled quality" water overnight, right in your sink. Easy to install. No tools required. After this adapter is screwed into the faucet spout, the unit can be snapped on and off instantly. | 11 |
| 6) DISSOLVE TO LOW ANGLE UNIT IN OPERATION WITH WATER MOVING THRU TUBE TO JUG. CG MATTED: "PENNIES PER GALLON" | It costs just pennies per gallon. It could be even better than the water you're buying. | 4 |
| 7) DISSOLVE TO KITCHEN NEXT AFTERNOON - DAUGHTER COMING HOME FROM SCHOOL - MOTHER TAKES OUT FULL JUG OF WATER FROM REFRIGERATOR. | Because you care about the water your family drinks -- you should have one -- especially if you're on a low sodium diet. | 5 |
| 8) ECU MOTHER'S HANDS POURING GLASS OF WATER - CG: "TAKES OUT UP TO 91% OF SODIUM" | It takes out up to 91% of sodium, because it works like a desalinization plant. | 4 |
| 9) ZOOM IN TO GLASS - MATTE IN MINERAL CHART WITH CG TYPE ABOVE: "REDUCES HARMFUL MINERALS" | And, it reduces many other harmful minerals. Did you realize you might actually be drinking mercury, lead. | |

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Complaint

Exhibit B - 2

| | | |
|---|--|----|
| | sulphate, nitrate, cadmium, chloride? | 9 |
| 10) CHANGE TO CHEMICAL CHART & CG: "REMOVES UP TO 99% OF THESE SUSPECTED CANCER-CAUSING CHEMICALS" | It also removes up to 99% of these pesticides and suspected cancer-causing chemicals. | 5 |
| 11) DISSOLVE TO MS UNIT IN OPERATION (REPEAT FR 6) | Yes, the Pollenex Bottled Water maker does all this -- and more. | 3 |
| CG: "FILTERS PARTICLES 20,000 TIMES MORE FINELY THAN CARBON FILTERS" | It filters particles 20,000 times more finely than conventional carbon filters -- | 4 |
| 12) TITLE REMAINS AS BACKGROUND DISSOLVES TO CROSS SECTION ARTWORK OF UNIT | because inside, water flows slowly through this cellulose acetate membrane -- separating harmful molecules from pure water. | 7 |
| 13) DISSOLVE TO ECU TITLE ON BOX "REVERSE OSMOSIS SYSTEM" PULL BACK TO FULL TITLE & ILLUSTRATION ON BOX | That's how reverse osmosis makes municipally-treated water even safer... a small price to pay to | 6 |
| 14) DISSOLVE TO REPEAT OF SC 1 IN SOFT-EDGED SQUARE MORTISE - TITLE ON RIGHT "SAVES MONEY" | safeguard your family's health. Compare it to water you buy. It saves you money. If you buy 10 gallons of bottled water a month at a dollar a gallon, you'll be spending \$120 a year! | 11 |
| 15) DISSOLVE BACK TO ILLUS ON BOX - SLOW PULL BACK TO FULL SHOT OF BOX WITH FULL JUG OF WATER NEXT TO IT. | Instead, make a modest investment in a Pollenex Bottled Water Maker and start saving immediately. It pays for itself in just a few short months. So buy one now - | 10 |
| 16) MATTE POLLENEX LOGO OVER TOP THIRD OF SCREEN | The Bottled Water Maker, from Pollenex! | 2 |

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DECISION AND ORDER

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

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

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

1. Respondent Associated Mills, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal place of business located at 165 N. Canal Street, Chicago, Illinois.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and the proceeding is in the public interest.

ORDER

DEFINITIONS

For purposes of this order, the following definitions apply:

"*Environment*" shall mean the matter and conditions physically surrounding a person or object, and shall include water, air, soil, light, sound, atmospheric pressure, temperature, and humidity.

"*Water treatment appliance or equipment*" shall mean a product designed to treat or remove any contaminant in water.

"*Environmental treatment appliance or equipment*" shall mean a product designed to treat or remove any contaminant in the environment.

"*Air cleaning appliance or equipment*" shall mean portable household electric cord connected room air cleaners (excluding ashtrays), defined more specifically as machines that (a) operate with an electrical source of power and contain a motor and fan for drawing air through a filter(s); (b) incorporate electrically charged plates in addition to a fan with a filter(s); (c) incorporate a negative ion generator in addition to a fan with a filter(s); or (d) incorporate a negative ion generator only.

I.

It is ordered, That respondent Associated Mills, Inc., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of the Pollenex Model WP120 Reverse Osmosis System or any other water treatment appliance or equipment, 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 the performance characteristics of such water treatment appliance or equipment, including that any such appliance or equipment can or will treat or remove any contaminant or reduce any health-related risk associated with any contaminant in water, unless at the time of making the representation respondent possesses and relies upon a reasonable basis for each such representation.

II.

It is further ordered, That respondent Associated Mills, Inc., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation,

subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any environmental treatment appliance or equipment, except air cleaning appliances or equipment, 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 the expected life over which any such appliance or equipment can or will (i) treat or remove any contaminant in the environment, or (ii) reduce any health-related risks associated with any contaminant in the environment, unless at the time of making the representation respondent possesses and relies upon a reasonable basis for each such representation.

III.

For purposes of this order a "reasonable basis" shall consist of competent and reliable evidence which substantiates the representation. To the extent that the evidence of a reasonable basis consists of scientific or professional tests, experiments, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, such evidence shall be "competent and reliable" only if those tests, experiments, analyses, research, studies, or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, using only procedures that are generally accepted in the profession as yielding accurate and reliable results.

IV.

It is further ordered, That respondent, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any product covered by this order, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall maintain written records:

1. Of all materials relied upon in making any claim or representation covered by this order;
2. Of all test reports, studies, surveys or demonstrations in its possession that materially contradict, qualify, or call into question the basis upon which respondent relied at the time of the initial

dissemination and each continuing or successive dissemination of any claim or representation covered by this order.

Such records shall be retained by respondent for a period of three years from the date respondent's advertisements, sales materials, promotional materials or post purchase materials making such claim or representation were last disseminated. Such records shall be made available to the Commission staff for inspection upon reasonable notice.

V.

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

VI.

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

RONBY CORPORATION, ET AL.

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

Docket 8560. Consent Order, Mar. 12, 1964—Modifying Order, Apr. 27, 1989

This order modifies the Commission's 1964 order (64 FTC 1294) with Fred Astaire Dance Studios Corp., the corporate predecessor to the Ronby Corp., by providing students with absolute cancellation and refund rights.

ORDER MODIFYING ORDER TO CEASE AND DESIST

The Commission on January 26, 1989, issued its order to show cause why this proceeding should not be reopened and its order of March 12, 1964 ("the Commission order of 1964"), modified.

Ronby Corporation, Chester F. Casanave and Charles L. Casanave having consented to the reopening of this proceeding, to being added as parties respondent thereunder and to the modification of the Commission order of 1964, as set forth in the show cause order, and the Commission having placed the show cause order on the public record for thirty (30) days and no comments having been filed by interested persons,

Now, therefore, *it is hereby ordered*, that the Commission order of 1964 be, and it hereby is, modified, as follows:

(1) By inserting a Roman numeral one (I) before the *It is ordered* preamble of the 1964 order;

(2) By substituting revised language in the *It is ordered* preamble of the 1964 order, as provided below;

(3) By substituting revised language in numbered paragraphs 1., 4., 5., 6., 7. and 9. of the newly designated Part I of the order, as provided below;

(4) By deleting paragraphs 3. and 8. thereof;

(5) By renumbering paragraphs 4., 5., 6., 7. and 9. thereof as paragraphs 3., 4., 5., 6. and 7., respectively; and

(6) By adding new Parts II, III, IV, V, VI and VII, as provided below.

It is further ordered, That Ronby Corporation, a corporation, Chester F. Casanave and Charles L. Casanave be, and they hereby are, joined as respondents in this matter.

It is further ordered, That this matter be styled as The Matter of Ronby Corporation, et al.

ORDER

I.

It is ordered, That respondents Ronby Corporation, a corporation, and Chester F. Casanave and Charles L. Casanave, individually, and as officers of said corporation, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any area franchisor, franchisee, or licensee, or any corporate or other device, in connection with the solicitation, advertising or sale of any dance instruction or dance instruction service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that a course of dancing instruction or a specified number of dancing lessons, or a dance instruction service or any other service or thing of value, will be furnished, unless the period or periods of bona fide dancing instruction or other service or thing of value is in fact furnished as represented;

2. Refusing to honor the terms and provisions of any offer or promise;

3. Requesting any student or prospective student to sign an uncompleted contract or agreement, or misrepresenting to any student or prospective student what is or will be due or payable;

4. Using in any single day "relay salesmanship," that is consecutive sales talks or efforts of more than one representative, with or without the employment of hidden listening devices, to induce the purchase of dancing instruction;

5. Representing in any manner that a dancing instructor job is obtainable at a studio where the purpose of such a representation is to induce an applicant to purchase a course of instruction, or misrepresenting what such an instructor will be paid;

6. Falsely assuring or representing to any student or prospective student that a given course of dancing instruction will enable him or her to achieve a given standard of dancing proficiency;

7. Using any technique or practice similar to those set out in paragraphs 3 through 6 hereof to mislead, coerce, or induce by other unfair or deceptive means the purchase of dance instruction or dance instruction service.

II.

It is further ordered, That respondents Ronby Corporation, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any area franchisor, franchisee, or licensee, or any corporate or other device, in connection with the solicitation, advertising or sale of any dance instruction or dance instruction service in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to disclose, clearly and conspicuously, in each dance instruction contract or dance instruction service contract, the following statement:

DEFINITIONS

For purposes of this contract the following definitions apply:

"*Total contract price*" shall mean the total cash price paid or to be paid by the student or prospective student for the dance instruction or dance instruction service which is the subject of the contract or written agreement.

"*Notice of cancellation*" shall be deemed to have been provided by a student or prospective student by mailing or delivering to the studio a written notification cancelling the contract or written agreement.

"*Reasonable and fair service fee*" shall mean no more than 10% of the total contract price for contracts of up to \$1,000. For contracts over \$1,000, "reasonable and fair service fee" shall mean no more than \$100 plus an amount equal to 5% of the contract price over \$1,000. "Reasonable and fair service fee" shall not exceed \$250 in total.

"*Dance instruction service*" shall mean any service or a thing of value, including a contest or a competition, other than dance instruction, sold, organized, sponsored or promoted by any dance studio, or by its employee or agent, including any person or organization associated or affiliated with the franchise operation, franchisee, employee or agent.

STUDENT CANCELLATION AND REFUND RIGHT

You, the student, have the right to cancel this contract at any time by a notice in writing mailed or delivered to the studio. If the studio refuses or fails to give you the refund, or the studio closes, you should mail a copy of the cancellation notice to the

Modifying Order

area franchisor whose full name and address are

and to Ronby Corporation, the national licensor of the trade name Fred Astaire Dance Studios, at 11945 Southwest 140th Terrace, Miami, Florida 33186. No special format or notarization is necessary.

THIS CONTRACT IS INVALID IF THE FULL NAME AND ADDRESS OF THE AREA FRANCHISOR ARE NOT PROVIDED.

If this agreement is cancelled within three business days, the studio will refund within not more than (30) days all payments made under the agreement.

After three business days, the studio will only charge you for the dance instruction and dance instruction service received under the agreement, or prearranged but not attended before the day you cancel, plus a reasonable and fair service fee, as defined above, and refund the balance in three (3) equal monthly installments, within not more than ninety (90) days.

provided, however, that a departure from this exact language to afford a greater right to a student than any right under this order, or to correctly provide the name and address of the national licensor or its equivalent, shall not be deemed a violation of this requirement of the order.

2.a. Entering into a contract or other written agreement for any dance instruction or dance instruction service unless the contract or other written agreement contains the definitions, terms and conditions recited in paragraph 1., above, in the exact language mandated by said paragraph and unless the contract or written agreement discloses clearly and conspicuously the rate charged per lesson for each type of dance instruction selected and the length of each lesson;

b. Failing to refund a student or prospective student who cancels any contract or written agreement within three business days from the date on which the contract or written agreement was executed all payments made by the student or prospective student. Such refunds shall be provided, and any evidence of indebtedness cancelled and returned, within 30 days after receiving notice of cancellation.

c. Receiving, demanding, or retaining more than a pro rata portion of the total contract price plus a reasonable and fair service fee where a student or prospective student cancels any contract or written agreement after three business days from the date on which the contract or written agreement was executed and within the term of the said contract or written agreement; and failing to refund the balance in three (3) equal monthly installments, within not more than

ninety (90) days after receiving notice of cancellation, or failing to cancel that portion of the student's or prospective student's indebtedness that exceeds the amount due;

The pro rata portion shall be calculated in the following manner:

(1) For the time period preceding notice of cancellation, total the number of hours or lessons of dance instruction that were received, or prearranged but not attended, by the student pursuant to the contract written agreement,

(2) Divide this number by the total number of hours or lessons of dance instruction which are the subject of the contract or written agreement,

(3) Apply the resulting percentage against the total contract price.

(4) For contracts combining a course of dance instruction with dance instruction services, separate prices for the dance instruction and the dance instruction service portions must be designated and the pro rata portion of the total contract price shall be the sum of the separate pro rata obligations for the dance instruction portion and the dance instruction service portion;

Provided, however, that this modified order does not create any private right of action against Ronby Corporation, Chester F. Casanave or Charles L. Casanave, by any student under any student contract.

d. Misrepresenting in any manner to any student or prospective student any of the provisions of this consent order.

3. Failing to subject any promissory note, instrument or evidence of indebtedness, given by a student pursuant to any contract for dance instruction or dance instruction services, to the students' cancellation and refund rights provided in paragraph 2. above, in such a manner that such student rights are legally binding on any third person who may acquire any right under any such note, instrument or evidence of indebtedness.

4. Attempting to obtain or obtaining from a student a waiver of the student's cancellation or refund right.

5. Failing to discontinue dealing with or terminate the use or engagement of any area franchisor who (1) continues, after notice, to engage in a course of conduct of acts or practices prohibited by this modified order, or (2) fails to discontinue dealing with or terminate the use or engagement of any franchisee or licensee who continues, after notice, to engage in a course of conduct of acts or practices prohibited by this modified order;

Provided, however, that Ronby Corporation and area franchisors may effect such termination in accordance with applicable law.

6. Failing to implement, within one hundred twenty (120) days from the date of service of this order, a program of surveillance adequate to reveal whether the business operation of each licensee or area franchisor conforms to the requirements of the modified order, and failing to maintain records of such surveillance program which shall be made available for inspection and copying to the Commission, upon reasonable notice and at reasonable times.

