

FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions, and Orders

IN THE MATTER OF

WHITE CASTLE SYSTEM, INC.

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

Docket C-3477. Complaint, Jan. 6, 1994--Decision, Jan. 6, 1994

This consent order prohibits, among other things, an Ohio-based chain of fast-food restaurants from misrepresenting the extent to which its fast-food container or any product or package is capable of being recycled or the extent of the availability of recycling collection programs for such products. In addition, the consent order prohibits the respondent from representing the environmental benefit of any product or packaging it uses unless it possesses competent and reliable evidence to substantiate the representation.

Appearances

For the Commission: *Theresa McGrew* and *C. Steven Baker*.

For the respondent: *Nicholas W. Zuk*, Columbus, OH.

COMPLAINT

The Federal Trade Commission, having reason to believe that White Castle System, 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 White Castle System, Inc. (“White Castle”), is a Delaware corporation with its principal office or place of business at 555 West Goodale Street, Columbus, Ohio.

PAR. 2. Respondent has offered for sale, sold, advertised, labeled and distributed food products that are contained in disposable paper packaging to the public.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated or has caused to be disseminated promotional materials, including product labeling on the paper packaging it uses to contain its food products, including but not necessarily limited to the attached Exhibit 1.

The aforesaid product labeling includes the following statement and a depiction of a three chasing arrow symbol:



Recyclable

PAR. 5. Through the use of the statement and depiction contained in the promotional materials referred to in paragraph four, including but not necessarily limited to the product labeling attached as Exhibit 1, respondent has represented, directly or by implication, that White Castle paper packaging is recyclable after ordinary use.

PAR. 6. In truth and in fact, while White Castle paper packaging is capable of being recycled, the vast majority of consumers cannot recycle the paper packaging because there are virtually no collection facilities that accept food contaminated paper for recycling. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the use of the statement and depiction contained in the promotional materials referred to in paragraph four, including but not necessarily limited to the product labeling attached as Exhibit 1, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 8. In truth and in fact, at the time it made the representation set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. 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

EXHIBIT 1



**White
Castle®**

Buy 'em by the "Sack"®

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**SAY NO TO DRUGS AND
YES TO LIFE**



DON'T BE A LITTERBUG!

EXHIBIT 1



*The taste
some people
won't live
without!®*



**White
Castle®**

*Hamburger Specialists
since 1921*

**PATENT NO.
2,435,355**



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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties, pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent White Castle System, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware corporation with its principal office or place of business at 555 West Goodale Street, Columbus, Ohio.

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

3. 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 shall apply:

The term “*product or package*” means any product or package, including, but not limited to, any item used by respondent to contain, serve, or package goods, offered for sale, sold or distributed to the public by respondent, its successors and assigns, under the White Castle brand name or any other brand name of respondent, its successors and assigns; and, also means any product or package sold or distributed to the public by third parties under private labeling agreements with respondent, its successors and assigns.

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

I.

It is ordered, That respondent, White Castle System, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, distribution, or use of any product or package in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the extent to which any such product or package is capable of being recycled or the extent to which recycling collection programs for such product or package are available.

II.

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

subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, distribution, or use of any product or package in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that any product or package offers any environmental benefit, unless at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

III.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence, in its possession or control that contradict, qualify or call into question such representation, or the basis relied upon for such representation including complaints from consumers.

IV.

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

V.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of

subsidiaries, or any other change in the corporation which may affect compliance obligations under 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

THE VALSPAR CORPORATION, ET AL.

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

Docket C-3478. Complaint, Jan. 25, 1994--Decision, Jan. 25, 1994

This consent order requires, among other things, a Minnesota-based corporation to divest, within 12 months of the date of the order, certain assets it acquired from Cargill, to Newco, an independent corporation that Valspar forms as a successor corporation to McWhorter, and to obtain Commission approval of the divestiture arrangement prior to consummation. In addition, the consent order requires McWhorter and Newco, for 10 years, to obtain the Commission's approval before acquiring any stock or other interest in any entity that manufactures coating resins in the United States.

Appearances

For the Commission: *Robert S. Tovsky* and *Rhett R. Krulla*.

For the respondents: *James F. Rill* and *Robert M. Huber*, *Collier, Shannon, Rill & Scott*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that The Valspar Corporation ("Valspar"), through its wholly-owned subsidiary McWhorter, Inc. ("McWhorter"), has entered into an agreement with Cargill, Incorporated ("Cargill"), that violates said Acts, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

DEFINITIONS

PARAGRAPH 1. For purposes of this complaint, the term “*coating resins*” means alkyd resins, modified alkyd resins, saturated polyester resins, and oil-modified urethane resins (excluding powder coating resins), supplied for use in formulating surface coatings. Such resins generally are produced from the reaction of polybasic acids or anhydrides and polyhydric alcohols.

THE RESPONDENTS

PAR. 2. Respondent The Valspar Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 1101 Third Street South, Minneapolis, Minnesota.

PAR. 3. Respondent McWhorter, Inc., a wholly-owned subsidiary of The Valspar Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business at 400 East Cottage Place, Carpentersville, Illinois.

PAR. 4. Valspar, through its wholly-owned subsidiary McWhorter, Inc., is a leading producer of coating resins in the United States.

PAR. 5. Cargill, through its Resin Products Division, is a leading producer of coating resins in the United States.

PAR. 6. At all times relevant herein, each of the respondents or their predecessors, and Cargill or its predecessors, have been engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12; and have been corporations whose business is in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

THE ACQUISITION

PAR. 7. On May 19, 1993, McWhorter entered into an agreement with Cargill for the acquisition of the assets and businesses of Cargill’s Resin Products Division (“the Acquisition”).

THE RELEVANT MARKETS

PAR. 8. For purposes of this complaint, the relevant lines of commerce in which to evaluate the effects of the Acquisition are the manufacture and sale of coating resins, and other markets contained therein.

PAR. 9. For purposes of this complaint, the relevant geographic market is the United States.

PAR. 10. The coating resins market in the United States is concentrated.

PAR. 11. Entry into the manufacture and sale of coating resins is difficult and would take a long time.

PAR. 12. Valspar, through its wholly-owned subsidiary McWhorter, and Cargill are actual competitors in the manufacture and sale of coating resins in the United States.

THE EFFECTS OF THE ACQUISITION

PAR. 13. The effect of the Acquisition may be substantially to lessen competition in the relevant market in the United States, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, because, among other things, the Acquisition eliminates substantial actual competition, between Valspar and Cargill and others, in the manufacture and sale of coating resins in the United States and significantly enhances the likelihood of collusion or interdependent coordination among the remaining firms in the relevant market.

THE VIOLATIONS CHARGED

PAR. 14. The Acquisition agreement described in paragraph seven violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 15. The Acquisition of the coating resins assets and businesses of Cargill by Valspar, through its wholly-owned subsidiary McWhorter, would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

PAR. 16. The Acquisition of the coating resins assets and businesses of Cargill by Valspar, through its wholly-owned

subsidiary McWhorter, would, if consummated, violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Owen dissenting.

DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the proposed acquisition of assets by The Valspar Corporation ("Valspar") and McWhorter, Inc. ("McWhorter") from Cargill, Incorporated, which acquisition is more fully described at paragraph I.(A) below, and Valspar and McWhorter 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 Valspar and McWhorter with violations of the Clayton Act and Federal Trade Commission Act; and

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

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

1. Respondent The Valspar Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1101 Third Street South, Minneapolis, Minnesota.

2. Respondent McWhorter, Inc., a wholly-owned subsidiary of The Valspar Corporation, is a corporation organized, existing and

doing business under and by virtue of the laws of the State of California, with its principal office and place of business at 400 East Cottage Place, Carpentersville, Illinois.

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

ORDER

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

(A) “*Acquisition*” means the acquisition described in the Sales and Purchase of Assets Agreement entered into on May 19, 1993 by which McWhorter has agreed to acquire and Cargill, Incorporated has agreed to convey certain rights and interests in, and title to, certain of the assets of Cargill.