7.a. Failing to deliver a copy of this modified order to each present and future area franchisor and franchisee, with directions that each such person promulgate and enforce the terms of the modified order in the operations of each studio, including the sales efforts of any independent contractor engaged by the studio for the selling of dance instruction or dance instruction service;

b. Failing to obtain from each person described in subsection 7.a. above, a signed statement setting forth his or her intention to conform his or her business practices to the requirements of this modified order;

c. Failing to notify the Commission of the name and address of any person from whom respondent is unable to obtain such a signed statement; and

d. Failing to keep each such agreement for a period of five (5) years after the termination of any such relationship; and failing to transmit to the Commission or its designated staff complete and legible copies of the same within fourteen (14) business days of receiving a request for copies thereof;

III.

It is further ordered, That respondents Ronby Corporation, Chester F. Casanave and Charles L. Casanave, shall report the discontinuance of their present business or their affiliation with any other business offering any dance instruction or service, such notice to include a description of respondent's new business or employment; and should either Chester F. Casanave or Charles L. Casanave create or become affiliated in any way with any corporation, partnership or other venture or business offering any dance instruction or service, such a corporation, partnership, venture or business shall be bound by the provisions of this modified order.

IV.

It is further ordered, That respondent Ronby Corporation shall notify the Commission at least thirty (30) days prior to any proposed or contemplated reorganization, dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creating or dissolution of a subsidiary or any other change in the corporate structure of such corporate respondent that may affect compliance obligations arising out of this order.

V.

It is further ordered, That respondents Chester F. Casanave and Charles L. Casanave each shall be relieved from any further obligation under Parts I and III of this order upon completely ceasing his involvement with any dance instruction, or dance instruction service, including licensing or franchising of the same, until such time as he resumes such activity in the future.

VI.

It is further ordered, That respondents Ronby Corporation, Chester F. Casanave and Charles L. Casanave, within one hundred twenty (120) days after the date of service upon each of them of this order, shall file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

VII.

It is further ordered, That respondent Ronby Corporation shall file or cause to be filed one (1) year after the date of service of this order a further detailed report on measures undertaken to protect the prepaid moneys of students.

Commissioner Strenio dissenting.

Complaint

111 F.T.C.

IN THE MATTER OF

ALAMO RENT-A-CAR, INC.

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

Docket C-3251. Complaint, Apr. 28, 1989—Decision, Apr. 28, 1989

This consent order requires, among other things, the Fort Lauderdale, Fla. rental company to disclose charges, terms and conditions that are mandatory or are not reasonably avoidable, to every consumer who inquires about the prices.

Appearances

For the Commission: *Maria C. Gambale and Ronald L. Waldman.*

For the respondent: *Robert A. Blair, Anderson, Hibey, Nauheim & Blair, Washington, D.C. William J. Baer, Arnold & Porter, Washington, D.C. and Howard L. Conklin, Tripp, Scott, Conklin & Smith, Ft. Lauderdale, Fla.*

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 Alamo Rent-A-Car, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph 1. Respondent Alamo Rent-A-Car, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its headquarters located at 110 South East Sixth Street, Fort Lauderdale, Florida.

Par. 2. Respondent, at all times mentioned herein, has maintained a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

Par. 3. Respondent advertises, offers for rental, and rents to consumers throughout the United States. rental vehicles that are

made available to consumers at its numerous rental offices nationwide. Many of respondent's rental offices are located at off-airport sites; an airport surcharge or fee may be imposed at these locations when consumers use an airport shuttle van for transportation to these sites.

Par. 4. In the course and conduct of its business, and for the purpose of inducing the rental of its rental vehicles, respondent has disseminated and caused the dissemination of promotional information. Such information includes written advertisement which state applicable fuel charges and disclose that airport surcharges or fees may apply to certain rentals. Respondent's advertisements typically invite consumers to reserve through their travel agents or to call respondent's toll-free "800" number to receive further information from respondent's agents and to make reservations.

Par. 5. Information imparted to consumers by respondents's agents in answer to consumer inquiries contains, among other things, statements and representations as to the price of contemplated rentals of respondent's vehicles.

Par. 6. In oral presentations in response to consumers' telephone inquiries to respondent's "800" number, respondent's agents have, in numerous instances, stated prices for respondent's car rental services without disclosing:

- (A) The existence and amount of a mandatory fuel charge; and
- (B) The existence and amount of a mandatory airport surcharge or fee that is imposed on consumers who travel from certain airport locations to one of respondent's rental stations in one of the respondent's shuttle vehicles.

The existence and amounts of these charges and fees would be material to consumers. The failure to disclose these facts, in light of respondent's representation of a price for a vehicle rental in connection with a discussion or inquiry, is an unfair or deceptive act or practice.

Par. 7. The acts and practices of respondent, as herein alleged, constituted, and now constitute, unfair and deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, may continue or recur in the absence of the relief herein requested.

DECISION AND ORDER

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

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

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

(1) Respondent Alamo Rent-A-Car, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its headquarters located at 110 South East Sixth Street, Fort Lauderdale, Florida.

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

ORDER

I.

For the purposes of this order, all required disclosures shall be made in a clear and conspicuous manner.

It is ordered, That respondent Alamo Rent-A-Car, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with the promotion, offering for rental or rental of any vehicle, in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Failing to disclose to consumers, in connection with any discussion or inquiry relating to the price of a contemplated rental, all airport surcharges or fees that are applicable to the contemplated rental or are not reasonably avoidable by consumers.

B. Failing to disclose to consumers, in connection with any discussion or inquiry relating to the price of a contemplated rental, all fuel charges that are applicable to the contemplated rental and are not reasonably avoidable by consumers.

C. Failing to disclose to consumers, in connection with any discussion or inquiry relating to the price of a contemplated rental, any other charges sought to be imposed in connection with a contemplated rental which are mandatory or which are not reasonably avoidable by consumers.

II.

It is further ordered, That respondent shall for a period of three (3) years distribute, or cause to be distributed, a copy of this order to all present and future operating divisions, subsidiaries, franchisees, dealers, and managerial employees.

III.

It is further ordered, That, for a period of ten years, respondent shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate status that may affect compliance obligations arising out of this order, such as dissolution, assignment of its business, or the emergence of a successor corporation.

IV.

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

IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

Docket 9189. Interlocutory Order, May 8, 1989

ORDER

Counsel for the General Motors respondents have moved that the complaint against three respondents in this matter be dismissed, and that their names be removed from the Final Order of the Commission. The three respondents are Mr. Porterfield Wilson, Jim Carney Buick Co., and Bill Greig Buick-Opel, Inc. Counsel have advised that Mr. Wilson is deceased, and that the two dealerships named are no longer in business. Complaint counsel do not oppose the motion.

The Commission has considered the motion and determined to grant it. Therefore,

It is ordered, That the complaint against Mr. Porterfield Wilson, Jim Carney Buick Co., and Bill Greig Buick-Opel, Inc. be, and it hereby is, dismissed.

It is further ordered, That the Final Order of the Commission be, and it hereby is, modified to remove their names therefrom.

Commissioner Machol not participating.

Interlocutory Order

111 F.T.C.

IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

Docket 9189, Interlocutory Order, May 17, 1988¹

ORDER

Counsel for General Motors respondents, having informed the Commission of the death of respondent Clarence R. Krajenke, moved for dismissal of the complaint against Mr. Krajenke. Complaint counsel had no objection to the motion. Therefore,

It is ordered, That the complaint against Mr. Krajenke be, and it hereby is, dismissed.

¹ This document was inadvertently omitted from the Federal Trade Commission Decisions-Volume 110.

IN THE MATTER OF
COLECO INDUSTRIES, INC.

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

Docket C-3252. Complaint, May 18, 1989—Decision, May 18, 1989

This consent order prohibits, among other things, a West Hartford, Ct. corporation from claiming that any computer-related product is or will be available for sale, or has or will have any capability, unless the product actually is available or has that capability, or the company has a reasonable basis for saying it will be available or will have that capability.

Appearances

For the Commission: *Don M. Blumenthal.*

For the respondent: *Cathelene Tierney, in-house attorney, Avon, Ct.*

COMPLAINT

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

Paragraph 1. Respondent is a Connecticut corporation, with its office and principal place of business located at 999 Quaker Lane South, West Hartford, Connecticut.

Par. 2. Respondent has manufactured, advertised, offered for sale, sold and distributed children's computers, including, but not necessarily limited to, My Talking Computer, and program modules and other products for use with such computers to the public.

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

Par. 4. Respondent has disseminated and caused the dissemination of advertisements and promotional materials for its product, My Talking Computer, published in magazines and broadcasted on television across state lines and disseminated in product brochures,

Complaint

111 F.T.C.

product packages and other sales literature directly to consumers or to distributors for display or distribution to consumers. Typical of respondent's advertisements and promotional material, but not necessarily all inclusive thereof, are the attached Exhibits A through C. The aforesaid advertisements and promotional material contain the following statements:

(1) Cleverly disguised as fun! Expansion modules sold separately. (Exhibit A, television advertisement.)

(2) It comes with 22 learning activities and includes a *full function* talking calculator. It's even expandable.

* * * * *

More advanced programs for older children are available too. (Exhibit B, print advertisement.)

(3) My Talking Computer Learn-For-Fun Expansion Modules
Build a Complete Learning System!

MODULE 1

Telling Time With Hands-that-Speak
Clock Overlay

This colorful, 3-dimensional overlay programs MY TALKING COMPUTER to teach your child how to tell time with fun, hands-on activities!

MODULE 2

Fun with Numbers

A delightful activity book programs MY TALKING COMPUTER with a variety of new numbers-learning challenges.

MODULE 3

Sesame Street Talking Cents

with My Talking Cash Register Overlay

The module comes with a 3-dimensional, plastic overlay program that simulates a cash register keyboard and teaches money counting with a variety of fun activities. Also included colorful activity booklet.

MODULE 4

Sesame Street Spells F U N!

The ever-popular Sesame Street gang gets together for more of their educational antics! Module comes with a colorful activity book containing hours of new, MY TALKING COMPUTER spelling fun!

(Exhibit C, point-of-purchase package display.)

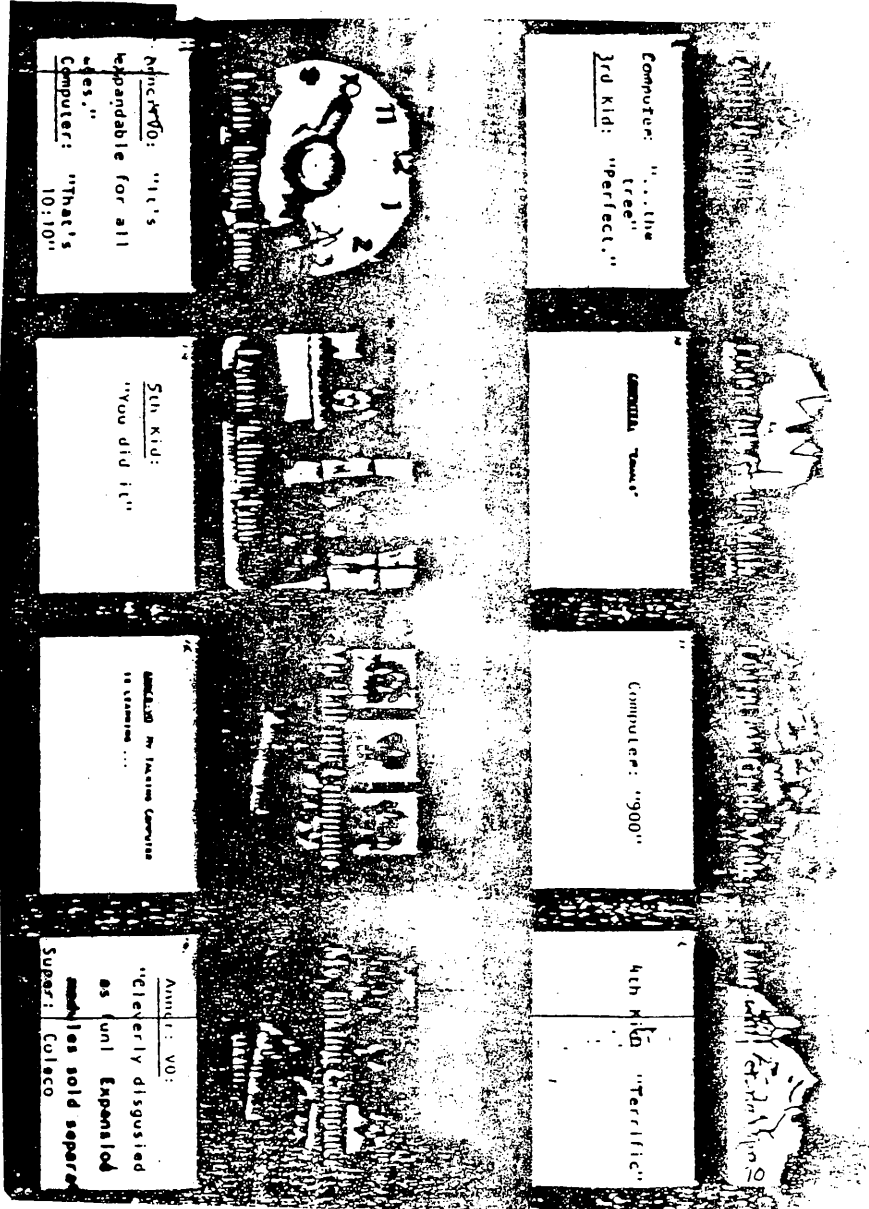
Par. 5. Through the use of the statements referred to in paragraph four, and others in promotional material not specifically set forth herein, respondent has represented, directly or by implication, that

four expansion modules for use with My Talking Computer, including specifically the modules identified in Exhibit C as Module 3 and Module 4, were available for purchase at the time the statements were published or displayed, and that persons purchasing My Talking Computer would be able to expand the capability of the computer immediately through the purchase of the advertised expansion modules including specifically Modules 3 and 4.

Par. 6. In truth and in fact, the expansion modules for use with My Talking Computer, identified in Exhibit C as Modules 3 and 4, were not available for purchase at the time the statements were published or displayed, and persons purchasing My Talking Computer would not be able to expand the capability of the computer immediately through the purchase of Modules 3 and 4. Respondent had abandoned plans to produce Module 3, and respondent did not produce or offer for sale Module 4 until more than one-and-a-half years after the statements first appeared. Therefore the representations set forth in paragraph five were, and are, false and misleading.

Par. 7. The acts and practices of respondent 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 acts and practices, constitute unfair and deceptive acts or practices in or affecting commerce and the dissemination of false advertisements in violation of Section 5(a) of the Federal Trade Commission Act.

Complaint



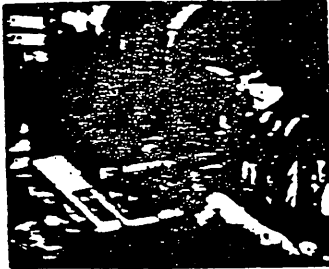
Complaint

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EXHIBIT B

THIS IS LEARNING.