(B) “*Acquired Assets*” means all assets, rights, title, interest, and businesses that Valspar acquires from Cargill, Incorporated pursuant to the Acquisition, as defined in paragraph I.(A), above.

(C) “*Valspar*” means The Valspar Corporation, all of its directors, officers, employees, agents, and representatives, all of its predecessors, subsidiaries, divisions, groups and affiliates controlled by any of the foregoing, all of their respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing.

(D) “*McWhorter*” means McWhorter, Inc., a wholly-owned subsidiary of Valspar, all of its directors, officers, employees, agents, and representatives, all of its predecessors, subsidiaries, divisions, groups and affiliates (including, but not limited to, the Properties to Be Divested as hereinafter defined) controlled by any of the foregoing, all of their respective directors, officers, employees, agents, and representatives, and the respective successors (including, but not limited to, Newco as hereinafter defined) and assigns of any of the foregoing.

(E) “*Cargill*” means the Resin Products Division of Cargill, Incorporated, all of its predecessors, divisions, groups and affiliates controlled by any of the foregoing, all of their respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing.

(F) "*Cargill Technology*" means general and specific information developed by Cargill or used in any product sold by Cargill on or before the date of the Acquisition, including all technology transferred in the Acquisition, all such information being sufficiently detailed for the commercial production, sale and use of such products, including, but not limited to, all technical information, data, specifications, drawings, design and equipment specifications, manuals, engineering reports, manufacturing designs and reports, operating manuals, and formulations. Cargill Technology shall exclude information to the extent disclosure of such information by Cargill is prohibited by a contract between Cargill and any coating producer.

(G) "*McWhorter Technology*" means general and specific information developed by McWhorter or used in any product sold by McWhorter to customers other than Valspar on or before the date of the Acquisition, all such information being sufficiently detailed for the commercial production, sale and use of such products, including, but not limited to, all technical information, data, specifications, drawings, design and equipment specifications, manuals, engineering reports, manufacturing designs and reports, operating manuals, and formulations. McWhorter Technology shall exclude information to the extent disclosure of such information by McWhorter is prohibited by a contract between McWhorter and any coating producer.

(H) "*Newco*" means McWhorter or a corporation to be formed by Valspar and McWhorter as a successor corporation to McWhorter, in accordance with paragraph II.(C) of this order, and through which Valspar shall divest, in a manner that receives the prior approval of the Commission, the Properties to Be Divested; and includes without limitation all of Newco's subsidiaries, divisions, groups and affiliates controlled by any of the foregoing, all of their respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing.

(I) "*Properties to Be Divested*" means the Acquired Assets and all facilities operated by Valspar at Carpentersville, Illinois, Portland, Oregon, and Philadelphia, Pennsylvania, utilized in the production of Coating Resins, including, without limitation, all plant facilities, machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property, and all right, title and interest in and to real property, together with appurtenances, licenses and permits.

(J) “*Valspar Retained Properties*” means all tangible and intangible assets and businesses of Valspar and McWhorter other than those included within the Properties to Be Divested.

(K) “*Commission*” means the Federal Trade Commission.

(L) “*Coating Resins*” means alkyd resins, modified alkyd resins, saturated polyester resins, and oil-modified urethane resins (excluding powder coating resins), supplied for use in formulating surface coatings. Such resins generally are formed from the reaction of polybasic acids or anhydrides and polyhydric alcohols.

(M) “*Viability and Competitiveness*” of the Properties to Be Divested and of the Valspar Retained Properties means that such respective properties are capable of functioning independently and competitively in the Coating Resins business.

II.

It is ordered, That:

(A) Within twelve (12) months of the date this order becomes final, Valspar shall divest, absolutely and in good faith, the Properties to Be Divested, and shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the Viability and Competitiveness of the Properties to Be Divested and to assure the Viability and Competitiveness of the Valspar Retained Properties. Provided, however, that this requirement shall not prohibit any shareholder of Valspar from participating, in his or her personal capacity as a shareholder of Valspar, in the distribution of the authorized common stock of Newco, pursuant to paragraph II.(D) of this order.

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

(C) Valspar shall divest the Properties to Be Divested by forming, in a manner that receives the prior approval of the Commission, Newco, with at least sufficient authorized common stock to comply with the provisions of this order and with by-laws obligating Newco to be bound by this order and containing provisions insuring compliance with paragraph II.(E) hereof, to which

McWhorter shall transfer the Properties to Be Divested by merger with Newco or otherwise. Valspar shall make all necessary regulatory filings to ensure that such common stock is registered, and shall also ensure that the stock is registered for trading on the NASDAQ National Market System or listed for trading on the New York Stock Exchange or the American Stock Exchange. Valspar shall demonstrate the Viability and Competitiveness of the Properties to Be Divested and of the Valspar Retained Properties, respectively, in its application for approval of the proposed divestiture. The purpose of the divestiture of the Properties to Be Divested is (1) to ensure the continuation of the Properties to Be Divested as an ongoing, viable business engaged, in competition with the Valspar Retained Properties and others, in the manufacture and sale of Coating Resins; (2) to ensure the continuation of the Valspar Retained Properties as an ongoing viable business engaged, in competition with the Properties to Be Divested and others, in the manufacture and sale of Coating Resins; and (3) to remedy any lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

(D) Valspar shall divest the Properties to Be Divested, only to an acquirer, including the shareholders of Valspar as a group, and in a manner that receives the prior approval of the Commission, including by distributing the shares of Newco pro rata to the stockholders of record of Valspar.

(E) Valspar (excluding, for purposes of this paragraph II.(E), Newco), McWhorter and Newco shall provide that:

1. After completion of the Acquisition and prior to the divestiture of Newco by distribution of the Newco stock to the stockholders of Valspar or otherwise, Valspar shall vote the stock of Newco for the election of an interim board of directors meeting the requirements of paragraph III.j of the Agreement to Hold Separate, to serve until the election of directors by the stockholders of Newco in accordance with paragraph II.(E)3 of this order;

2. Within seven (7) days of the distribution or other divestiture of the Newco stock, any director of Newco who is also a Valspar director, officer, employee or agent shall resign from the Newco Board, and the remaining directors of Newco shall designate a new director or new directors in accordance with this order who are not directors, officers, employees or agents of Valspar;

3. Newco shall within twelve (12) months of the distribution or other divestiture of the Newco stock call a stockholders' meeting for the purpose of electing directors;

4. No nominee for the board of directors of Newco shall, at the time of his or her election, be an officer, director or employee of Valspar or shall hold, or have under his or her direction or control, greater than 5 percent of the outstanding common stock of Valspar;

5. No officer, director or employee of Valspar shall concurrently serve as an officer, director or employee of Newco nor shall any officer, director or employee of Newco serve concurrently as an officer, director or employee of Valspar;

6. No officer or director of Newco shall hold, or have under his or her direction or control, greater than 5 percent of the outstanding common stock of Valspar; and officers and directors of Newco in aggregate, shall not concurrently hold, or have under their direction or control, greater than 10 percent of the outstanding common stock of Valspar;

7. C. Angus Wurtele shall not, as long as he remains an officer or director of Valspar, hold, or have under his direction or control, more than 12.4 percent of the outstanding common stock of Newco, and the other directors and officers of Valspar in aggregate, shall not concurrently hold, or have under their direction or control, greater than 5 percent of the outstanding common stock of Newco;

8. No officer or director of Valspar shall increase by purchase his or her holdings of Newco authorized common stock beyond the percentage that such officer or director holds as a result of any initial distribution of such stock pursuant to paragraph II.(D) of this order, nor shall such officer or director be permitted to be a creditor of Newco;

9. No officer or director of Valspar shall concurrently serve as an officer or director of any entity that holds or controls, as trustee or otherwise, greater than five percent of the outstanding common stock of Newco, and no officer or director of Newco shall concurrently serve as an officer or director of any entity that holds or controls, as trustee or otherwise, greater than five percent of the outstanding common stock of Valspar;

10. Except as provided for in paragraph II.(E)1 and paragraph II.(E)2 of this order and except with respect to organization matters prior to the divestiture of Newco by distribution of the Newco stock to the stockholders of Valspar or otherwise, no officer or director of

Valspar, who concurrently holds or has under his or her direction or control more than one percent of the outstanding common stock of Newco shall, in his or her personal capacity as a shareholder of Newco or otherwise, vote any stock of Newco which he or she shall hold or which shall be held under his or her direction or control, nor shall any officer, director or employee of Valspar influence, or attempt to control, supervise or influence, directly or indirectly, any other person's voting of Newco stock; and no officer or director of Newco, who concurrently holds or has under his or her direction or control more than one percent of the outstanding common stock of Valspar shall, in his or her personal capacity as a shareholder of Valspar or otherwise, vote any stock of Valspar which he or she shall hold or which shall be held under his or her direction or control, nor shall any officer, director or employee of Newco influence, in his or her personal capacity as a shareholder of Valspar or otherwise, or attempt to control, supervise or influence, directly or indirectly, any other person's voting of Valspar stock;

11. Neither Valspar nor any officer, director or employee of Valspar, in his or her personal capacity as a shareholder of Newco or otherwise, shall participate in any decision by Newco, at shareholders, meetings or otherwise, relating to Newco's production, capacity, development, marketing, pricing or sale of Coating Resins, nor exercise, or attempt to exercise, in any way, directly or indirectly, any control, supervision or influence over any policy, decision or action regarding any aspect of Newco's production, capacity, development, marketing, pricing or sale of Coating Resins, other than through the policies, decisions, and actions of Valspar relating to the purchase, in the ordinary course of business, by Valspar of products from Newco for use in Valspar coatings; and neither Newco nor any officer, director or employee of Newco, in his or her personal capacity as a shareholder of Valspar or otherwise, shall participate in any decision by Valspar, at shareholders' meetings or otherwise, relating to Valspar's production, capacity, development, marketing, pricing or sale of Coating Resins, nor exercise, or attempt to exercise, in any way, directly or indirectly, any control, supervision or influence over any policy, decision or action regarding any aspect of Valspar's production, capacity, development, marketing, pricing or sale of Coating Resins, other than through the policies, decisions, and actions of Newco relating to the sale, in the ordinary course of business, by Newco of products to Valspar for use in Valspar

coatings; provided however that nothing in this Section 11 shall prohibit Valspar and Newco from participating in a buying cooperative or other group formed to purchase raw materials, so long as the formation and practices of such group or cooperative comply with the antitrust laws and any other statutes enforced by the Commission.

12. Neither Valspar nor any officer, director or employee of Valspar, in his or her personal capacity as a shareholder of Newco or otherwise, shall take any action to obtain or attempt to obtain, directly or indirectly, from Newco, any competitively sensitive information regarding Newco, and Newco shall not provide any such competitively sensitive information to Valspar, except as necessary to the purchase, in the ordinary course of business, by Valspar of products from Newco for use in Valspar coatings; and neither Newco nor any officer, director or employee of Newco, in his or her personal capacity as a shareholder of Valspar or otherwise, shall take any action to obtain or attempt to obtain, directly or indirectly, from Valspar, any competitively sensitive information regarding Valspar, and Valspar shall not provide any such competitively sensitive information to Newco, except as necessary to the purchase, in the ordinary course of business, by Valspar of products from Newco for use in Valspar coatings;

(F) Valspar shall take such action as is necessary to maintain the Viability and Competitiveness and the marketability of the Properties to Be Divested and of the Valspar Retained Properties and shall not cause or permit the destruction, removal or impairment of the Properties to Be Divested or of the Valspar Retained Properties except (1) in the ordinary course of business and (2) for ordinary wear and tear.

III.

It is further ordered, That, as part of the divestiture of the Properties to Be Divested pursuant to paragraph II, above: (1) Newco shall provide to Valspar a worldwide paid-up, non-royalty bearing, perpetual and non-exclusive license, without the right to sub-license to third-parties, to use the Cargill Technology to make, use and sell any product; and (2) Valspar shall provide to Newco a worldwide, paid-up, non-royalty bearing, perpetual and nonexclusive license,

without the right to sub-license to third-parties, to use the McWhorter Technology to make, use and sell any product.

IV.

It is further ordered, That:

(A) If Valspar and McWhorter have not divested, absolutely and in good faith and with the Commission's approval, the Properties to Be Divested within twelve (12) months of the date this order becomes final, Valspar, McWhorter and Newco shall consent to the appointment by the Commission of a trustee to divest the Acquired Assets, along with any additional assets and other arrangements that may be necessary to assure the Viability and Competitiveness of the Acquired Assets and of the Valspar Retained Properties. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45 (1), or any other statute enforced by the Commission, Valspar, McWhorter and Newco shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Valspar, McWhorter or Newco to comply with this order.

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

1. The Commission shall select the trustee, subject to the consent of Valspar, McWhorter and Newco, 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, subject to the prior approval of the Commission, have the exclusive power and authority to divest the Acquired Assets, along with any additional assets and businesses and other arrangements that may be necessary to assure the Viability and

Competitiveness of the Acquired Assets and the Viability and Competitiveness of the Valspar Retained Properties.

3. The trustee shall have eighteen (18) months from the date of appointment to accomplish the divestiture. If, however, at the end of the eighteen-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission. Provided, however, the Commission 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 related to the Acquired Assets, or any other relevant information, as the trustee may reasonably request. Valspar, McWhorter and Newco shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. Valspar, McWhorter and Newco shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by Valspar, McWhorter or Newco shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or the court for a court-appointed trustee.

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

6. The trustee shall serve, without bond or other security, at the cost and expense of Valspar, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of Valspar, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and

responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Valspar and McWhorter 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 Acquired Assets.

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

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

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

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

11. The trustee shall have no obligation or authority to operate or maintain the Acquired Assets.

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

V.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until Valspar, McWhorter and Newco have accomplished the divestitures required by paragraph II of this order, Valspar, McWhorter and Newco shall each submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to

comply, are complying and have complied with those provisions, including the Agreement to Hold Separate. Valspar, McWhorter and Newco shall each include in their compliance reports, among other things that are required from time to time, a full description of substantive contacts or negotiations for the divestiture of the Properties to Be Divested as specified in paragraphs II and III of this order, including the identity of all parties contacted. Valspar, McWhorter and Newco also shall each include in their compliance reports, among other things, copies of all written communications to and from such parties, all internal memoranda, reports and recommendations concerning divestiture.

VI.

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

(A) Assets used by the seller since January 1, 1990, to manufacture Coating Resins and located in the United States, including its territories and possessions, other than the acquisition of used machinery or equipment from brokers for such machinery or equipment, by means of normal transactions customary in the used equipment market, for which the value, in any given year, shall not exceed five hundred thousand (500,000) dollars; or

(B) all or any part of the stock or share capital of, or any other interest in, any entity that owns or operates assets located in the United States, including its territories and possessions, engaged in the production of Coating Resins.

VII.

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for ten (10) years, Valspar shall not acquire, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise, all or any part of the stock, share capital or assets of, or any interest in, Newco or any of the Properties to Be Divested, other than the acquisition of

used machinery or equipment from brokers for such machinery or equipment, by means of normal transactions customary in the used equipment market, for which the value, in any given year, shall not exceed five hundred thousand (500,000) dollars.

VIII.

It is further ordered, That, one year from the date this order becomes final and annually for nine years thereafter, Valspar, McWhorter and Newco (if Newco is distinct from McWhorter) shall each file with the Commission a verified written report of their compliance with this order. Valspar, McWhorter and Newco shall each maintain and include in such compliance reports a copy of all written correspondence between Valspar and Newco and a detailed description of all other communications or meetings between Valspar and Newco, other than correspondence, communications or meetings relating solely to technical issues of resin performance in Valspar coatings and to matters relating to the purchase and sale of Coating Resins between Valspar and Newco in the ordinary course of business.

IX.

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

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

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

X.

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

XI.

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for a period ending ten (10) years after the completion of the divestitures required by paragraph II of this order, Valspar, McWhorter and Newco shall be bound by the terms of this order and shall comply with the obligations imposed herein. Thereafter this order shall have no further force or effect.