(cleverly disguised
as fun)



With an astoundingly clear voice and unlimited patience, the My Talking Computer™ learning system gently guides your child through all the basic skills: colors, shapes, math, spelling and reading. And it does all this with colorful picture book "keyboards" that will enthrall and delight.

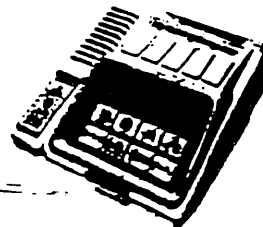
It comes with 24 learning activities and includes a full function talking calculator. It's even expandable.

The "clock" program has moveable hands for learning to tell time (analog and digital).*

More advanced programs for older children are available too.

Kids love My Talking Computer™ learning system for the fun. You'll love it for the learning.

My Talking Computer™



COLECO
Play and Learn

Complaint

EXHIBIT C

**My Talking Computer™
Learn-For-Fun™ Expansion Modules
Build a Complete Learning System!**

MODULE 1

Telling Time™ with Hands that Speak™
Clock Overlay

This colorful, 3-dimensional overlay programs MY TALKING COMPUTER™ to teach your child how to tell time with fun, hands-on activities!

MODULE 2

Fun with Numbers

A delightful activity book programs MY TALKING COMPUTER™ with a variety of new numbers-learning challenges.

MODULE 3

Sesame Street™ Talking Cents™
with My Talking Cash Register™ Overlay

The module comes with a 3-dimensional, plastic overlay program that simulates a cash register keyboard and teaches money counting with a variety of fun activities. Also included: colorful activity booklet.

MODULE 4

Sesame Street™ Spells FUN!

The ever-popular Sesame Street™ gang gets together for more of their educational antics! Module comes with a colorful activity book containing hours of new, MY TALKING COMPUTER™ spelling fun!

Expansion modules sold separately.

Sesame Street, 1980 Children's Television Workshop, Sesame Street and the Sesame Street sign are trademarks and service marks of Children's Television Workshop.

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puter™

ystem

Additional modules (^{sold} separately)
make MY TALKING COMPUTER™
an expandable fun center that
grows with your child!

Learn-for-Fun™
Expansion Module 1

- Telling Time™ with
Hands-that-Speak™ Clock Overlay

Learn-for-Fun™
Expansion Module 2

- Fun with Numbers

Learn-for-Fun™
Expansion Module 3

- Sesame Street® Talking Cents™
with My Talking Cash Register™

Learn-for-Fun™
Expansion Module 4

- Sesame Street® Spells F U N!™

DECISION AND ORDER

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

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

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

1. Respondent Coleco Industries, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at 999 Quaker Lane South, West Hartford, Connecticut.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

O R D E R

I.

It is ordered, That respondent Coleco Industries, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution of My Talking Computer, or any other computer or computer-related product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

(a) That any such product is available for sale to the public or has any capability, unless, at the time such representation is made, such product is then available for sale to the public in reasonable quantities or has said capability.

(b) That any such product will be available for sale to the public or will have any capability, unless, at the time of such representation, respondent possesses and relies upon a reasonable basis for said representation.

II.

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

III.

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

IV.

It is further ordered, That respondent shall distribute a copy of this order to each of its operating divisions and to each officer and other personnel responsible for the preparation or review of advertising material. In addition, respondent shall distribute to each distributor, retail outlet and wholesale outlet to which it has sold or delivered My Talking Computer, and to each consumer about whom Coleco has records who has inquired about the availability of Modules 3 and 4 for My Talking Computer, a copy of Attachment A to this order, a letter outlining the availability of said modules.

V.

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

ATTACHMENT A

NOTICE TO WHOLESALERS, DISTRIBUTORS, RETAILERS,
AND PURCHASERS OF MY TALKING COMPUTER

Dear Wholesaler, Distributor, Retailer, or Consumer:

Coleco Industries, Inc., ("Coleco") is the manufacturer of an electronic learning product known as **MY TALKING COMPUTER** (Item No. 8200).

As the result of an agreement between Coleco and the Federal Trade Commission, arising out of consumer inquiries relating to certain accessories for **MY TALKING COMPUTER** known as Module 3 (Sesame Street Talking Cents with **MY TALKING CASH REGISTER**) and Module 4 (Sesame Street Spells **FUN!**), Coleco hereby provides you with the following information:

- Module 3 will not be available for purchase.
- While Module 4 was manufactured in limited quantities, it no longer is in production and supplies have been exhausted. It will not be available for purchase.

Coleco Industries, Inc.

Set Aside Order

111 F.T.C.

IN THE MATTER OF

GOODYEAR TIRE & RUBBER CO., ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 6486. Consent Order, March 9, 1961—Set Aside Order, June 2, 1989*

The Federal Trade Commission has set aside a 1961 consent order as to Atlantic Refining Co. ("Arco"), (58 FTC 309), thus removing all requirements and prohibitions because Arco has shown that significant changes of law make it unlikely that the practices prohibited by the order would be found unlawful were the original case brought today.

ORDER REOPENING AND SETTING ASIDE
FINAL ORDER ISSUED ON MARCH 9, 1961

On February 3, 1989, the Atlantic Richfield Company ("Arco") filed a request to reopen and set aside the Final Order that was entered in this proceeding on March 9, 1961, or in the alternative to modify the order. The request was filed pursuant to section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) and section 2.51 of the Federal Trade Commission Procedures and Rules of Practice, 16 CFR 2.51.

Arco seeks to have set aside or modified the order issued in Docket No. 6486 which prohibits the Atlantic Refining Company ("Atlantic") from entering into certain kinds of contracts with the Goodyear Tire and Rubber Company ("Goodyear") and other of its suppliers. Arco was formed as a result of the merger of Atlantic with other oil companies. Arco is the successor to Atlantic and bound by the terms of the order in Docket No. 6486.

Arco asserts that, since the adjudication of this order, there have been changes of fact and of law that warrant reopening the order and setting it aside, in whole or in part, and that the public interest requires termination or modification of the order. Arco's central contention is that it ought to be allowed to negotiate with suppliers of tires, batteries and other automotive accessories ("TBA") concerning the terms of sale of those items to Arco franchisees that sell Arco petroleum products. Arco asserts that it could negotiate for its franchisees cooperative advertising and other promotional activities that are sponsored by TBA manufacturers. Obtaining such promotion-

al benefits would eliminate a restriction that Arco alleges unnecessarily places Arco and its petroleum franchisees at an unwarranted disadvantage.

The Commission has considered Arco's request and has concluded that Arco has made a showing that warrants setting aside the entire order in Docket No. 6486. Significant changes of law since the order was entered warrant setting aside the order.

Background

On March 9, 1961, the Commission held that the TBA sales commission agreement between Atlantic and Goodyear and another between Atlantic and the Firestone Tire and Rubber Company ("Firestone") constituted unfair methods of competition and violated section 5 of the Federal Trade Commission Act. 58 FTC 309. The Court of Appeals and the United States Supreme Court upheld the Commission's decision and order. 331 F.2d 394 (7th Cir. 1964), 381 U.S. 357 (1965).

Prior to 1951, Atlantic had acquired TBA products and resold them to its petroleum franchisees. In 1951, it switched to a system under which Atlantic selected manufacturers of TBA to supply its franchisees. Atlantic entered into "best efforts" contracts with Goodyear and Firestone. Under these contracts Atlantic agreed that it would exert its best efforts to promote Goodyear products to all of its franchisees within a designated geographic area and Firestone products within another area. In return those companies agreed to limit TBA sales to Atlantic franchisees within the designated areas and to pay Atlantic a commission on all their sales to the franchisees. Under the sales commission plan, designated Goodyear and Firestone wholesalers were allocated geographical regions. In each region, one wholesaler was to be the sole source of TBA supplies to each Atlantic franchisee.

The Commission's decision stated this arrangement was unlawful because it "presents a classic example of the use of economic power in one market (here, gasoline distribution) to destroy competition in another market (TBA distribution)." 58 FTC at 367. The Commission found that Atlantic had "sufficient economic power" to reduce competition that would have existed from suppliers of other TBA products. *Id.* at 364.

Atlantic was found to have successfully implemented its sales commission program through the use of threats and coercion. *Id.* at 347. The decision stated that Atlantic threatened, explicitly and

implicitly, to cancel franchises of gas stations that did not buy the TBA products that Atlantic recommended. *Id.* at 343-47. The gas station franchise agreements were subject to annual review and could be cancelled by Atlantic on a number of subjective grounds. *Id.* 356.

The Hearing Examiner found that sales of TBA were vital to service station owners. TBA provided both the products for the full services expected by customers and additional revenues that made the stations profitable. 58 FTC at 313.

The Commission entered an order that prohibits Atlantic from promoting or coordinating the sale of TBA products from any TBA vendor other than itself to Atlantic franchisees. In summary, the six paragraphs forbid Atlantic from:

1. Entering into agreements with Goodyear or other TBA suppliers in connection with sales by those suppliers to Atlantic franchisees.
2. Accepting anything of value for promoting the sale of any vendor's TBA products.
3. Using contracts, economic incentives and other means to encourage its franchisees to acquire any vendor's TBA products other than Atlantic's.
4. Monitoring the sale of any vendor's TBA products other than its own.
5. Intimidating or coercing its franchisees to acquire TBA products.
6. Preventing or attempting to prevent its franchisees from buying the TBA products of their choice.

The Hearing Examiner's proposed order, in effect, would have imposed only the restrictions of paragraphs 5 and 6. The Commission appears to have added paragraphs 1-4 because it believed the sales commission plans could persist "even without the use of overt coercive tactics or of written or oral tying agreements, and this power is a fact existing independently of the particular method of distributing or sponsoring TBA used by Atlantic." 58 FTC at 364-5.

Standard for Reopening a Final Order of the Commission

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require.¹ A

¹ Section 5(B) provides, in part:

[T]he Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the

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

The language of Section 5(b) plainly anticipates that the burden is on the requester to make “a satisfactory showing” of changed conditions to obtain reopening of the order. See also *Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982) (requester must show “exceptional circumstances, new, changed, or unforeseen at the time the decree was entered”). The legislative history also makes clear that the requester has the burden of showing, by means other than conclusory statements, why an order should be modified.² If the Commission determines that the requestor has made the necessary showing, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the requester fails to meet its burden of making the satisfactory showing of changed conditions required by the statute.

person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part.

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

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

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

The requester's burden is not a light one in view of the public interest in repose and the finality of Commission orders. See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974) ("sound basis for . . . [not reopening] except in the most extraordinary circumstances"); *RSR Corp. v. FTC*, 656 F.2d 718; 721-22 (D.C. Cir. 1981) (applying *Bowman Transportation* standard to FTC order).

Changed Conditions of Law Warrant Reopening the Order

Arco has requested that the Commission set aside the order because of changed conditions of fact and law or, absent changed conditions, because of the public interest. For the reasons described below, changes of law warrant reopening the order against Atlantic. Having reopened and set aside the order on the basis of changes of law, the Commission does not reach the issue of whether the changes of fact or public interest considerations warrant reopening.

In finding a violation, the Commission considered Atlantic's sales commission plan to be in the nature of a tying restriction and that it had unlawful vertical restraint aspects. Arco asserts that in 1961 the Commission did not consider fundamental issues necessary under current legal standards to find that the sales commission plan would be unlawful. Arco also asserts that the practices prohibited by the order are now unlikely to be unlawful. These assertions are of the types that warrant reopening an order and considering appropriate modifications.

1. The Tying Rationale

The Commission's decision was, to a large extent, based on the similarity of this case to a tying restriction where the sale of one product is conditioned on the agreement to buy another. While the opinion did not classify the matter as a tying case, that appears to be because the Atlantic franchise was not explicitly conditioned on the purchase of Goodyear or Firestone products. Nevertheless, the mode of analysis and source of precedent was that of tying cases. 58 FTC at 363-4. The opinion stated, for example, this is "a classic example of the use of economic power in one market (here, gasoline distribution) to destroy competition in another market (TBA distribution)." *Id.* at 367.

Arco points out that the tying concept used by the Commission in this case relies on the Supreme Court's approach to tying in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958) and related decisions. That line of cases bases illegality on the finding of a tie and the foreclosure of a substantial volume of commerce. Those cases do not require and the Commission did not find that Atlantic had market power in the tying product (franchises for gas stations).

The approach of *Northern Pacific* to unlawful tying was ended in 1977 by the Supreme Court's decision in *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610 (1977). In that case, the Court determined that a precondition to finding unlawful tying was establishing that the seller had market power in the tying product (*i.e.*, franchises). It required a finding that the seller have the power to raise price above a competitive level or impose other burdensome terms that could not be imposed in a competitive market. *See also, Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984).

Despite language in the Commission's opinion about Atlantic's power in the gasoline market, the Commission made no inquiry into the question of whether it had the power to raise price above a competitive level. And, in view of the fact that Atlantic had a market share of less than seven percent of its gasoline market, it seems unlikely that there would have been a basis for such a finding if the inquiry had been made. The Commission's discussion of economic power concerned Atlantic's total assets and the disparity of wealth between Atlantic and its franchisees. 58 FTC at 356, 364.

For purposes of reopening the order, the important point is that the Commission made no inquiry concerning the market power of Atlantic and that today such an inquiry would be mandatory. In addition, Arco has shown that under current law a finding of unlawful restraints is unlikely. *Fortner* and subsequent cases established criteria that changed the law of tying in ways that are central to the determination of this case. Accordingly, there has been a change of law that warrants reopening this order.

2. The Vertical Restraints Rationale

Although the Commission relied on *Northern Pacific*, 356 U.S. 1, and used a tying rationale for its decision, it did not explicitly characterize the case as an unlawful tie-in. Indeed, the Supreme Court, in affirming, suggests the Commission found something other, perhaps more, than an unlawful tie. 381 U.S. 357, 369-70 (1965). If

the Commission's finding was not that the sales commission plan was an unlawful tie, the plan was, nevertheless, held to be a *per se* unlawful vertical restraint of some other type. Since the Supreme Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), it has been clear that non-price vertical restraints generally are to be evaluated under a rule of reason standard. That standard requires consideration of whether interbrand competition may be enhanced by efficiencies resulting from vertical restraints. But as the Supreme Court noted in reviewing this case, the Commission refused to consider "evidence of economic justification" or to analyze "the competitive effect of the sales commission plan, examining the entire market in tires, batteries and accessories." 381 U.S. 357 at 371 (1965). Thus, to the extent the Commission's decision rests on an analysis of non-price vertical restraints, it appears that this change of law also warrants reopening the order.

The Order Will Be Set Aside

An order is not automatically set aside on the grounds that the law has changed, even if, as here, the Commission refused to consider issues that later become mandatory. Having satisfied itself on a record of adequate proof under then prevailing standards, the Commission does not have to reprove its case to maintain a final order. The order will remain in force unless the requester can show that there is no basis in current law on which such a case could be brought and either that there is no need for the order or that the current effect of the order is detrimental to competition.