Commissioner Owen dissenting.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and among The Valspar Corporation, a corporation organized and existing under the laws of Delaware, with its principal office and place of business located at 1101 Third Street South, Minneapolis, Minnesota, its wholly-owned subsidiary, McWhorter, Inc. (collectively "Valspar"), a corporation organized and existing under the laws of California, with its principal office and place of business located at 400 East Cottage Place, Carpentersville, Illinois 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, on May 19, 1993, Valspar entered into an Asset Purchase Agreement providing for the acquisition (hereinafter the "Acquisition") of certain properties, businesses and other assets (hereinafter "the Acquired Assets") of Cargill, Incorporated ("Cargill"); and

Whereas, Valspar and Cargill each manufacture and sell Coating Resins; and

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

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

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

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

Whereas, the purpose of this Agreement and the consent order is to:

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

(ii) Preserve the Properties to Be Divested as a viable business, independent of Valspar, engaged in the manufacture and sale of

Coating Resins pending the divestiture of the Properties to Be Divested as viable and ongoing enterprises, and

(iii) Remedy anticompetitive effects of the Acquisition in the Coating Resins market; and

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

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

Now, therefore, the Parties agree, upon understanding that the Commission has determined that it has reason to believe the Acquisition may substantially lessen competition in the market for Coating Resins, and in recognition that the Commission may exercise any and all rights to enforce this Agreement and the consent order to which it is annexed and made a part thereof, and, in the event the required divestitures are not accomplished, to seek divestiture of the Properties to Be Divested, and other relief, as follows:

1. Valspar agrees to execute and be bound by the attached consent order. Terms capitalized herein shall have the same definitions as terms capitalized in the consent order.

2. Valspar agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 2.a or 2.b, it will comply with the provisions of paragraph 3 of this Agreement with respect to the Acquired Assets:

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

b. The day after the divestiture required by the consent order has been completed.

3. Valspar will hold the Acquired Assets as they are presently constituted (hereafter the "Held-Separate Assets") separate and apart on the following terms and conditions:

a. Valspar may elect at any time after this order becomes final to establish as Held Separate Assets the Properties to be Divested, in lieu of the Acquired Assets. At such time, the provisions of this paragraph 3 shall apply to the Properties to be Divested.

b. The Held-Separate Assets shall be held separate and apart and shall be operated independently of Valspar (meaning here and hereinafter, Valspar excluding the Held-Separate Assets and excluding all personnel connected with the Held-Separate Assets as of the date this Agreement was signed) except to the extent that Valspar must exercise direction and control over the Held-Separate Assets to assure compliance with this Agreement or with the consent order.

c. Valspar shall not exercise direction or control over, or influence directly or indirectly, the Held-Separate Assets; provided, however, that Valspar may exercise only such direction and control over the Held-Separate Assets as is necessary to assure compliance with this Agreement or with the consent order.

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

e. Except for the single Valspar director, officer, employee, or agent serving on the "New Board" or "Management Committee" (as defined in subparagraph 3.j), Valspar shall not permit any director, officer, employee, or agent of Valspar also to be a director, officer or employee of the Held-Separate Assets. In the event any members of the existing management of the Held-Separate Assets should choose not to accept employment with Newco, or retire or otherwise leave their management positions, the non-Valspar (as Valspar is defined in subparagraph 3.b hereof) directors or members serving on the New Board or Management Committee (as defined in subparagraph 3.j hereof) shall have the power to replace such members of management.

f. Except as required by law or as reported by the auditor (provided for in subparagraph 3.g) and except to the extent that necessary information is exchanged in the course of evaluating and consummating the Acquisition, defending investigations or litigation, obtaining legal advice, acting to assure compliance with this

Agreement or the consent order (including accomplishing the technology licensing required by paragraph III of the order, and the divestitures), or negotiating agreements to dispose of assets, Valspar shall not receive or have access to, or the use of, any “material confidential information” of the Held-Separate Assets, as applicable, not in the public domain, except as such information would be available to Valspar 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 Valspar from sources other than Cargill or the Held-Separate Assets, as applicable, and includes but is not limited to customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets).

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

h. Valspar shall not change the composition of the management of the Held-Separate Assets except that the non-Valspar (as Valspar is defined in subparagraph 3.b hereof) directors or members serving on the New Board or Management Committee (as defined in subparagraph 3.j hereof) shall have the power to remove any employee for cause. Provided, however, that at such time as Valspar elects to establish as Held-Separate Assets the Properties to Be Divested, in lieu of the Acquired Assets, Valspar may separate permanently from Valspar and transfer to the Held-Separate Assets such McWhorter management and other McWhorter personnel as Valspar may elect.

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

j. Valspar shall either (1) separately incorporate the Held-Separate Assets and adopt new Articles of Incorporation and By-laws that are not inconsistent with other provisions of this Agreement or

(2) establish a separate business venture with articles of agreement covering the conduct of the Held-Separate Assets, in accordance with this Agreement. Valspar shall elect a new board of directors of the Held-Separate Assets ("New Board") or Management Committee of the Held-Separate Assets ("Management Committee") once it obtains title to the Held-Separate Assets. Valspar may elect the directors to the New Board or select the members of the Management Committee; provided, however, that such New Board or Management Committee shall consist of at least two non-Valspar directors, officers, or employees and no more than one Valspar director, officer, employee, or agent, provided, however, that such Valspar director, officer, employee, or agent shall enter into a confidentiality agreement in accordance with the provisions of paragraph 3.1 hereof and shall not be a person involved in Valspar's Coating Resins business. Such director or Management Committee member who is also a Valspar director, officer, employee, or agent shall participate in matters that come before the New Board or Management Committee only for the limited purpose of considering a capital investment or other transactions exceeding \$500,000 and carrying out Valspar's and the Held-Separate Assets' responsibilities under this Agreement or under the consent order. Except as permitted by this Agreement, such Director or Management Committee member shall not participate in any matter, or attempt to influence the votes of the other directors or Management Committee members with respect to matters that would involve a conflict of interest if Valspar and the Held-Separate Assets were separate and independent entities. Meetings of the New Board or Management Committee during the term of this Agreement shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Agreement.

k. Any current officer or employee of Valspar may confer with the New Board or the Management Committee of the Held-Separate Assets, for the purposes of establishing or organizing the administrative functions within the Properties to Be Divested in order to comply with the terms of the consent order, but shall not be provided access to any material confidential information of the Held-Separate Assets.

1. Any Valspar director, officer, employee, or agent who obtains or may obtain confidential information under this Agreement shall enter a confidentiality agreement prohibiting disclosure of confiden-

tial information until the day after the divestitures required by the consent order have been completed.

m. All earnings and profits of the Held-Separate Assets shall be retained separately in the Held-Separate Assets. If necessary, Valspar shall provide the Held-Separate Assets with sufficient working capital to operate at current rates of operation.

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

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

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

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

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

DISSENTING STATEMENT OF COMMISSIONER DEBORAH K. OWEN

In order to approve the final issuance of a consent order, the Commission must necessarily find that there is reason to believe that the law has been violated and that issuing the order would be in the public interest. Because I do not find reason to believe that the law has been violated, I dissent from the commission's action today.¹

My decision here is based on many of the same considerations that led me to partially dissent in the Occidental case.² As I view the available evidence, and calculate the Herfindahl-Hirschmann Index, the proposed acquisition by Valspar Corporation of Cargill, Inc.'s Resin Products Division would increase concentration in a moderately concentrated market by an amount that would potentially raise competitive concerns under the Merger Guidelines.³ Based on my reading of Section 1.51 of the Guidelines and the Commission's opinion in *B.F. Goodrich Co.*, 110 FTC 207 (1988), the amount of evidence needed to overcome these concerns is not immense.⁴ There is abundant evidence here that anticompetitive effects are unlikely.⁵ Specifically, the large number of competitors, and the heterogeneity of many of the products, would militate against the success of any attempted collusive scheme. Moreover, there is compelling evidence that customers can, and do, switch suppliers in response to a 5 percent price increase, including switching to many non-Cargill suppliers.

In light of this evidence, I cannot find reason to believe that the originally proposed combination would result in a violation of the law, and I must dissent from the decision to approve final issuance of the consent order.