In this request, Arco has satisfied this standard for modification. Arco has presented persuasive evidence that Atlantic probably lacked the "economic power" (as that term has been understood since *Fortner*, 429 U.S. 610) to effect an unlawful tie. Arco has also shown that there is no need for the order by presenting evidence that gas stations as a group, and Arco in particular, probably have too small a market share to produce substantial competitive effects on TBA distribution.³

Furthermore, there is some danger that paragraphs 5 and 6, the core provisions of this order, might have anticompetitive effects by deterring efficient conduct if they remained in force. They prohibit the use of coercion or intimidation as means of marketing TBA products,

³ Gas stations nationwide sold 3 percent of replacement batteries and 8 percent of replacement tires in 1987.
Document at 10

and preventing franchises from buying or displaying TBA products of their choice. The coercive use of economic power certainly can be illegal, but the disparity of bargaining power that the Commission identified in this case does not imply coercion. Under today's legal standards, even if Arco wished to require its franchisees to carry certain other branded products as a condition of obtaining or maintaining its franchise, the requirement would not constitute coercion and would be legal under a rule of reason in the absence of proof that it injured consumers. In view of these considerations, it appears that continuing the order in this case is unwarranted.

Accordingly, *it is ordered*, that this matter be reopened and that the Commission's order in Docket No. 6486 issued on March 9, 1961, be set aside as to Atlantic Refining Co. as of the date of this order.

IN THE MATTER OF

KKR ASSOCIATES, ET AL.

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

Docket C-3253. Complaint, June 13, 1989—Decision, June 13, 1989

This consent order requires, among other things, that the respondents divest either Beatrice or RJR assets used in the production and sale of packaged nuts, ketchup and oriental food, following KKR's acquisition of RJR Nabisco, Inc. Respondents are also required to hold RJR's assets and operations separate and apart from other entities owned by KKR, pending completion of the required divestitures.

Appearances

For the Commission: *Renee S. Henning.*

For the respondents: *Joseph A. DeFrancis, Latham & Watkins,* Washington, D.C. and *Richard C. Weisberg, Latham & Watkins,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents, KKR Associates, a limited partnership; Kohlberg Kravis Roberts & Co. L. P. ("KKR & Co."), a limited partnership; RJR Acquisition Corporation ("RJR Acquisition"), a corporation; RJR Associates, L.P. ("RJR Associates"), a limited partnership; RJR Holdings Group, Inc. ("RJR Group"), a corporation; RJR Holdings Corp. ("RJR Holdings"), a corporation; Henry R. Kravis, a natural person; Robert I. MacDonnell, a natural person; Michael W. Michelson, a natural person; Paul E. Raether, a natural person; and George R. Roberts, a natural person (collectively, "Respondents"), all subject to the jurisdiction of the Federal Trade Commission, have acquired the majority of the stock of RJR Nabisco, Inc. ("RJR") 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 ("FTC Act"), 15 U.S.C. 45; and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

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

a. "*Branded*" products as used herein includes all products other than products offered as generic products or with a retail establishment's private label.

b. "*KKR*" means KKR Associates, KKR & Co. and any corporations, partnerships, joint ventures, companies, subsidiaries, divisions, groups or affiliates that either KKR Associates or KKR & Co. controls directly or indirectly.

II. RESPONDENTS

2. Respondent KKR Associates is a New York limited partnership with its office and principal place of business at 9 West 57th Street, New York, New York.

3. Respondent KKR & Co. is a Delaware limited partnership with its office and principal place of business at 9 West 57th Street, New York, New York.

4. Respondent RJR Acquisition is a corporation organized under the laws of the State of Delaware with its office and principal place of business at 9 West 57th Street, New York, New York.

5. Respondent RJR Associates is a Delaware limited partnership with its office and principal place of business at 9 West 57th Street, New York, New York.

6. Respondent RJR Group is a corporation organized under the laws of the State of Delaware with its office and principal place of business located at 9 West 57th Street, New York, New York.

7. Respondent RJR Holdings is a corporation organized under the laws of the State of Delaware with its office and principal place of business at 9 West 57th Street, New York, New York.

8. Respondent Henry R. Kravis is a general partner in KKR Associates and KKR & Co. and is President of RJR Holdings, RJR Acquisition, and RJR Group with his office and principal place of business at 9 West 57th Street, New York, New York.

9. Respondent Robert I. MacDonnell is a general partner in KKR Associates and KKR & Co. with his office and principal place of business at 101 California Street, San Francisco, California.

10. Respondent Michael W. Michelson is a general partner in KKR Associates and KKR & Co. with his office and principal place of business at 101 California Street, San Francisco, California.

11. Respondent Paul E. Raether is a general partner in KKR Associates and KKR & Co. with his office and principal place of business at 9 West 57th Street, New York, New York.

12. Respondent George R. Roberts is a general partner in KKR Associates and KKR & Co. with his office and principal place of business at 101 California Street, San Francisco, California.

13. Respondents at all times relevant herein have been and are now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are either individuals or corporations or partnerships whose business or practices are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. ACQUIRED COMPANY

14. RJR is a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business at 300 Galleria Parkway, Atlanta, Georgia.

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

IV. THE ACQUISITION

16. On or about November 30, 1988, RJR Holdings Corp., RJR Holdings Group, Inc. and RJR Acquisition entered into a purchase agreement with RJR pursuant to which RJR Acquisition agreed to purchase the majority of the capital stock of RJR. Purchase of the majority of the capital stock would give RJR Acquisition control of RJR. The total value of the proposed acquisition is approximately \$24.8 billion.

V. RELEVANT MARKETS

17. For purposes of this complaint, the relevant lines of commerce in which to analyze the respondents' acquisition of RJR are branded catsup/ketchup, shelf-stable oriental entrees, shelf-stable oriental noodles, shelf-stable oriental vegetables, soy sauce and packaged nuts.

18. For purposes of this complaint, the relevant sections of the country include the entire United States.

19. Production and distribution of branded catsup/ketchup, shelf-stable oriental entrees, shelf-stable oriental noodles, shelf-stable oriental vegetables, soy sauce and packaged nuts is highly concentrated, whether measured by Herfindahl-Hirschmann. Indices ("HHI") or two-firm and four-firm concentration ratios.

20. Entry into the relevant markets set out in paragraphs 17 and 18 herein, is very difficult.

21. KKR and RJR are actual competitors in the production and distribution of branded catsup/ketchup, shelf-stable oriental entrees, shelf-stable oriental noodles, shelf-stable oriental vegetables, soy sauce and packaged nuts.

VI. EFFECTS

22. The effect of the acquisition may be substantially to lessen competition in the relevant markets described above in paragraphs 17 and 18 in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45, in the following ways, among others:

- a. Eliminate actual competition between RJR and KKR;
- b. Significantly enhance the likelihood of collusion or interdependent coordination among the firms that produce or sell the relevant products in the United States.

VII. VIOLATION CHARGED

23. The acquisition as set forth in paragraph 16 herein violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission (the "Commission"), having initiated an investigation of the proposed acquisition (the "Acquisition") of the voting securities of RJR Nabisco, Inc. ("RJR") by RJR Holdings Corp. ("RJR Holdings"), all of whose voting securities are currently held by RJR Associates, L.P., through the tender offer by, and subsequent merger with and into RJR of, RJR Acquisition Corporation ("RJR Acquisition"), a wholly-owned subsidiary of RJR Holdings; and KKR Associates, a New York limited partnership, the general partners of KKR Associates, Kohlberg Kravis Roberts & Co. L.P. ("KKR & Co."), a Delaware limited partnership, the general partners

of KKR & Co., RJR Associates, L.P. ("RJR Associates"), a Delaware limited partnership, RJR Holdings, a Delaware corporation, RJR Acquisition Corporation ("RJR Acquisition"), a Delaware corporation, and RJR Holdings Group, Inc. ("RJR Group"), a Delaware corporation (collectively, "Respondents"), having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order that was dated January 30, 1989, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondents have violated Section 5 and Section 7, 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

Respondents and Commission counsel having thereafter submitted a revised executed agreement containing a consent order that was dated April 26, 1989, and that was the same as the January agreement, except for minor, non-substantive modifications occasioned by the April restructuring of RJR; and

The Commission having duly considered the comments filed 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 modified complaint, makes the following jurisdictional findings and enters the following modified order:

1. Respondent KKR Associates is a New York limited partnership with its office and principal place of business at 9 West 57th Street, New York, New York.

2. Respondent KKR & Co. is a Delaware limited partnership with its office and principal place of business at 9 West 57th Street, New York, New York.

3. Respondent RJR Acquisition is a corporation organized under the laws of the State of Delaware with its office and principal place of business at 9 West 57th Street, New York, New York.

4. Respondent RJR Associates is a Delaware limited partnership with its office and principal place of business at 9 West 57th Street, New York, New York.

5. Respondent RJR Group is a corporation organized under the laws of the State of Delaware with its office and principal place of business located at 9 West 57th Street, New York, New York.

6. Respondent RJR Holdings is a corporation organized under the laws of the State of Delaware with its office and principal place of business at 9 West 57th Street, New York, New York.

7. Respondent Henry R. Kravis is a general partner in KKR Associates and KKR & Co. and is President of RJR Holdings, RJR Acquisition, and RJR Group with his office and principal place of business at 9 West 57th Street, New York, New York.

8. Respondent Robert I. MacDonnell is a general partner in KKR Associates and KKR & Co. with his office and principal place of business at 101 California Street, San Francisco, California.

9. Respondent Michael W. Michelson is a general partner in KKR Associates and KKR & Co. with his office and principal place of business at 101 California Street, San Francisco, California.

10. Respondent Paul E. Raether is a general partner in KKR Associates and KKR & Co. with his office and principal place of business at 9 West 57th Street, New York, New York.

11. Respondent George R. Roberts is a general partner in KKR Associates and KKR & Co. with his office and principal place of business at 101 California Street, San Francisco, California.

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

ORDER

I.

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

a. "*Respondents*" means KKR Associates, KKR & Co., RJR Acquisition, RJR Associates, RJR Group, and RJR Holdings, their predecessors and successors, and any corporations, partnerships, joint ventures, companies, subsidiaries, divisions, groups or affiliates that any respondent controls directly or indirectly, and their respective directors, officers, employees, agents, representatives, and their respective successors and assigns, as well as Henry R. Kravis, George R. Roberts, Robert I MacDonnell, Paul E. Raether and Michael W. Michelson, and any partnerships that they individually or collectively control.

b. "*Acquisition*" means any of the respondents' acquisitions of outstanding shares of RJR Nabisco, Inc.

c. "*Beatrice/Hunt-Wesson, Inc.*," is a Delaware corporation, with its principal place of business at 1645 W. Valencia Drive, Fullerton, California and its predecessors and successors, and any corporations, partnerships, joint ventures, companies, subsidiaries, divisions, groups or affiliates that Beatrice/Hunt-Wesson, Inc. controls directly or indirectly, and their respective directors, officers, employees, agents, representatives, and their respective successors and assigns.

d. "*Beatrice Parties*" means BCI Associates, L.P., BCI Associates II, L.P., KKR Partners II L.P., BCI Equity Associates, L.P., BCI Securities, L.P. and Beatrice Company and their predecessors and successors, and any corporations, partnerships, joint ventures, companies, subsidiaries, divisions, groups or affiliates that any Beatrice Party controls directly or indirectly, and their respective directors, officers, employees, agents, representatives, and their respective successors and assigns.

e. "*Branded*" products are used herein includes all products other than products offered as generic products or with a retail establishment's private label.

f. "*Chun King*" means the Chun King business of Nabisco Foods Company and includes all of RJR's assets and businesses associated with the development, production, distribution and sale of shelf-stable oriental entrees, shelf-stable oriental noodles, shelf-stable oriental

vegetables, and soy sauce. Associated assets and businesses are further delineated in the subparagraphs of Schedule A.

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

h. "*Control*" includes any situation in which any respondent or any of its principals, partners, directors, officers, employees, agents, representatives, or any of their respective successors or assigns constitutes a majority of a board of directors.

h-1. "*Del Monte Foods USA*" includes Del Monte Foods USA and Del Monte Manufacturing, Inc.

i. "*Food Assets and Businesses*" means Chun King, Del Monte Foods USA, the Planters LifeSavers Company and any other assets or businesses used in the product development, manufacture, distribution or sale of any edible products by Chun King, Del Monte Foods USA, or the Planters LifeSavers Company.

j. "*Henry R. Kravis*" means Henry R. Kravis, a natural person, general partner in KKR & Co. and KKR Associates, and President of RJR Holdings, RJR Acquisition, and RJR Group.

k. "*KKR Associates*" means KKR Associates, a New York limited partnership.

l. "*KKR & Co.*" means Kohlberg Kravis Roberts & Co. L.P., a Delaware limited partnership.

m. "*Robert I. MacDonnell*" means Robert I. MacDonnell, a natural person and general partner in KKR & Co. and KKR Associates.

n. "*Michael W. Michelson*" means Michael W. Michelson, a natural person and general partner in KKR & Co. and KKR Associates.

o. "*Paul E. Raether*" means Paul E. Raether, a natural person and general partner in KKR & Co. and KKR Associates.

p. "*Relevant Products*" means branded: catsup/ketchup, shelf-stable oriental entrees, shelf-stable oriental noodles, shelf-stable oriental vegetables, soy sauce and packaged nuts.

q. "*RJR*" means RJR Nabisco, Inc., its predecessors and successors, and any corporations, partnerships, joint ventures, companies, subsidiaries, divisions, groups or affiliates that RJR controls directly or indirectly, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

r. "*RJR Acquisition*" means RJR Acquisition Corporation, a Delaware corporation and subsidiary of RJR Holdings.

s. "*RJR Associates*" means RJR Associates, L.P., a Delaware limited partnership of which KKR Associates is the general partner.

t. "*RJR Group*" means RJR Holdings Group, Inc., a Delaware corporation and subsidiary of RJR Holdings.

- u. "*RJR Holdings*" means RJR Holdings Corp., a Delaware corporation.
- v. "*George R. Roberts*" means George R. Roberts, a natural person, and a general partner in KKR & Co. and KKR Associates.
- w. "*Schedule A Properties*" means the assets and businesses listed in Schedule A.
- x. "*Schedule A-1 Properties*" means the assets and businesses listed in Schedule A-1.
- y. "*Schedule B Properties*" means the assets and businesses listed in Schedule B.
- z. "*Successors*" includes any partnership in which two or more of the general partners in KKR Associates or KKR & Co. are partners.

II.

It is ordered, That:

(A) The respondents shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, either the Schedule A Properties or the Schedule A-1 Properties, as well as any additional Food Assets and Businesses that (i) the respondents may at their discretion include as a part of the assets to be divested and are acceptable to the acquiring entity and the Commission, or (ii) the Commission shall require to be divested to ensure the divestiture of the Schedule A Properties or the Schedule A-1 Properties as ongoing, viable enterprises, engaged in the businesses in which the properties are presently employed.

(B) The Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I, shall continue in effect until such time as the respondents have completed all of the Commission-approved divestitures of the Schedule A Properties or the Schedule A-1 Properties, or until such other time as the Agreement to Hold Separate provides, and the respondents shall comply with all terms of said Agreement.

(C) Divestiture of the Schedule A Properties or the Schedule A-1 Properties shall be made only to a buyer or buyers that receive the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Schedule A Properties or the Schedule A-1 Properties is to ensure the continuation of the assets as ongoing, viable enterprises engaged in the same businesses in which the properties are presently

employed, and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

(D) The respondents shall take such action as is necessary to maintain the viability and marketability of the Schedule A Properties, and to prevent the destruction, removal or impairment of any assets or businesses to be divested except in the ordinary course of business and except for ordinary wear and tear.

(E) The individual respondents shall take no action that diminishes the viability or marketability of the Schedule A-1 Properties, or permits the destruction, removal or impairment of any assets or businesses to be divested except in the ordinary course of business and except for ordinary wear and tear. To the extent any individual respondent has any direct or indirect responsibility or fiduciary duty with regard to the A-1 Properties, that respondent shall take such action as is necessary to maintain the viability and marketability of the Schedule A-1 Properties.

III.

It is further ordered, That:

(A) If the respondents have not divested the Schedule A Properties or the Schedule A-1 Properties within the twelve-month period, the respondents shall consent to the appointment by the Commission of a trustee to divest the Schedule B Properties. In the event that the Commission brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. Section 45(1), or any other statute enforced by the Commission, the respondents shall consent to the appointment of a trustee in such action. The appointment of a trustee shall not preclude the Commission from seeking civil penalties or any other relief available to it for any failure by respondents to comply with this order.

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

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

(2) The trustee shall have the power and authority to divest the Schedule B Properties. Provided, however, the trustee shall not have the power to divest the Planters LifeSavers Company if the Commission has approved and the respondents have divested, pursuant to this order, either (i) the assets and businesses associated with the development, production, distribution and sale of all relevant products within the Planters LifeSavers Company or (ii) the assets and businesses associated with the development, production, distribution and sale of all relevant products within Beatrice/Hunt-Wesson that develop, produce, distribute or sell the same relevant products as the Planters Lifesavers Company. Provided, further, the trustee shall not have the power to divest Del Monte Foods USA if the Commission has approved and the respondents have divested, pursuant to this order, (a) either (i) Chun King or (ii) the assets and businesses associated with the development, production, distribution and sale of all relevant products within Beatrice/Hunt-Wesson that develop, produce, distribute or sell the same relevant products as Chun King, and (b) either (i) the assets and businesses associated with the development, production, distribution and sale of all relevant products within Del Monte Foods USA or (ii) the assets and businesses associated with the development, production, distribution and sale of all relevant products within Beatrice/Hunt-Wesson that develop, produce, distribute or sell the same relevant products as Del Monte Foods USA. Provided, further, the trustee shall not have the power to divest Chun King if the Commission has approved and the respondents have divested, pursuant to this order, the assets and businesses associated with the development, production, distribution and sale of all relevant products within Beatrice/Hunt-Wesson that develop, produce, distribute or sell the same relevant products as Chun King.

(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 and, if the trustee is appointed by a court, subject also to the prior approval of the court. If, however, at the end of the eighteen-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or by the court 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 of any businesses that the trustee has the duty to divest. The respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. The respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestitures.

(5) The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to the respondents' absolute and unconditional obligation to divest at no minimum price and the purpose of the divestitures as stated in Paragraph II C.

(6) The trustee shall serve at the cost and expense of the respondents, on such reasonable and customary terms and conditions as the Commission or a court may set, including the employment of accountants, attorneys or other persons 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 the appropriate respondent and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Schedule B Properties.

(7) 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, the respondents shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture.

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

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

IV.

It is further ordered, That, within sixty (60) days after the date this order becomes final, and every sixty (60) days thereafter until the

respondents have fully complied with the provisions of paragraph II of this order, each respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying with, or has complied with that provision. The respondents shall include in compliance reports, among other things that are required from time to time, a full description of the contracts or negotiations for the divestiture of properties specified in paragraph II of this order, including the identity of all parties contacted. The respondents also shall include in their compliance reports copies of all material written communications to and from such parties, and all internal memoranda, reports and recommendations concerning the required divestitures.

V.

It is further ordered, That, for a ten (10) year period commencing on the date this order becomes final, each respondent (but in the case of an individual respondent, only so long as he remains a general partner, officer, director, or employee of a nonindividual respondent) shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries, partnerships or otherwise, assets used or previously used in (and still suitable for use in), or any interest in, or the whole or any part of the stock or share capital of, any company that is engaged in the production of any relevant product, or that owns or licenses a branded trademark used in connection with the sale of any relevant product. Provided, however, that the corporate respondents may, in the ordinary course of business, make purchases of used equipment for not more than \$500,000. Provided further, that the individual and partnership respondents, and each pension, benefit or welfare plan or trust controlled by the corporate respondents may acquire, for investment purposes only, an interest of not more than five (5) percent of the stock or share capital of any concern. For the purposes of this proviso, any purchase by any such pension, benefit or welfare plan or trust made at the direction or suggestion of any individual or partnership respondent shall be included in the five (5) percent of the stock or share capital that the individual or partnership respondents may acquire.

VI.

It is further ordered, That, one (1) year from the date this order becomes final and for each of nine (9) years thereafter, each respondent shall file with the Commission a verified written report of its compliance with paragraph V.

VII.

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

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

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

VIII.

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

SCHEDULE A

Unless the Beatrice Parties divest the Schedule A-1 Properties pursuant to the terms of this order, the respondents shall divest all of RJR's assets and businesses associated with the development, production, distribution and sale of the relevant products. The divestiture shall include all of RJR's assets, properties, business and

goodwill, tangible and intangible, utilized in the manufacture or sale of such relevant products, including, without limitation, the following:

- (a) All machinery, fixtures, equipment, vehicles, furniture, tools and all other tangible personal property;
- (b) All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes and quality control data;
- (c) Inventory;
- (d) Accounts and notes receivable;
- (e) Intellectual property rights, patents, copyrights, trademarks and trade names, excluding the trademark or trade name "Nabisco";
- (f) All right, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits;
- (g) All right, title and interest in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;
- (h) All rights under warranties and guarantees, express or implied;
- (i) All books, records and files;
- (j) All items of prepaid expense; and
- (k) All known or unknown, liquidated or unliquidated, contingent or fixed, rights or causes of action which RJR has or may have against any third party, and all such rights that RJR has or may have in or to any asset or property relating primarily to the particular assets divested, excluding, however, all known or unknown, liquidated or unliquidated, contingent or fixed, causes of action that RJR has or may have to the extent they arise out of or are related to any liability, obligation or claim not to be assumed by the purchaser of such asset divested.

With respect to a class of similar assets (such as trucks) a fraction of the use of which has been devoted to the assets divested, such fraction of such class (or as close an approximation to such fraction as can be separately transferred) shall be included within the assets divested.

Provided, however, if the Beatrice Parties divest the Schedule A-1 Properties pursuant to the terms of this order associated with the development, production, distribution and sale of a particular relevant

product, the respondents shall not be required to divest RJR's assets and businesses associated with the development, production, distribution and sale of that relevant product, unless such assets and businesses are also assets and businesses associated with the development, production, distribution or sale of another relevant product.

SCHEDULE A-1

Unless the respondents divest the Schedule A Properties pursuant to the terms of this order, the Beatrice Parties shall divest all of the Beatrice/Hunt-Wesson, Inc. assets and businesses associated with the development, production, distribution and sale of the relevant products. The divestiture shall include all of Beatrice/Hunt-Wesson, Inc. assets, properties, business and goodwill, tangible and intangible, utilized in the manufacture or sale of such relevant products, including, without limitation, the following:

- (a) All machinery, fixtures, equipment, vehicles, furniture, tools and all other tangible personal property;
- (b) All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes and quality control data;
- (c) Inventory;
- (d) Accounts and notes receivable;
- (e) Intellectual property rights, patents, copyrights, trademarks and trade names, excluding the trademark or trade name "Beatrice";
- (f) All right, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits;
- (g) All right, title and interest in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;
- (h) All rights under warranties and guarantees, express or implied;
- (i) All books, records and files;
- (j) All items of prepaid expense; and
- (k) All known or unknown, liquidated or unliquidated, contingent or fixed, rights or causes of action which Beatrice/Hunt-Wesson, Inc.

has or may have against any third party, and all such rights that Beatrice/Hunt-Wesson, Inc. has or may have in or to any asset or property relating primarily to the particular assets divested, excluding, however, all known or unknown, liquidated or unliquidated, contingent or fixed, causes of action that Beatrice/Hunt-Wesson, Inc. has or may have to the extent they arise out of or are related to any liability, obligation or claim not to be assumed by the purchaser of such asset divested.

With respect to a class of similar assets (such as trucks) a fraction of the use of which has been devoted to the assets divested, such fraction of such class (or as close an approximation to such fraction as can be separately transferred) shall be included within the assets divested.

Provided, however, if the respondents divest the Schedule A Properties pursuant to the terms of this order associated with the development, production, distribution and sale of a particular relevant product, the Beatrice Parties shall not be required to divest the Beatrice/Hunt-Wesson, Inc. assets and businesses associated with the development, production, distribution and sale of that relevant product, unless such assets and businesses are also assets and businesses associated with the development, production, distribution or sale of another relevant product.

SCHEDULE B

The trustee shall divest the following divisions, businesses, or subsidiaries of RJR:

1. Del Monte Foods USA,
2. Planters Lifesavers Company,
3. Chun King.

The trustee shall also divest any additional Food Assets and Businesses that the Commission shall require to be divested to ensure the divestiture of the Schedule B Properties as ongoing, viable enterprises, engaged in the businesses in which the properties are presently employed. Notwithstanding the last paragraph of Schedule A and Schedule A-1, the trustee shall have the power and authority to divest all the Schedule B Properties, except as provided in paragraph III (B) (2) of this order.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and among KKR Associates, a New York limited partnership, the general partners of KKR Associates ("KKR Partners"), Kohlberg Kravis Roberts & Co. L.P. ("KKR & Co."), a Delaware limited partnership, the general partners of Kohlberg Kravis Roberts & Co. L.P. ("KKR & Co. Partners"), RJR Associates, L.P. ("RJR Associates"), a Delaware limited partnership, RJR Holdings Corp. ("RJR Holdings"), a Delaware corporation, RJR Acquisition Corporation ("RJR Acquisition"), a Delaware corporation, and RJR Holdings Group, Inc. ("RJR Group"), a Delaware corporation (collectively, "the Acquiring Parties"), 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").

PREMISES

Whereas, RJR Acquisition, a wholly-owned subsidiary of RJR Holdings, all of whose voting securities are currently held by RJR Associates, commenced a tender offer on October 27, 1988, as amended, for up to 165,509,015 of the outstanding shares of RJR Nabisco, Inc. ("RJR"), with the intent of effecting a merger of RJR Acquisition into RJR, pursuant to which RJR would become a subsidiary of RJR Holdings (the "Acquisition"), all as contemplated by and provided for in that certain merger agreement entered into among RJR Holdings, RJR Acquisition, RJR Group and RJR dated as of November 30, 1988; and

Whereas, the Commission is now investigating the transaction to determine if the acquisition 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 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 certain of RJR's food 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 properties described in Schedule A, Schedule A-1 and Schedule B to the Consent Order (the "Schedule A Properties," "Schedule A-1 Properties," and "Schedule B Properties," respectively) and the Commission's right to seek to restore RJR as a viable competitor; and

Whereas, the purpose of this agreement and the Consent Order is to preserve the Chun King business of Nabisco Foods Company as that business is defined in the Consent Order ("Chun King"), Del Monte Foods USA ("Del Monte Foods USA," as used herein, includes Del Monte Foods USA and Del Monte Manufacturing, Inc.) and the Planters LifeSavers Company as viable food companies pending the divestiture of the Schedule A Properties as viable, on-going enterprises, in order to remedy any anticompetitive effects of the acquisition and to preserve the assets and businesses as viable food companies in the event that divestiture is not achieved; and

Whereas, the acquiring parties' entering into this agreement shall in no way be construed as an admission by them that the acquisition is illegal; and

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

Now, *therefore*, 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 the acquiring parties 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 divestitures are not accomplished, to seek divestiture of such assets as are held separate pursuant to this agreement, as follows:

1. The acquiring parties agree to execute and be bound by the attached Consent Order.

2. The acquiring parties agree that, until the first to occur of (i) three business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's rules; or (ii) if the Commission issues the Consent Order finally, until all of the divestitures required by the Consent Order have been completed, the acquiring parties shall hold all of RJR's assets and business operations separate and apart on the following terms and conditions:

a. All of RJR's assets and businesses shall be operated independently of the acquiring parties and independently of any other parties owned in whole or in part by any of the acquiring parties.

b. Except as permitted to the acquiring parties sitting on the "New Board" (as defined in subparagraph (h)), and as is necessary to assure compliance with this agreement, the acquiring parties shall not exercise direction or control over, or influence directly or indirectly, any of RJR's assets and businesses.

c. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the acquisition, defending investigations or litigation, preventing a default under the terms of the credit agreement among RJR Holdings and certain banks entered into in connection with the acquisition (the "Credit Agreement") or negotiating an agreement to dispose of assets, the acquiring parties shall not receive or have access to, or the use of, any "material confidential information" relating to RJR's "Food Assets and Businesses" not in the public domain, except as such information would be available to the acquiring parties 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 the acquiring parties from sources other than RJR, and includes but is not limited to customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets. "Food Assets and Businesses," as used herein, means any assets and businesses used in the product development, manufacture, distribution or sale of any "relevant product" as the Consent Order defines that term. Provided, however, that assets and businesses associated with a particular relevant product shall not continue to be Food Assets and Businesses for the purposes of this Agreement to Hold Separate when the trustee

loses the power to divest such assets and businesses, pursuant to paragraph III (B) (2) of the Consent Order.

d. The acquiring parties shall not change the composition of the management of RJR's assets and businesses except that the directors serving on the "New Board" (as defined in subparagraph (h)), excluding directors who are officers, partners, employees or agents of KKR & Co. or KKR Associates, shall have the power to remove employees for cause, and the New Board shall have the power to remove any RJR employees not employed by or assigned to Chun King, Del Monte Foods USA, and the Planters LifeSavers Company.