¹ Because of my decision on the underlying case, I do not need to reach any issues that might be presented by the proposed remedies.

² Statement of Comm. Deborah K. Owen, Concurring in Part, and Dissenting in Part, Occidental Petroleum Corporation, Dkt. No. 9205, slip. op. (Dec. 22, 1982), appeal pending, No. 93-4122 (Second Circuit, June 2, 1993).

³ U.S. Department of Justice & Federal Trade Commission Horizontal Merger Guidelines, Section 1.51, reprinted in 4 Trade Reg. Rep. (CCH) paragraph 13,104.

⁴ Occidental Petroleum, *supra* note 2, slip op. at 8.

⁵ This obviates any need to consider entry or possible defenses to an otherwise anticompetitive combination.

IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

Docket 9189. Interlocutory Order, Jan. 27, 1994

ORDER

On December 13, 1993, counsel for respondent John L. Drummy, Sr. filed "Respondent's Unopposed Motion to Reconsider Decision As To Deceased Respondent, John L. Drummy, Sr." The Motion requests that the complaint against Mr. Drummy be dismissed and the order of February 22, 1989, be modified to delete his name because he passed away on November 30, 1993. The motion recites that Drummy Oldsmobile, Inc. will remain as a respondent. Complaint counsel do not oppose the motion.

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

It is ordered, That the complaint against John L. Drummy, Sr. be and hereby is dismissed.

It is further ordered, That the order of February 22, 1989, of the Commission be and hereby is modified to delete the name of John L. Drummy, Sr.

Interlocutory Order

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IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

Docket 9189. Interlocutory Order, Jan. 27, 1994

ORDER

On January 3, 1994, counsel for McAlister Motors Inc. filed "Respondent McAlister Motors Inc.'s Second Superceding Motion to Reconsider Decision As To Its Status as a Respondent Because It Is Out of Business," requesting that the Commission dismiss the complaint against it and remove its name from the order of February 22, 1989.

McAlister Motors previously filed a similar request, but furnished an affidavit stating that its Toyota franchise had been sold to Audette Toyota. On September 28, 1993, the Commission issued an order directing that McAlister Motors file additional information on the issue whether Audette Toyota is a successor or assign within the meaning of the order of February 22, 1989. McAlister Motors has now provided evidence that its Toyota franchise was terminated at the time that the assets of the dealership were sold to Audette Toyota. Complaint Counsel does not oppose the motion.

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

It is ordered, That the complaint against McAlister Motors, Inc. be and hereby is dismissed.

It is further ordered, That the order of February 22, 1989, of the Commission be and hereby is modified to delete the name of McAlister Motors, Inc.

IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

Docket 9189. Interlocutory Order, Jan. 27, 1994

ORDER

Counsel for the Volkswagen Respondents filed "Respondents' Unopposed Motion to Reconsider Decision As To One Business Dealership Respondent and One Dealership Association Respondent," requesting that the Commission dismiss the Complaint against Autobahn Motors and the Southeastern Michigan Volkswagen Dealers Association, Inc. and remove their names from the order of February 22, 1989. Complaint counsel does not oppose the motion.

The sole shareholder of Autobahn Motors, Inc. sold the dealership assets to Mell Farr Imports in 1993. Autobahn Motors has ceased doing business, and its Volkswagen and Mazda franchises have been terminated.

According to an affidavit by counsel for the Southeastern Michigan Volkswagen Dealers Association, Inc., a motion was made to disband and dissolve the association at a meeting on August 5, 1993, and the motion carried. The affidavit recites that the association "has proceeded to wind down its affairs." A copy of a form titled "Certificate of Dissolution" is attached to the motion.

The Commission has considered the motion and determined to grant it as to Autobahn Motors, Inc.

It is ordered, That the complaint against Autobahn Motors, Inc. be and hereby is dismissed.

It is further ordered, That the order of February 22, 1989, of the Commission be and hereby is modified to delete the name of Autobahn Motors, Inc.

It is further ordered, That respondent Southeastern Michigan Volkswagen Dealers Association, Inc. be and hereby is directed to file further information concerning whether there is any successor or assign of the association within the meaning of the definition of "Association Respondent" in the order of February 22, 1989 and concerning the reasons for dissolution of the association. In particular, respondent should provide detailed information concerning whether any entity, formal or informal, has undertaken any of the activities formerly carried on by the Southeastern Michigan Volkswagen Dealers Association, Inc.

IN THE MATTER OF
PROMODES, S.A., ET AL.

Docket 9228. Consent Order, May 17, 1990--Modifying Order, Jan. 28, 1994

This order reopens the proceeding and modifies the Commission's consent order issued May 17, 1990 (113 FTC 372) by deleting paragraphs II.A.3 and II.A.6, thereby ending the respondents' obligation to divest two Red Food Supermarkets in Tennessee. The Commission determined that the respondents demonstrated that this action would be in the public interest.

ORDER GRANTING REQUEST TO REOPEN AND MODIFY

Promodes, S.A. ("Promodes") and The Red Food Stores, Inc. ("Red Food") filed a Motion Requesting Federal Trade Commission To Issue Order Reopening and Modifying Consent Order Issued May 17, 1990 ("Petition") in Docket No. 9228 on October 12, 1993,¹ 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 and Procedure, 16 CFR 2.51. Promodes and Red Food (collectively, "respondents") request that the Commission reopen and modify the consent order issued by the Commission on May 17, 1990 ("order"), which became final on May 29, 1990, to terminate the obligation to divest certain supermarkets in Chattanooga, Tennessee.

For the reasons discussed below, the Commission has determined that respondents have demonstrated that it is in the public interest to reopen and modify the order.

I. The Complaint and Order

The order, which became final on May 29, 1990, settled charges that respondents' April 22, 1989, acquisition of seven supermarkets in Chattanooga from The Kroger Company violated Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45. The order required respondents to divest, the stores listed in paragraph II.A. of the order (the "II(A) Properties") by March 1, 1991. Respondents failed to divest the stores by the deadline, however, and on January 6, 1992, the Commission appointed Neill A.

¹ Respondents filed a confidential version of the Petition on October 1, 1993, but did not file the public version until October 12.

Thompson, III, trustee to divest the supermarkets pursuant to paragraph III.A of the order.

Pursuant to a contract arranged by the trustee, on December 21, 1992, Red Food divested its Martin Luther King store, as required by paragraph II.A.5 of the order, to Mr. Jeffrey Mitchell, previously a Red Food store manager.

On December 22, 1992, the trustee requested that the Commission extend for one year his time to divest the remaining stores. On January 28, 1993, respondents requested a substitution of a store in the place of one required to be divested, and on February 3, 1993, the trustee filed an application to divest the substitute store. The Commission granted a nine-month extension as to four stores on May 12, 1993. Also on that date, the Commission issued an order to Show Cause why the order should not be reopened and modified to eliminate two stores from the divestiture requirement of the order due to the fact that no serious interest had been shown in those stores and it was unlikely that any divestitures could be achieved within a reasonable time. Respondents did not object, and on May 21, 1993, the Commission issued an order to set aside the requirement to divest the stores identified in paragraphs II.A.1 and II.A.2 of the order. The previous day, on May 20, 1993, the substitution and divestiture were approved.

On behalf of Smith & Woods, the acquirer of the substitute store, the trustee filed a divestiture application on June 21, 1993, for one of the two remaining stores. However, the trustee withdrew the application after Smith & Woods determined it was no longer interested in any further acquisitions of Red Food stores. To date, accordingly, two stores remain to be divested. The trustee's time to divest expired on October 6, 1993.

II. Respondents' Petition

Respondents are requesting relief from any further divestiture obligations. Respondents' Petition is based on changes of fact and public interest considerations. Additionally, respondents assert that, in any event, reopening and modifying the order is not necessary because their obligation to divest terminated by law upon the expiration of the trustee's time to divest.²

² Respondents do not assert any changes of law that would require reopening the order.