e. The acquiring parties shall do nothing to diminish the viability and marketability of Chun King, Del Monte Foods USA, and the Planters LifeSavers Company, and shall not sell, transfer, encumber, or otherwise impair the marketability or viability of their assets (other than in the normal course of business).

f. The acquiring parties shall do nothing to diminish the normal working capital of the Food Assets and Businesses.

g. All material transactions out of the ordinary course of business and not otherwise precluded shall be subject to a majority vote of the New Board (as defined in subparagraph (h)).

h. The acquiring parties may adopt new Articles of Incorporation and By-laws, provided that they are not inconsistent with other provisions of this Agreement, and may cause the election of a new board of directors of RJR ("New Board") once they are majority shareholders of RJR. The acquiring parties may elect the directors to the New Board. Except as permitted by this agreement, the directors of RJR who are also partners, officers, employees or agents of KKR & Co. or KKR Associates shall not receive in their capacity as directors of RJR material confidential information relating to RJR's Food Assets and Businesses, and shall not disclose any such information received under this agreement to the acquiring parties or to any company owned in whole or in part by any of the acquiring parties. Nor shall such directors use such information to obtain any advantage for the acquiring parties or for any company owned in whole or in part by the acquiring parties. Said directors shall also not disclose to RJR any material confidential information relating to the Food Assets and Businesses of any company owned in whole or in part by any of the acquiring parties. Said directors of RJR shall enter into a confidentiality agreement prohibiting disclosure of confidential information. Such directors may participate in matters that come before the New Board

that do not concern Chun King, Del Monte Foods USA, and the Planters LifeSavers Company. Such directors may participate in matters that come before the New Board concerning Chun King, Del Monte Foods USA, and the Planters LifeSavers Company only for the limited purpose of considering: (i) capital expenditures in excess of \$5,000,000; (ii) sale of any capital assets for more than \$5,000,000; (iii) any decision relating to financing, restructuring or the issuance of indebtedness in the aggregate sum of more than \$5,000,000; (iv) preventing a default under the terms of the credit agreement; (v) negotiating incentive compensation arrangements for key managers solely for the purpose of facilitating the divestitures; or (vi) carrying out the Acquiring Parties' and RJR's responsibility to assure that the Schedule A and Schedule B Properties and such other properties as the Commission may elect to add under paragraph II of the Consent Order are maintained in such manner as will permit their divestiture as on-going, viable assets. Except as permitted by this agreement, such director shall not participate in, or attempt to influence the vote of any other director with respect to, any matters that would involve a conflict of interest if the acquiring parties and RJR were separate and independent entities. Meetings of the Board during the term of this agreement, shall be stenographically transcribed and the transcripts shall be retained for two (2) years after the termination of this agreement.

i. Nothing herein shall prevent the New Board from negotiating or entering into agreements to dispose of RJR's assets, provided that any such disposition with respect to properties potentially subject to the divestiture of the trustee under the Consent Order shall be made only to a buyer or buyers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

j. The Board of RJR Holdings, RJR Group, or RJR Acquisition shall neither declare any cash dividend on any class of its stock nor permit the repayment of the principal of any loan from any acquiring party, other than RJR Holdings, RJR Group or RJR Acquisition, until the divestitures required pursuant to the Consent Order have been completed. The acquiring parties shall not borrow funds or issue dividends if the result would be to impair the Food Assets' and Businesses' viability, marketability, or ability to operate at their previously budgeted 1989 levels of expenditure on an annualized basis.

k. Should the Commission seek in any proceeding to compel the acquiring parties to divest themselves of the shares of RJR stock they shall acquire, or to compel the acquiring parties to divest any assets or businesses they may hold, or to seek any other injunctive or equitable relief, the acquiring parties 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 RJR stock to be acquired. The acquiring parties also waive all rights to contest the validity of this agreement.

3. In the event the Commission has not finally approved and issued the Consent Order within one hundred twenty (120) days of its publication in the Federal Register, the acquiring parties may, at their option, terminate this Agreement to Hold Separate by delivering written notice of termination to the Commission, which termination shall be effective ten (10) days after the Commission's receipt of such notice, and this agreement shall thereafter be of no further force and effect. If this agreement is so terminated, the Commission may take such action as it deems appropriate, including but not limited to an action pursuant to Section 13 (b) of the Federal Trade Commission Act, 15 U.S.C. 53(b). Termination of this Agreement to Hold Separate shall in no way operate to terminate the Agreement Containing Consent Order to Cease and Desist that the acquiring parties have entered into in this matter.

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 the acquiring parties made to their offices, the acquiring parties shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of the acquiring parties 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 the acquiring parties relating to compliance with this agreement; and

b. Upon five (5) days notice to the acquiring parties, and without restraint or interference from them, to interview partners, officers, directors or employees of the acquiring parties, who may have counsel present, regarding any such matters.

No information or documents obtained by the Commission pursuant to this agreement shall be divulged by any representative of the Commission to anyone outside the Commission. except in the case of

legal proceedings, in the case of a request from Congress, a Congressional Committee, or Congressional Subcommittee, for the purpose of securing compliance with this agreement or as otherwise required by law. Upon the termination of this agreement, all such information and documents shall, at the request of the acquiring parties, be returned to the acquiring parties or destroyed.

If, at any time, information or documents are furnished by the acquiring parties and the acquiring parties identify such documents as "Confidential," then the Commission shall provide to the acquiring parties ten (10) days notice or, if ten (10) days is not possible, as many days notice as possible prior to divulging such material.

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

Complaint

111 F.T.C.

IN THE MATTER OF

GENERAL RENT-A-CAR SYSTEMS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3255. Complaint, June 13, 1989—Decision, June 13, 1989*

This consent order requires, among other things, the Miami, Fla. national car rental company to disclose charges that are mandatory or are not reasonably avoidable to every consumer that inquires about the prices and also to disclose to consumers the car models they are to receive under the car size classification that each consumer selects.

*Appearances*For the Commission: *Michael R. MacPhail* and *Joel C. Winston*.For the respondents: *Donald L. Peusner*, Miami, Fla.

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 respondents General Rent-A-Car Systems, Inc., a corporation, and General Rent-A-Car, Inc., a corporation, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent General Rent-A-Car Systems, Inc. is a corporation organized, existing, and doing business under and by virtue of the law of the State of Florida. Respondent General Rent-A-Car, Inc. is a corporation organized, existing, and doing business under and by virtue of the law of the State of Delaware. Respondents' offices and principal places of business are located at 2741 North 29th Avenue, Hollywood, Florida. Respondent General Rent-A-Car, Inc. is a wholly-owned subsidiary of respondent General Rent-a-Car Systems, Inc.

PAR. 2. Respondents, at all times mentioned herein, have maintained a substantial course of business, including the acts and

practices hereinafter set forth, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. Respondents advertise, offer for rental, and rent to consumers throughout the United States, rental vehicles made available to consumers at numerous rental offices nationwide. Many of respondents' rental offices are located at off-airport sites; an airport surcharge or fee is imposed at certain of these locations when consumers use an airport shuttle van for transportation to these sites.

PAR. 4. In the course and conduct of their business, in order to induce the rental of their automobiles, respondents have disseminated or caused the dissemination of promotional information, including written advertisements stating that fuel charges will be assessed, and that airport fees may be assessed at certain locations. Respondents' advertisements typically invite consumers to call a toll-free "800" number to receive further information from their agents and to make reservations.

PAR. 5. In response to consumer inquiries to their toll-free number, respondents' agents make statements and representations regarding, among other things, the price of contemplated rentals of their vehicles, and their classification by size, *e.g.*, "subcompact," "compact," and "intermediate."

PAR. 6. In oral presentations in response to consumer inquiries, respondents' agents have, in numerous instances, stated prices for respondents' rental services without disclosing:

- (a) The existence and amount of a mandatory fuel charge; and
- (b) The existence and amount of a mandatory airport "surcharge" or "fee" imposed on consumers who travel in one of respondents' shuttle vehicles from certain airport locations to one of respondents' rental offices.

The existence and amounts of these charges and fees would be material to consumers. The failure to disclose these facts, in light of respondents' oral price representations, is an unfair or deceptive act or practice.

PAR. 7. Under respondents' vehicle classification system, certain automobile models classified by the federal government, automobile manufacturers, and other vehicle rental companies as "subcompacts" or "compacts" are classified by respondents as "compacts" and "intermediates," respectively. In oral presentations in response to consumer inquiries, respondents' agents have, in numerous instances, stated prices and accepted reservations for specific vehicle classifica-

tions without disclosing what model of automobile consumers will receive. Because of the vehicle classification system used by respondents, information on the particular model being received would be material to consumers. The failure to disclose this information, in light of respondents' vehicle classification representations, is an unfair or deceptive act or practice.

PAR. 8. The acts and practices of respondents, as herein alleged, have constituted, and now constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the 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 General Rent-A-Car Systems, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida. Respondent General Rent-A-Car, Inc. is a

corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware. Respondents' offices and principal places of business are located at 2741 North 29th Avenue, Hollywood, Florida. Respondent General Rent-A-Car, Inc. is a wholly-owned subsidiary of respondent General Rent-a-Car Systems, Inc.

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

ORDER

I.

For the purposes of this order, all required disclosures shall be made in a clear and conspicuous manner.

It is ordered, That respondents General Rent-A-Car Systems, Inc., a corporation, and General Rent-A-Car, Inc., a corporation, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with the promotion, offering for rental or rental of any vehicle, in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Failing to disclose to consumers, in connection with any discussion or inquiry relating to the price of a contemplated rental, all airport surcharges or fees that are applicable to the contemplated rental or are not reasonably avoidable by consumers.

B. Failing to disclose to consumers, in connection with any discussion or inquiry relating to the price of a contemplated rental, all fuel charges that are applicable to the contemplated rental or are not reasonably avoidable by consumers.

C. Failing to disclose to consumers, in connection with any discussion or inquiry relating to the price of a contemplated rental, any other charges sought to be imposed in connection with a contemplated rental that are mandatory or that are not reasonably avoidable by consumers.

D. Failing to disclose to consumers, in connection with any discussion or inquiry in which an automobile reservation is made, the automobile model or models that they may receive under the classification rented.

II.

It is further ordered, That respondents shall for a period of three (3) years distribute, or cause to be distributed, a copy of this order to all present and future operating divisions, subsidiaries, franchisees, dealers, and managerial employees.

III.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in either 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 that may affect compliance obligations under this order. Respondents shall require, as a condition precedent to the closing of any sale or other disposition of all or a substantial part of their assets, that the acquiring party file with the Commission, prior to the closing of such sale or other disposition, a written agreement to be bound by the provisions of the order.

IV.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, 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

UJENA, INC.

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

Docket C-3254. Complaint, June 14, 1989—Decision, June 14, 1989

This consent order prohibits, among other things, the Mountain View, Ca. corporation from misrepresenting the terms and conditions of a money-back guarantee, from failing to provide a full refund of the amount stated in the money-back guarantee within the time specified in the offer, and from failing to transmit a credit statement to the consumer's credit card issuer within seven business days of accepting the return of merchandise.

Appearances

For the Commission: *Janet M. Grady* and *Jerome M. Steiner, Jr.*

For the respondent: *John Anderson, President*, Mountain View, Ca. and *Peter B. Gelblum, Mitchell, Silberberg & Knupp*, Los Angeles, Ca.

COMPLAINT

The Federal Trade Commission, having reason to believe that Ujena, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and the Truth in Lending Act, and the implementing Regulation Z promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Ujena, Inc. is a Delaware corporation, with its principal office or place of business at 1400 Shoreline Boulevard, Mountain View, California.

PAR. 2. Respondent has advertised, offered for sale, sold and distributed swimwear and related products.

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

PAR. 4. In the course and conduct of its business, and for the purpose of inducing the purchase of respondent's products, respondent

has disseminated various advertisements and promotional materials. Typical statements in respondent's advertisements and promotional materials include the following:

"OUR GUARANTEE—If you are not completely satisfied with any item you purchase from us, return it within ten days (30 days for exchange and merchandise credits) and we will refund your purchase price."

* * * * *

"OUR GUARANTEE—If you are not completely satisfied with any item you buy from us, return it and we will refund your purchase price."

* * * * *

"OUR GUARANTEE—If you are not completely satisfied with any item you buy from us, return it within 30 days (7 days for Ujena Leathers) and we will refund your purchase price."

PAR. 5. By and through the use of its statements set forth in paragraph four, respondent has represented, directly or by implication, that in all instances respondent honors valid refund requests in a timely manner.

PAR. 6. In truth and in fact, in many instances, respondent does not honor valid refund requests in a timely manner. Therefore, the representations set forth in paragraph four are false and misleading and constitute deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act.

PAR. 7. Respondent is a creditor as "creditor" is defined in Section 103(f) of the Truth in Lending Act, and in Section 226.2(a)(17) of Regulation Z, and is therefore, required to comply with the applicable provisions of that Act and Regulation.

PAR. 8. Section 226.12(e)(1) of Regulation Z, which implements Section 166 of the Truth in Lending Act, provides that:

"When a creditor other than the card issuer accepts the return of property or forgives a debt for services that is to be reflected as a credit to the consumer's credit card account, that creditor shall, within seven business days from accepting the return or forgiving the debt, transmit a credit statement to the card issuer through the card issuer's normal channels for credit statements."

PAR. 9. In many instances, respondent has failed to transmit credit statements to the card issuer through the card issuer's normal channels for credit statements within seven business days from accepting the return of property or forgiving the debt as required by Section 226.2(e)(1) of Regulation Z.

PAR. 10. The acts and practices of respondent as alleged in this

complaint constitute unfair and deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act and of the Truth in Lending Act and of the implementing Regulation Z.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Ujena, Inc. ("respondent"), and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, and the Truth in Lending Act, and the implementing Regulation Z promulgated under the Truth in Lending Act; and

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

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

1. Ujena, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal business address located at 1400 Shoreline Boulevard, Mountain View, California.

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

ORDER

For purposes of this order the following definitions shall apply:

A. "*Valid refund request*" shall mean a refund request responsive to a money-back guarantee offer which meets all requirements disclosed clearly in the offer;

B. "*Credit Statement*" means any type of notice transmitted by the respondent or its agents to a credit card issuer that causes a consumer's account to be credited for the amount indicated on the notice;

C. "*Credit Sale*" shall be defined as provided by Section 226.2(a)(16) of Regulation Z, 12 CFR 226.2(a)(16); and

D. "*Card Issuer*" shall be defined as provided by Section 226.2(a)(7) of Regulation Z, 12 CFR 226.2(a)(7).

I.

It is ordered, That respondent Ujena, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, and distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting in any matter, directly or by implication, any term or condition of a money-back guarantee offer;

B. Failing to provide, to any person who has made a valid refund request and who has paid by cash, check or money order, a full refund of whatever amount was stated in the guarantee offer specified, within ten (10) business days of receipt of the refund request; and

C. Failing to transmit, where there was a credit sale, a credit statement to the consumer's card issuer within seven (7) business days of accepting the return of property or forgiving the consumer's debt.