Respondents claim that there is no serious interest in either store to be divested because of the increased competition surrounding each store and because of the low sales volume of the two stores. Respondents claim that in the area of Red Food store 140 (“store 140”) a new 50,000 square foot Food Max has been built and the continued strengthening of a new 30,000 square foot Food Lion has made it difficult for store 140 to compete effectively. There are two new Sav-A-Lots in the area surrounding Red Food store 129 (“store 129”), the other remaining store, and it is apparently rumored that a Food Lion is entering the market near store 129, making it difficult to divest. There has been a decline in sales at both stores to be divested. Petition at 8-9. Moreover, respondents claim that since the order was entered, Chattanooga has fallen into a recession and prospective purchasers have found it difficult to find financial support. Petition at 10.

Respondents claim that they need to end the losses being sustained by the two remaining stores to maintain Red Food’s competitive vigor in the Chattanooga area. Removing the divestiture requirement would enable Red Food to close the stores, halting any further losses. Red Food has experienced a significant reduction in its profits in general, and the continuing losses incurred at the remaining stores will adversely affect its ability to compete, to the detriment of consumers. Petition at 10. Respondents assert that these losses constitute the affirmative need required to reopen the order under the public interest standard. Respondents claim that the continued obligation to divest the remaining stores inequitably injures Red Food’s ability to compete and is contrary to the remedial purposes of the order. Petition at 12-13.

Citing United States v. Combustion Engineering, 364 F. SUPP. 181 (D. Conn. 1972), respondents also claim that, in any event, the obligation to divest the two stores terminated by law on the expiration of the trustee’s term. Petition at 14. For the reasons set forth below, the Commission rejects this contention.

III. Standards for Reopening and Modification

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. A

satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) (“Hart Letter”).³

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 (unpublished) (“Damon Letter”). For example, it may be in the public interest to modify an order “to relieve any impediment to effective competition that may result from the order.” *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of section 5(b) plainly anticipates that the burden is on the petitioner to make a “satisfactory showing” of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission “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.” S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of

³ *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (“A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.”).

petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required, and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

IV. Promodes and Red Food Have Demonstrated an Affirmative Need to Modify the Order and Have Demonstrated that the Modification is in the Public Interest

The trustee appointed by the Commission under paragraph III of the order attempted unsuccessfully for twenty-one months to divest the two stores. There is no suggestion that the trustee failed to act diligently or to use his best efforts to accomplish the divestitures. The inability of the trustee to accomplish divestiture -- notwithstanding the extension of the trusteeship by nine months -- is evidence that divestiture of the two stores is extremely unlikely. Continuation of the requirement to divest and the requirement to maintain the viability and marketability of the stores -- which are steadily losing sales -- imposes unanticipated costs on the respondents that impede their ability to compete. Accordingly, respondents have demonstrated an affirmative need to modify the order.⁴

With regard to the second prong of the analysis -- whether respondents have shown that the reasons to set aside the divestiture requirement outweigh the need to continue to impose divestiture obligations on them -- the Commission notes that the purpose of the order was to increase competition through the divestiture of a specified number of supermarkets. In the wake of more than three years' efforts to divest the two stores at issue -- including twenty-one months of serious efforts by the trustee -- Red Food is losing money because of its continued operation of the two remaining stores. These

⁴The Commission has already relieved respondents of the divestiture obligation for two other stores. The Commission found it extremely unlikely that respondents would be able to divest the stores originally identified in paragraphs II.A.1. and II.A.2. and set aside those paragraphs on May 21, 1993.

losses have weakened Red Food's ability to compete -- a result plainly at odds with the objective of the order. In these circumstances -- the extreme unlikelihood that the stores can be divested, coupled with the financial and competitive costs that the divestiture requirement imposes on Red Food -- it is in the public interest to reopen and modify the order.⁵

The Commission, having determined to reopen and modify this order, also addresses a subsidiary assertion made by the respondents. Respondents assert in their Petition that their obligation to divest the stores terminated by law upon the expiration of the trustee's term, citing *United States v. Combustion Engineering*, 364 F. Supp. 181 (D. Conn. 1972). Contrary to respondents' assertions, that case is not comparable to the current matter. The language of the order in *Combustion Engineering* required that defendant "make continuous bona fide efforts to sell and consummate a sale" of the assets. The court held there that that language did not create an absolute obligation to divest. 364 F. Supp. at 186. Respondents' assertion that, as in *Combustion Engineering*, the order in Docket No. 9228 required them only "to make reasonable efforts to divest certain assets for a specified period of time," Petition at 14, is incorrect. The language of the current order requires that "[w]ithin nine (9) months after this order becomes final, respondents shall divest, absolutely and in good faith, order at paragraph II.A. This language creates an absolute obligation to divest the stores identified in paragraph II.⁶ The date contained in the order is a deadline, after which respondents are in violation of the divestiture obligation. The divestiture obligation contained in the order does not automatically terminate following that deadline. Moreover, the courts have held that under the language contained in this order, a respondent violates the order merely by failing to divest within the time allotted.⁷ Because the language of the consent order in *Combustion Engineering* differs substantially from that in the current order, that case does not support respondents' position.

⁵ Because the Petition is granted on the ground that it is in the public interest, the Commission need not address the question whether changes of fact justify the requested relief.

⁶ The use of the phrase "good faith" refers to the terms of the divestiture, and is not a limitation on the obligation to divest. *U.S. v. Beatrice*, 344 F. Supp. 104, 116 (D. Minn. 1972), *aff'd*, 493 F.2d 1259 (8th Cir. 1974), *cert. denied*, 420 U.S. 961 (1975).

⁷ See, *U.S. v. Papercraft Corp.*, 540 F.2d 131, 140 (3rd Cir. 1976); *U.S. v. Louisiana-Pacific Corp.*, Civil No. 81-813 RE slip op. at 2 (D. Ore. Feb. 23, 1982).

V. Conclusion

Accordingly, *It is ordered*, That this matter be reopened and that the order in Docket No. 9228 be, and hereby is, modified, as of the effective date of this order, as follows:

Paragraph II.A.3. and paragraph II.A.6. of the order are deleted from paragraph II of the order.

Commissioner Owen dissenting in part.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the decision to reopen and modify the order, relieving the respondents of the obligation to divest certain supermarkets in Chattanooga, Tennessee. The Commission-appointed trustee, during a 21-month period, has not accomplished the required divestitures. In classic understatement, the Commission concludes that the trustee's lack of success is "evidence that divestiture of the two stores is extremely unlikely."

A Commission-appointed trustee serves as a neutral arbiter to establish whether the divestiture required by the order can be accomplished (assuming the trustee's good faith and diligence and the absence of evidence that the respondent has frustrated the trustee's efforts). If the trustee cannot identify potential buyers, continued imposition of the divestiture requirement no longer serves the public interest. In these circumstances, the requirement imposes costs, and the respondent need not make a particularized showing of those costs.

The Commission has in the past recognized that an obligation to divest particular assets may be modified in the public interest when the respondent "has been unable to find an acquirer (for those assets) at any price." *RSR Corporation*, 98 FTC 872 (1981); compare *Louisiana-Pacific Corporation*, 112 FTC 547, 561 (1989) (asserted financial disadvantage distinguished from impossibility). The trustee having failed to effect divestiture, the requirement now should be lifted.

STATEMENT OF COMMISSIONER DEBORAH K. OWEN
CONCURRING IN PART AND DISSENTING IN PART

I concur in the decision to reopen and modify the consent order in this matter to relieve respondents' obligation to divest the South Pittsburg and Highway 58 supermarkets. This modification to the order is clearly in the public interest. However, I dissent from Commission's failure to find that this order modification is also warranted by changes in fact.

I believe that changes in market conditions following issuance of the order have indeed created circumstances today that warrant modification. Among other factors, entry by competing supermarket chains has altered the competitive atmosphere in the areas where the stores are located. Presumably, when the Commission originally decided to include these stores in the list of properties to be divested, it did not perceive any significant threat to their continued viability. Despite evidence suggesting that respondents have properly maintained the stores, each is now running significant operating losses. Thus, certain facts must have changed to alter the status of these supermarkets.

The Commission has already acknowledged that new entry in the vicinity of respondents' Fort Oglethorpe store, listed in order paragraph II.A.(2), may have warranted the removal of Red Food's obligation to divest that store.¹ In addition to other factors, new entrants near the South Pittsburg and Highway 58 supermarkets appear to have significantly altered the competitive conditions under which these two supermarkets operate. Just as the opening of new supermarkets in the Fort Oglethorpe neighborhood may have justified an order modification regarding that store, entry in the vicinity of the Highway 58 and South Pittsburg stores, along with other changed conditions, warrant the present modification.

¹ See Order to Show Cause, D-9228 (May 13, 1993).

IN THE MATTER OF

OCCIDENTAL PETROLEUM CORPORATION, ET AL.

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

Docket 9205. Final Order, Dec. 22, 1992--Modified Final Order, Feb. 3, 1994*

This modified final order requires Occidental, a California-based corporation, to divest certain PVC assets to a Commission-approved acquirer within twelve months and to provide to the acquirer all PVC technology used or developed by the respondent for use in connection with the PVC assets to be divested. The modified order also prohibits Occidental, for 10 years, from acquiring all or any part of the stock or assets of, or any interest in, any producer of PVC located in the United States, without prior Commission approval.

Appearances

For the Commission: *Eric D. Rohlck* and *Daniel P. Ducore*.

For the respondents: *Michael Sohn, Arnold & Porter*, Washington, D.C. *Louis Nizer, Phillips, Nizer, Benjamin, Krim & Ballon*, New York, N.Y. and *Robert D. Luss*, in-house counsel for respondent Occidental Chemical Corporation, Dallas, TX.

MODIFIED FINAL ORDER

The Commission issued a final order in this proceeding on December 22, 1992, and the respondents, Occidental Petroleum Corporation and Occidental Chemical Corporation (collectively "Occidental"), subsequently filed a petition for review of that order in the United States Court of Appeals for the Second Circuit. On November 15, 1993, the Commission and Occidental filed a joint motion asking that court to modify the Commission's final order pursuant to a stipulation between the Commission and Occidental. Commissioner Yao issued the attached statement and Commissioner Owen issued the attached dissent to the Commission's entry into the stipulation. On January 12, 1994, the court of appeals granted the parties' joint motion and entered its order modifying the Commission's final order of December 22, 1992.

* Final Order, etc. previously published at 115 FTC 1010 (1992).

Now therefore, it is hereby ordered, That the aforesaid final order be, and it hereby is, modified in accordance with the order of the Court of Appeals to read as follows:

FINAL ORDER

I.

It is ordered, That the following definitions apply:

A. "*Occidental*" means collectively Occidental Petroleum Corporation, a corporation organized under the laws of Delaware with its principal place of business in Los Angeles, California, and Occidental Chemical Corporation, a corporation organized under the laws of New York with its principal place of business in Dallas, Texas, and their directors, officers, agents and employees and their subsidiaries, divisions, affiliates, successors and assigns;

B. "*Tenneco*" means Tenneco, Inc., and Tenneco Polymers, Inc., two corporations organized under the laws of Delaware with their principal places of business in Houston, Texas, and their directors, officers, agents and employees and their subsidiaries, divisions, affiliates, successors and assigns;

C. "*Acquired PVC assets*" means the suspension PVC homopolymer manufacturing facility located at Pasadena, Texas, the suspension PVC and dispersion PVC manufacturing facility located at Burlington, New Jersey, and all assets, titles, properties, interests, rights and privileges, tangible and intangible, related to the PVC business that were acquired by Occidental from Tenneco on or about April 30, 1986;

D. "*PVC divestiture assets*" means the PVC manufacturing facility owned by Occidental and located at Addis, Louisiana; the suspension PVC and dispersion PVC manufacturing facility located at Burlington, New Jersey; all assets, titles, properties, interests, rights, privileges, and goodwill, tangible and intangible, utilized in the production, distribution or sale of PVC from the Addis, Louisiana, and Burlington, New Jersey, facilities; and all assets, titles, properties, interests, rights, privileges, and goodwill, tangible and intangible, related to the suspension PVC copolymer and dispersion PVC business that were acquired by Occidental from Tenneco on or about April 30, 1986, together with all improvements

thereto. The PVC divestiture assets include, without limitation, the following:

1. All plant facilities, machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property;

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, rights to software, trademarks, patents, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes and quality control data; provided, however, that Occidental shall not be required to convey any property rights in, or any right to use, the "Occidental," "Oxy" or "OxyChem" trademarks or the Occidental logo;

3. Raw material and finished product inventories and goods in process;

4. All right, title and interest in and to real property, together with appurtenances, licenses and permits;

5. All right, title and interest in and to the contracts entered into in the ordinary course of business with customers (to the extent assignable) (together with associated bid and performance bonds), sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees; provided however, that

(a) Any revenues earned or losses incurred by Occidental in connection with Occidental's operation; or

(b) Any claim arising under a bid or performance bond as a result of the operation of the PVC divestiture assets prior to the date of divestiture shall be retained by Occidental.

6. All rights after the date of divestiture under warranties and guarantees, express or implied;

7. All separately maintained, as well as relevant portions of not separately maintained books, records and files; and

8. All items of prepaid expense.

The PVC divestiture assets do not include any assets, titles, properties, interests, rights, privileges, or goodwill, tangible or intangible, related exclusively to any PVC manufacturing facility

other than the facility located at Addis, Louisiana, or the suspension PVC and dispersion PVC facility located at Burlington, New Jersey.

E. "PVC" means any vinyl chloride homopolymer with the repeating unit $\text{CH}_2=\text{CHCl}$ and any copolymer of vinyl chloride with varying amounts of other chemicals, including vinyl acetate, ethylene, propylene, vinylidene chloride or acrylates;

F. "Mass PVC" means PVC produced from vinyl chloride by the mass (also referred to as "bulk") process;

G. "Suspension PVC homopolymer" means PVC homopolymer produced from vinyl chloride by the suspension process;

H. "Suspension PVC copolymer" means any copolymer of vinyl chloride and vinyl acetate produced by the suspension process and containing more than 50 percent by weight of vinyl chloride;

I. "Dispersion PVC" means PVC produced by the emulsion or dispersion process.

II.

It is ordered, That within twelve (12) months from the date this order becomes final, Occidental shall divest, absolutely and in good faith, at no minimum price, the PVC divestiture assets. The purpose of the divestiture is to establish the PVC divestiture assets, either singly or separately, as a viable competitor in PVC, by ensuring the continuation of the assets as ongoing, viable enterprises in the PVC industry and to remedy the lessening of competition resulting from the acquisition of the acquired PVC assets by Occidental. The divestiture(s) shall be made only to an acquirer or acquirers and only in a manner that receives the prior approval of the Federal Trade Commission.

Pending divestiture, Occidental shall take all measures necessary to maintain the PVC divestiture assets in their present condition and to prevent any deterioration, except for normal wear and tear, of any part of the PVC divestiture assets, so as not to impair the present operating viability and market value of the PVC divestiture assets.

III.

It is further ordered, That at the time of the divestiture required by this order, Occidental shall provide to the acquirer or acquirers of the PVC divestiture assets, on a nonexclusive basis, all PVC

technology (including patent licenses and know-how) used by Occidental or developed by Occidental for use in connection with the PVC divestiture assets; and

For a period of one (1) year following the divestiture required by this order, Occidental shall provide the acquirer or acquirers of the PVC divestiture assets, if the acquirer(s) so requests, such additional know-how as may reasonably be required to enable the acquirer(s) to manufacture and sell PVC. Occidental shall charge the acquirer(s) no more than its own costs for providing such additional know-how.

IV.