II.

It is further ordered, That respondent shall:

A. Notify the Commission at least thirty (30) days prior to any

proposed change in respondent, such as dissolution, reorganization, assignment, or sale resulting in the emergence of a successor corporation, or any other change in the corporation which may affect compliance obligations arising out of this order; and

B. Within sixty (60) days after this order becomes final, submit to the Federal Trade Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Complaint

111 F.T.C.

IN THE MATTER OF

PEPSICO, INC., ET AL.

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

Docket C-3262. Complaint, June 29, 1989—Decision, June 29, 1989

This consent order requires, among other things, Pepsico to allow General Cinema Corp. (GCC) to continue distributing non-Pepsi brands in Broward County, Fla. and the Staunton, Va. area, and requires Pepsico to obtain prior Commission approval, for five years, for any carbonated soft drink asset acquisition in those two areas and to notify the Commission of any acquisition that would create substantial overlaps.

Appearances

For the Commission: *Ronald B. Rowe, Constance M. Salemi and Jeffery I. Zuckerman.*

For the respondents: *Edward V. Lahey, Jr., in-house counsel, Purchase, N.Y., Samuel Frankeheim, in-house counsel, Chestnut Hill, Ma., Richard T. Colman and Raymond A. Jacobsen, Howrey & Simon, Washington D.C., and Stephen M. Axinn, C. Benjamin Crisman, Jr., Peter E. Greene, Skadden, Arps, Slate, Meagher & Flom, New York City.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the respondent, PepsiCo, Inc., a corporation subject to the jurisdiction of the Commission, has entered into an agreement to purchase the shares of three General Cinema Corporation bottling subsidiaries that, if completed, would violate the provision of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; that said agreement constitutes a violation of Section 5 of the FTC Act, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section

11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

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

a. "*PepsiCo*" means PepsiCo, Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by PepsiCo, and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

b. "*GCC*" means General Cinema Corporation, its predecessors, subsidiaries, divisions, groups and affiliates controlled by GCC and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

c. "*GCB Miami*" means General Cinema Beverages of Miami, Inc., its predecessors, subsidiaries, divisions groups and affiliates controlled by GCB Miami and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

d. "*GCB Virginia*" means General Cinema Beverages of Virginia, Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by GCB Virginia and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

e. "*GCB Staunton*" means General Cinema Beverages of Staunton, Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by GCB Staunton and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

f. "*Brand*" or "*brand name*" means the trademarked name of any type of soft drink product and excludes warehouse, private label and house brands.

g. "*Person*" means any natural person or any corporate entity, partnership, association, joint venture, governmental entity, trust or other organization or entity.

h. "*Bottler*" refers to a person that is engaged in bottling soft drinks or that has been granted an exclusive bottling appointment by any manufacturer of soft drink syrup or concentrate.

i. "*Bottles*", "*bottling*" or "*bottled*" means the process of putting

syrup or concentrate and other ingredients together as a soft drink in a bottle or can, regardless of the sources of the syrup or concentrate.

j. "*Territory*" means an area for which a bottler has been granted an exclusive bottling appointment.

k. "*Soft drink*" means a carbonated soft drink, as classified under the four-digit Standard Industrial Classification industry code 2086.

l. "*Non-PepsiCo brand*" product means a carbonated soft drink sold under a trademark owned by a person other than PepsiCo.

II. THE PARTIES

2. PepsiCo is a corporation organized and existing under the laws of the State of North Carolina, with its executive offices located at 700 Anderson Hill Road, Purchase, New York.

3. In 1987, PepsiCo's net soft drink sales totaled \$4.1 billion.

4. GCC is a corporation organized and existing under the laws of the State of Delaware with its executive offices located at 27 Boylston Street, Chestnut Hill, Massachusetts.

5. In 1987, GCC's sales of soft drinks totaled \$709.8 million.

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

III. THE PROPOSED ACQUISITION

7. In approximately November, 1988, PepsiCo entered into negotiations with GCC to acquire all the stock of GCC's wholly-owned subsidiaries, including GCB Miami, GCB Staunton and GCB Virginia ("subsidiaries") and other GCC wholly-owned bottling subsidiaries. PepsiCo and GCC agreed upon a price of approximately \$1.75 billion in January 1989. PepsiCo is a manufacturer of concentrate and a bottler of soft drinks in a number of markets. GCC, through these and other subsidiaries, is also a bottler of soft drinks in a number of markets. After the acquisition PepsiCo will remain a concentrate manufacturer and soft drink bottler in the markets where it does business, and GCC will distribute soft drinks in two markets, the Broward County, Florida area market and the Staunton, Virginia area market, as hereinafter described.

IV. TRADE AND COMMERCE

8. A relevant line of commerce in which to analyze PepsiCo's proposed acquisition of the subsidiaries is branded soft drinks. Another relevant line of commerce in which to analyze PepsiCo's proposed acquisition of these subsidiaries is no broader than all soft drinks.

9. One relevant section of the country is a single county area in which GCB Miami bottles and distributes soft drinks. This area may include, but is not limited to, Broward County. Another relevant section of the country is approximately a six-county area in which GCB Virginia bottles and GCB Staunton distributes soft drinks. These counties or portions of counties may include, but are not limited to, Augusta, Rockingham, Page, Highland, Shenandoah, and Nelson Counties.

V. MARKET STRUCTURE

10. The production, distribution and sale of soft drinks in relevant markets is highly concentrated, whether measured by the Herfindahl-Hirshmann indices or two-firm and four-firm concentration ratios.

VI. ENTRY CONDITIONS

11. Entry into the relevant markets is difficult or unlikely.

VII. COMPETITION

12. PepsiCo is a supplier of concentrate to at least two bottlers of PepsiCo brands and other brands in the relevant markets. GCC through the identified bottling subsidiaries is in actual competition with other bottlers of PepsiCo brands and other brands in the relevant markets with respect to non-PepsiCo soft drinks brands. This acquisition would make PepsiCo both a bottler of non-PepsiCo brands and a supplier of PepsiCo brand concentrate to a bottler in the relevant markets.

VIII. EFFECTS

13. The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant lines of commerce in the relevant sections of the country in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

- a. By eliminating direct competition between the identified bottling subsidiaries and bottlers of PepsiCo brands and other brands; and
- b. By increasing the likelihood of, or facilitating collusion where there are already high levels of concentration; thus increasing the likelihood that firms will increase prices and restrict output of branded soft drinks in the relevant markets.

IX. VIOLATIONS CHARGED

14. The proposed acquisition of the subsidiaries by PepsiCo violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and would, if consummated, violate Section 7 of the Clayton Act, 15 U.S.C. 18 and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

Commissioner Azcuenaga recused.

DECISION AND ORDER

The Federal Trade Commission (the "Commission") having initiated an investigation of the proposed acquisition of voting securities of General Cinema Corporation's ("GCC") General Cinema Beverages subsidiaries by PepsiCo, Inc. ("PepsiCo"); and GCC and PepsiCo 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 GCC and PepsiCo with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

GCC and PepsiCo, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in the 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 GCC and PepsiCo have violated the said Acts, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public

record for a period of sixty (60) days, 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 procedures prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

GCC is a corporation organized, existing, and doing business under the laws of the State of Delaware, with its executive offices located at 27 Boylston Street, Chestnut Hill, Massachusetts.

PepsiCo is a corporation organized, existing, and doing business under the laws of the State of North Carolina, with its executive offices located at 700 Anderson Hill Road, Purchase, New York.

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

ORDER

I.

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

A. "*GCC*" means General Cinema Corporation, its predecessors, subsidiaries, divisions, groups and affiliates controlled by GCC, and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

B. "*PepsiCo*" means PepsiCo, Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by PepsiCo, and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

C. "*Acquisition*" means PepsiCo's acquisition of the voting securities of the GCC subsidiaries identified on Exhibit 1, which are engaged in the soft drink business.

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

E. "*Person*" means any natural person or any corporate entity, partnership, association, joint venture, governmental entity, trust or any other organization or entity.

II.

It is ordered, That

A. For a period a five (5) years from the date this order becomes final, PepsiCo agrees to supply to GCC, for sale in the Staunton and Broward County Areas (as defined in Exhibit 2 hereto), carbonated soft drink products, on the terms set forth in the Supply Agreements dated March 14, 1989, copies of which are attached as Exhibit 3. Nothing contained in such Supply Agreements shall restrict GCC from obtaining carbonated soft drink products from suppliers other than PepsiCo.

B. For a period of five (5) years from the date this order becomes final, PepsiCo shall not acquire, without the prior approval of the Commission, directly or indirectly, the stock, share capital, equity interest or assets of any person if, as a result of such acquisition, PepsiCo would become a bottler or distributor of carbonated soft drink products in the Staunton or Broward County Areas.

C. Prior to the Commission's acceptance of this agreement, GCC shall have executed and effectuated the modification of franchise agreements to ensure that it will retain rights to distribute 7UP, Dr Pepper, Barq's and Sunkist products in the Broward County, Florida Area and Dr Pepper, Barq's and Mountain Dew products in the Staunton, Virginia Area, as described in Exhibit 4 to this agreement.

III.

It is further ordered, That

A. For a period of ten (10) years from the date this order becomes final, GCC shall not, without the prior approval of the Commission, assign or transfer any of the supply agreements described in Exhibit 3 to this agreement, the franchise agreements described in Exhibit 4 to this agreement, or, except in the ordinary course of business, any other physical assets presently owned by GCC and included in the description in Exhibit 5 to this agreement.

B. For a period of ten (10) years from the date this order becomes final, PepsiCo shall notify the Commission at least thirty (30) days in advance of any proposed acquisition by it of the stock, share capital, equity interest or assets of any person if, as a result of such acquisition, PepsiCo would become the bottler or distributor of one or

more non-PepsiCo brand products in any geographic area in the United States in which PepsiCo would not also own or operate the bottler or distributor of PepsiCo-brand products. For purposes of this provision, a "non-PepsiCo brand" product is a carbonated soft drink sold under a trademark owned by a person other than PepsiCo. This provision shall not require PepsiCo to notify the Commission of any acquisition: (a) in which the person being acquired sold 50,000 192 ounce equivalent cases or less of non-PepsiCo brand products in such geographic area in the calendar year immediately preceding the acquisition; (b) that is subject to Paragraph II.B of this order; or (c) that must be reported to the Commission pursuant to the Hart-Scott-Rodino Act, 15 U.S.C. 18a.

PepsiCo shall provide the notification to the Federal Trade Commission at least thirty days prior to acquiring any such interest (hereinafter referred to as the "first waiting period"). PepsiCo shall provide to the Commission supplemental information, upon request, either in PepsiCo's possession or reasonably available to PepsiCo. Such supplemental information shall include a copy of the proposed acquisition agreement, the names of the principal representatives of PepsiCo and the firm PepsiCo desires to acquire who negotiated the acquisition agreement, any management or strategic plans discussing the proposed acquisition, and all documents relating to competition for the provision of carbonated soft drink products in the geographic areas served by the bottler or distributor to be acquired. If, within the first waiting period, representatives of the Federal Trade Commission make a written request for additional information, PepsiCo shall not consummate the acquisition until twenty days after submitting such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. 18a).

IV.

It is further ordered, That one year from the date this order becomes final and annually thereafter, PepsiCo and GCC shall file with the Commission a verified written report of their compliance with this order. Such reports filed by PepsiCo shall include a listing of all acquisitions made by PepsiCo without prior approval of the Commis-

sion under Paragraph II.B of this order, or prior notice to the Commission under Paragraph III.B of this order, or reported to the Commission pursuant to the Hart-Scott-Rodino Act, 15 U.S.C. 18a.

V.

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

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

2. Upon five (5) days' written notice to GCC or PepsiCo, and without restraint or interference from them, to interview officers or employees of GCC or PepsiCo, who may have counsel present, regarding such matters.

VI.

It is further ordered, That GCC and PepsiCo shall notify the Commission at least thirty (30) days prior to any change in their respective corporate structures that may affect compliance obligations arising out of this order, including but not limited to dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change.

Commissioner Azcuenaga recused.

EXHIBIT 1

General Cinema Beverages, Inc.
General Cinema Beverages of California, Inc.
General Cinema Beverages of Dayton, Inc.
General Cinema Beverages of Ft. Myers, Inc.
General Cinema Beverages of Georgia, Inc.
General Cinema Beverages of Indiana, Inc.

General Cinema Beverages of North Carolina, Inc.
General Cinema Beverages of North Florida, Inc.
General Cinema Beverages of Ohio, Inc.
General Cinema Beverages of Springfield, Inc.
General Cinema Beverages of Virginia, Inc.
General Cinema Beverages of Washington, D.C., Inc.
General Cinema Beverages of West Virginia, Inc.
General Cinema Beverages of Akron, Inc.
General Cinema Beverages of Miami, Inc.
General Cinema Beverages of Youngstown, Inc.

EXHIBIT 2

Staunton, Virginia Area

The "Staunton, Virginia Area" consists of (1) the following counties, or portions of counties, in the State of Virginia: Augusta, Rockingham, Page, Highland, that portion of Shenandoah County south of an east and west line running along the most northerly boundary of, and including, the town of Woodstock, and (with the exception of Mountain Dew products) that portion of Nelson County located south of a line running due east and west through the northernmost point on the city limits of the town of Lovingston, including the town of Lovingston and all dealer outlets located on the above described line; and (2) in the State of Virginia, the independent cities of Staunton, Waynesboro and Harrisonburg, all independent cities as so located on February 10, 1989.

Broward County, Florida Area

The "Broward County, Florida Area" consists of the following counties, or portions of counties, in the State of Florida: Broward, Glades, and that portion of Hendry County east of State Highway 29, excluding the locality known as LaBelle and all other towns and dealer outlets immediately abutting on said State Highway 29.

EXHIBIT 3

Supply Agreement for Staunton

This agreement, dated as of this 14th day of March, 1989, by and between Pepsi-Cola Company, a division of PepsiCo, Inc. (hereinafter "Seller") and General Cinema Beverages of Staunton, Inc. (hereinafter "Buyer")

1. Purchase and Sale

a.) Subject to the terms and conditions set forth below, seller agrees to sell to buyer and buyer agrees to purchase from seller, the amounts requested by buyer of soft drink products being sold or distributed by buyer on the date hereof including but not limited to the products set forth in Exhibit A hereto and all new related products, formulations or package sizes introduced by the franchise companies (and their respective subsidiaries) whose trademarks are set forth on Exhibit A (hereinafter, collectively, the "Franchise Companies") as it may be amended from time to time by mutual agreement of the parties, or whose products are currently being sold or distributed by buyer (the "Products") said products to be sold by buyer in buyer's Staunton, Virginia licensed territory (hereinafter "Buyer's territory") during the term of this agreement.

b.) Buyer will provide seller with a rolling 30 day written estimate of volume requirements for each product and package supplied under this agreement at the beginning of each month during the term of this agreement. Nothing herein contained shall restrict buyer from obtaining soft drink products from suppliers other than the seller.

2. Term of Agreement

This agreement shall remain in effect, unless sooner terminated as provided below, for a period of five (5) years commencing on the date of Closing of the transaction contemplated in the Stock Purchase Agreement by and among General Cinema Corporation and SIFTCO, Inc. and Pepsi-Cola Metropolitan Bottling Company, Inc. and PepsiCo, Inc. dated February 13, 1989. In the event said Closing does not occur on or before June 1, 1989, this agreement shall terminate on said date unless extended by written agreement of the parties.

3. Consideration

Seller shall invoice buyer for each case of product which complies with seller's express representations and warranties as set forth in paragraph 4 below at the time of its sale to buyer hereunder. For each product sold to buyer which fulfills seller's said representations and warranties, buyer shall pay seller's actual cost of ingredients and packaging materials, plus one percent (1%) of such costs to cover shrinkage, breakage, etc., and transportation, which actual costs will be fully documented by seller upon buyer's reasonable request. Buyer shall pay all involved amounts within thirty (30) days of receipt of

seller's invoice. Any invoice remaining open past its due date shall bear interest at the rate of 1½% per month until paid in full.

4. Representation and Warranties

A. Seller hereby represents and warrants that (i) all of the products delivered hereunder to buyer shall comply with the requirements, including, without limitation, label requirements, for each soft drink as established by the licensor of such soft drink products; (ii) shall be of good and merchantable quality and fit for the end use intended; and (iii) shall be fit for introduction into interstate commerce pursuant to Section 404 of the Federal Food, Drug and Cosmetic Act, inasmuch as it shall not be adulterated or misbranded within the meaning of such Act; and (iv) shall otherwise comply with all applicable federal, state or local laws, rules and regulations. In the event buyer notifies seller that any of the products supplied hereunder do not conform to the representations and warranties contained in this section, seller shall replace such non-qualifying products with product which complies with seller's representations and warranties within seven working days of the date of its receipt of notice of such non-conforming delivery.

B. It is understood and agreed that each of the franchise companies will be directly damaged if (i) any of the representations and warranties of seller, as set forth in paragraph 4A above, are untrue or inaccurate in any way, or (ii) seller fails to meet any of its obligations under this agreement. Accordingly, in consideration of the permitted use of the trademarks listed on Exhibit "A" and by virtue of the authority granted by each of the franchise companies to buyer to enter into this agreement, each of the franchise companies is hereby constituted and shall be considered a third party beneficiary of this agreement and shall have the right to enforce directly all of the rights and remedies provided herein regarding (i) any misrepresentation or breach of warranty by seller with respect to those matters contained in paragraph 4A above, and (ii) the failure by seller to meet any of its obligations under this agreement.

C. Seller hereby agrees to defend, indemnify and hold buyer and each of the franchise companies harmless from any and all claims, demands, liabilities, damages, losses, costs and expenses (including, without limitation, reasonable attorney's fees) incurred by buyer or any of the franchise companies as a result of (i) seller's failure to fulfill its obligations hereunder (ii) any breach by seller of its express

representation or warranties contained herein or (iii) any claim which if true would constitute such a breach.

D. Buyer hereby agrees to defend, indemnify and hold seller harmless from any and all claims, demands, liabilities, losses, damages, costs and expenses (including, without limitation, reasonable attorney's fees) incurred by the seller as a result of buyer's failure to fulfill its obligations hereunder, or as a result of buyer's improper handling, storage, delivery or merchandising of the products.

5. Delivery of Product

All product shall be sold F.O.B. buyer's plant. Seller shall produce the products at its nearest plant to buyer's plant. Buyer shall have the right to take delivery at seller's nearest plant and provide its own transportation with a reduction in price to reflect seller's reduced transportation cost.

6. Order

Buyer shall notify seller seven working days prior to the date of delivery of the type and quantities of products drinks which it will require, together with a delivery schedule therefore, and seller agrees to make such deliveries pursuant to buyer's reasonable instructions.

7. Force Majeure

Neither party shall have any obligation to the other for its inability to perform its obligations hereunder by reason of fire, strike, boycott, federal, state or local legislation, or regulation issued in connection therewith, or for any other reason beyond the party's control; provided that the affected party uses its best efforts to thereafter renew its performance hereunder as expeditiously as possible.

8. Assignment

This agreement and the rights and obligations of the parties hereunder, may be assigned by either party, upon the prior written consent of the other party which consent shall not be unreasonably withheld; it being understood however that buyer and seller may assign this agreement without the other party's consent to its respective parent company, or any direct or indirect subsidiary of said parent company.

9. Miscellaneous

This agreement and the exhibit attached hereto constitutes the entire understanding of the parties and supersedes all prior written or oral arrangements with regard to the subject matter hereof. This agreement may not be modified or amended except by a written agreement executed by duly authorized representatives of both parties to this agreement. The remedies provided hereunder are cumulative and not exclusive of all other legal and equitable remedies available to each of the parties. A waiver by either party of any of its rights hereunder shall not constitute a waiver in the future of any other rights of that party.

In witness whereof, the parties have executed this agreement on the date and year first above written.

EXHIBIT A

PRODUCTS

Mt. Dew
Diet Mt. Dew
Barq's Root Beer
Barq's Diet Root Beer
Dr. Pepper
Diet Dr. Pepper
Caffeine Free Dr. Pepper

PACKAGES

12 oz. Cans
2 Liter PET Bottles
16 oz. NR. Bottles

Supply Agreement for Broward

This agreement, dated as of this 14th day of March, 1989, by and between Pepsi-Cola Company, a division of PepsiCo, Inc. (hereinafter "Seller") and General Cinema Beverages of Broward, Inc. (hereinafter "Buyer")

1. Purchase and Sale

a.) Subject to the terms and conditions set forth below, seller agrees to sell to buyer and buyer agrees to purchase from seller, the amounts

requested by buyer of soft drink products being sold or distributed by buyer on the date hereof including but not limited to the products set forth in Exhibit A hereto and all new related products, formulations or package sizes introduced by the franchise companies (and their respective subsidiaries) whose trademarks are set forth on Exhibit A (hereinafter, collectively, the "Franchise Companies") as it may be amended from time to time by mutual agreement of the parties, or whose products are currently being sold or distributed by buyer (the "Products") said products to be sold by buyer in buyer's Broward County, Florida licensed territory (hereinafter "Buyer's territory") during the term of this agreement.

b.) Buyer will provide seller with a rolling 30 day written estimate of volume requirements for each product and package supplied under this agreement at the beginning of each month during the term of this agreement. Nothing herein contained shall restrict buyer from obtaining soft drink products from suppliers other than the seller.

2. Term of Agreement

This agreement shall remain in effect, unless sooner terminated as provided below, for a period of five (5) years commencing on the date of Closing of the transaction contemplated in the Stock Purchase Agreement by and among General Cinema Corporation and SIFTCO, Inc. and Pepsi-Cola Metropolitan Bottling Company, Inc. and PepsiCo, Inc. dated February 13, 1989. In the event said Closing does not occur on or before June 1, 1989, this agreement shall terminate on said date unless extended by written agreement of the parties.

3. Consideration

Seller shall invoice buyer for each case of product which complies with seller's express representations and warranties as set forth in paragraph 4 below at the time of its sale to buyer hereunder. For each product sold to buyer which fulfills seller's said representations and warranties, buyer shall pay seller's actual cost of ingredients and packaging materials, plus one percent (1%) of such costs to cover shrinkage, breakage, etc., and transportation, which actual costs will be fully documented by seller upon buyer's reasonable request. Buyer shall pay all involved amounts within thirty (30) days of receipt of seller's invoice. Any invoice remaining open past its due date shall bear interest at the rate of 1½% per month until paid in full.

4. Representation and Warranties

A. Seller hereby represents and warrants that (i) all of the products delivered hereunder to buyer shall comply with the requirements, including, without limitation, label requirements, for each soft drink as established by the licensor of such soft drink products; (ii) shall be of good and merchantable quality and fit for the end use intended; and (iii) shall be fit for introduction into interstate commerce pursuant to Section 404 of the Federal Food, Drug and Cosmetic Act, inasmuch as it shall not be adulterated or misbranded within the meaning of such Act; and (iv) shall otherwise comply with all applicable federal, state or local laws, rules and regulations. In the event buyer notifies seller that any of the products supplied hereunder do not conform to the representations and warranties contained in this section, seller shall replace such non-qualifying products with product which complies with seller's representations and warranties within seven working days of the date of its receipt of notice of such non-conforming delivery.

B. It is understood and agreed that each of the franchise companies will be directly damaged if (i) any of the representations and warranties of seller, as set forth in paragraph 4A above, are untrue or inaccurate in any way, or (ii) seller fails to meet any of its obligations under this agreement. Accordingly, in consideration of the permitted use of the trademarks listed on Exhibit "A" and by virtue of the authority granted by each of the franchise companies to buyer to enter into this agreement, each of the franchise companies is hereby constituted and shall be considered a third party beneficiary of this agreement and shall have the right to enforce directly all of the rights and remedies provided herein regarding (i) any misrepresentation or breach of warranty by seller with respect to those matters contained in paragraph 4A above, and (ii) the failure by seller to meet any of its obligations under this agreement.

C. Seller hereby agrees to defend, indemnify and hold buyer and each of the franchise companies harmless from any and all claims, demands, liabilities, damages, losses, costs and expenses (including, without limitation, reasonable attorney's fees) incurred by buyer or any of the franchise companies as a result of (i) seller's failure to fulfill its obligations hereunder, (ii) any breach by seller of its express representation or warranties contained herein or (iii) any claim which if true would constitute such a breach.

D. Buyer hereby agrees to defend, indemnify and hold seller

harmless from any and all claims, demands, liabilities, losses, damages, costs and expenses (including, without limitation, reasonable attorney's fees) incurred by the seller as a result of buyer's failure to fulfill its obligations hereunder, or as a result of buyer's improper handling, storage, delivery or merchandising of the products.

5. Delivery of Product

All product shall be sold F.O.B. buyer's plant. Seller shall produce the products at its nearest plant to buyer's plant. Buyer shall have the right to take delivery at seller's nearest plant and provide its own transportation with a reduction in price to reflect seller's reduced transportation cost.

6. Order

Buyer shall notify seller seven working days prior to the date of delivery of the type and quantities of products which it will require, together with a delivery schedule therefore, and seller agrees to make such deliveries pursuant to buyer's reasonable instructions.

7. Force Majeure

Neither party shall have any obligation to the other for its inability to perform its obligations hereunder by reason of fire, strike, boycott, federal, state or local legislation, or regulation issued in connection therewith, or for any other reason beyond the party's control; provided that the affected party uses its best efforts to thereafter renew its performance hereunder as expeditiously as possible.

8. Assignment

This agreement and the rights and obligations of the parties hereunder, may be assigned by either party, upon the prior written consent of the other party which consent shall not be unreasonably withheld; it being understood however that buyer and seller may assign this agreement without the other party's consent to its respective parent company, or any direct or indirect subsidiary of said parent company.

9. Miscellaneous

This agreement, and the exhibit attached hereto constitutes the entire understanding of the parties and supersedes all prior written or oral arrangements with regard to the subject matter hereof. This

agreement may not be modified or amended except by a written agreement executed by duly authorized representatives of both parties to this agreement. The remedies provided hereunder are cumulative and not exclusive of all other legal and equitable remedies available to each of the parties. A waiver by either party of any of its rights hereunder shall not constitute a waiver in the future of any other rights of that party.

In witness whereof, the parties have executed this agreement on the date and year first above written.

EXHIBIT A

PRODUCTS

7Up
diet 7Up
Cherry Seven-Up
diet Cherry Seven-Up
Dr. Pepper
Diet Dr. Pepper
Caffeine Free Dr. Pepper
Barq's Root Beer
Barq's diet Root Beer
Sunkist Orange
diet Sunkist Orange
Sunkist Grape
Sunkist Strawberry
Sunkist Punch

PACKAGES

12 oz. Cans
2 Liter PET Bottles
16 oz. NR. Bottles

EXHIBIT 4

Staunton, Virginia Area Franchise

GCC shall retain rights to distribute the products set forth below in the following territories within the Staunton, Virginia area:

Dr Pepper Products:

Augusta, Rockingham, Page and Highland Counties, Virginia, all as so located on July 23, 1938.

Shenandoah County, Virginia, south of an east and west line running along the most northerly boundary of and to include the town of Woodstock, all as so located on July 23, 1938.

That part of Nelson County, Virginia located south of a line running due east and west through the northernmost point on the city limits of the town of Lovingston. It is the intent of this description to include the town of Lovingston and all dealer outlets located on the above described line within this territory. This description is as so located on March 20, 1969.

In the State of Virginia, the independent cities of Staunton, Waynesboro and Harrisonburg, all independent cities as so located on February 10, 1989.

Mountain Dew products:

The Counties of Augusta, Rockingham, Page, and Highland, and also that part of Shenandoah County, south of an east and west line running along the most northerly boundary of and to include, the town of Woodstock.

Barq's products:

In the Commonwealth of Virginia, the Counties of Augusta, Rockingham, Page and Highland.

Also, that part of Shenandoah County, Virginia, south of an east and west line running along the most northerly boundary of and to include the town of Woodstock.

Broward County, Florida Area Franchise

GCC shall retain rights to distribute the products set forth below in the following territories within the Broward County, Florida area:

Dr Pepper products:

Broward County, Glades County, and that portion of Hendry County lying east of State Highway 29, excluding the locality known as LaBelle and all other towns and dealer outlets immediately abutting on said State Highway 29.

7-Up products:

Broward County, Glades County, and that portion of Hendry County lying east of State Highway 29, excluding the locality known as LaBelle and all other towns and dealer outlets immediately abutting on said State Highway 29.

Sunkist products:

Broward County.

Barq's products:

Broward County.

EXHIBIT 5

Staunton, Virginia Area

The "Retained Assets and Operations" in the Staunton, Virginia Area shall consist of the franchise rights and supply agreement with respect to Dr Pepper, Barq's and Mountain Dew products, together with the associated warehouse facilities, real estate, trucks, forklifts, vending machines, visi-coolers, fountain equipment, full goods inventory, and point-of-sale marketing materials in that area dedicated to those products.

Broward County, Florida Area

The "Retained Assets and Operations" in the Broward County area shall consist of the franchise rights and supply agreement with respect to 7UP, Dr Pepper, Barq's and Sunkist products, together with the associated warehouse facilities, real estate, trucks, forklifts, vending machines, visi-coolers, fountain equipment, full goods inventory, and point-of-sale marketing materials in that area dedicated to those products.