It is further ordered, That at the time of the divestiture required by this order, Occidental shall assign or otherwise transfer to the acquirer(s) of the PVC divestiture assets:

A. To the extent requested by the acquirer(s), any or all purchase, exchange, and other supply agreements for vinyl chloride monomer ("VCM") and other feedstocks for the manufacture of PVC relating to the PVC divestiture assets;

B. All PVC sales, toll or exchange agreements relating to PVC produced in (or supplied by Occidental at any time since May 1, 1986, from) the PVC divestiture assets;

C. All PVC customer records and files for each customer to whom Occidental has supplied suspension PVC homopolymer, suspension PVC copolymer, or dispersion PVC, respectively, since May 1, 1986, from the PVC divestiture assets exclusively, apart from any temporary supply from another production facility in connection with any supply disruption, temporary shutdown, capacity outage, or maintenance of the PVC divestiture assets; and

D. The name and address of, and the name and telephone number of the contact person(s) at, each customer to whom Occidental has supplied suspension PVC homopolymer, suspension PVC copolymer, or dispersion PVC, respectively, at any time since May 1, 1986, from the PVC divestiture assets and from another production facility; any portion of the customer records and files for each such customer that relates solely to sales to such customer from the PVC divestiture assets; and a copy of all other customer records and files for each

such customer excluding any portion of such records and files that relates solely to sales to such customer from a production facility other than the PVC divestiture assets. Provided, however, that Occidental may redact from any such copy any disclosure of pricing, volume or customer complaints with respect to a production facility other than the PVC divestiture assets.

V.

It is further ordered, That if Occidental has not divested the PVC divestiture assets within the twelve-month period provided in paragraph II of this order, the Federal Trade Commission may appoint a trustee to effect the divestiture. The trustee shall be a person with experience and expertise in acquisitions and divestitures. Neither the appointment of a trustee nor a Commission decision not to appoint a trustee under this paragraph V of the order shall preclude the Commission from seeking civil penalties and other relief available to it, including a court-appointed trustee, for any failure by Occidental to comply with this order.

Any trustee appointed by the Commission pursuant to this paragraph V shall have the following powers, authority, duties and responsibilities:

A. The trustee shall have the exclusive power and authority, subject to the prior approval of the Commission, to divest the PVC divestiture assets. The trustee shall have twelve (12) months from the date of appointment to accomplish the divestiture. If, however, at the end of the twelve month period, the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission.

B. The trustee shall have full and complete access to the personnel, books, records and facilities of the PVC divestiture assets, and Occidental shall develop such financial or other information relevant to the PVC divestiture assets as the trustee may reasonably request. Occidental shall cooperate with the trustee and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Occidental shall

extend the time for divestiture under this paragraph V in an amount equal to the delay, as determined by the Commission.

C. The power and authority of the trustee to divest shall be at the most favorable price and terms available consistent with this order's absolute and unconditional obligation to divest at no minimum price and with the purposes of the divestiture as stated in paragraph II of this order, subject to the prior approval of the Commission.

D. The trustee shall serve without bond or other security and at the cost and expense of Occidental on such reasonable and customary terms and conditions as the Commission may set. The trustee shall have authority to retain, at the cost and expense of Occidental, such consultants, attorneys, investment bankers, business brokers, accountants, appraisers and other representatives and assistants as are reasonably necessary to assist in the divestiture. The trustee shall account for all monies derived from the divestiture and for all expenses incurred. After approval by the Commission of the account of the trustee, including fees for the trustee's services, all remaining monies shall be paid to Occidental, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee divesting the PVC divestiture assets.

E. Occidental shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages or liabilities arising in any manner out of or in connection with the trustee's duties under this order, unless the Commission determines that such losses, claims, damages or liabilities arose out of the misfeasance, gross negligence or the willful or wanton acts or bad faith of the trustee.

F. Promptly upon appointment of the trustee and subject to the approval of the Commission, Occidental shall, subject to the Federal Trade Commission's prior approval and consistent with the provisions of this order, transfer to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

G. If the trustee ceases to act or fails to act diligently, the Commission may appoint a substitute trustee.

H. The Commission may on its own initiative or at the request of the trustee issue such additional orders or directions as may be

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

I. The trustee shall have no obligation or authority to operate or maintain the PVC divestiture assets.

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

VI.

It is further ordered, That for a period of ten (10) years from the date this order becomes final, Occidental, without the prior approval of the Federal Trade Commission, shall not directly or indirectly acquire -- other than the acquisition of manufactured product in the ordinary course of business -- all or any part of the stock of, or any interest in, any producer of PVC located in the United States; or all or any part of the assets of any producer of PVC located in the United States used, or previously used, either in connection with the production or sale of PVC or in connection with the development of PVC product.

VII.

It is further ordered, That Occidental shall, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until it has fully complied with paragraph II of this order, submit in writing to the Commission a report setting forth in detail the manner and form in which it intends to comply, is complying or has complied with that paragraph. Such compliance reports shall include, among other things that may be required from time to time, a full description of all contacts and negotiations relating to the divestiture of the PVC divestiture assets, including the name and address of all persons contacted, copies of all written communications to and from such persons and all nonprivileged internal memoranda, reports and recommendations concerning divestiture; and

Occidental shall submit such further written reports of its compliance as the staff of the Commission may from time to time request in writing.

VIII.

It is further ordered, That Occidental, upon written request and on reasonable notice, for the purpose of securing compliance with this order, and subject to any legally recognized privilege, shall permit duly authorized representatives of the Commission.

A. Reasonable access during the office hours of Occidental, which may have counsel present, to inspect and copy books, ledgers, accounts, correspondence, memoranda, reports and other records and documents in the possession or control of Occidental that relate to any matter contained in this order; and

B. Subject to the reasonable convenience of Occidental, an opportunity to interview officers or employees of Occidental, who may have counsel present, regarding such matters.

IX.

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

Commissioner Owen dissenting in part.¹

¹ Commissioner Owen concurs with the result reached in the Opinion of the Commission with respect to the markets for suspension PVC copolymer and dispersion PVC and with the relief ordered with respect to those two markets, including the divestiture of the Burlington, New Jersey, plant. Commissioner Owen dissents with respect to the provisions in the Modified Final Order that require divestiture of the Addis plant.

STATEMENT OF COMMISSIONER DEBORAH K. OWEN
CONCURRING IN PART AND DISSENTING IN PART

While the proposed settlement seems preferable to the Commission's final order in this matter in certain respects, I continue to believe that the Occidental/Tenneco combination did not violate Section 5 of the Federal Trade Commission Act in the mass and suspension PVC homopolymer market, for reasons stated in my separate opinion. Accordingly, I do not believe that any divestiture should be required beyond that which is necessary to cure the anticompetitive problems in the suspension PVC copolymer and dispersion PVC markets, and I must respectfully dissent with respect to the provisions in the Modified Final Order that require divestiture of the Addis plant.

CONCURRING STATEMENT OF COMMISSIONER DENNIS A. YAO

The Commission has accepted a settlement that modifies the Commission's order that was issued with its decision in this matter on December 22, 1992. I did not participate in the Commission's decision in this matter. Given that decision, however, I believe that the Modified Final Order accomplishes the aims of the Commission's order and, therefore, have voted in favor of accepting this settlement.

IN THE MATTER OF
ABBOTT LABORATORIES

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

Docket 9253. Complaint, June 10, 1992--Decision, Feb. 4, 1994

This consent order prohibits, among other things, an Illinois-based manufacturer of infant formula from soliciting its competitors to adopt or adhere to any provision restricting consumer mass media advertising, including provisions in the Infant Formula Council or other organizational codes or statements, except to the extent that they prohibit false or deceptive advertising.

Appearances

For the Commission: *Richard B. Dagen* and *Michael E. Antalics*.

For the respondent: *Thomas A. Gottschalk, Kirkland & Ellis,*
Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Abbott Laboratories ("Abbott" and sometimes referred to as "respondent") has violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

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

(a) "*Infant formula*" means a food as described at 21 U.S.C. 321(aa), which purports to be or is represented for special dietary use solely as a food for infants by reason of its simulation of human milk or its suitability as a complete or partial substitute for human milk.

(b) "*WIC*" means the Special Supplemental Food Program for Women, Infants and Children as described in 42 U.S.C. 1786 *et seq.*

The program, administered by the United States Department of Agriculture (USDA) through its Food and Nutrition Service (FNS) and state and local agencies, is designed to provide supplemental foods (including infant formula) and nutrition education to women, infants and children (up to their fifth birthday) with income levels that put them at nutritional risk.

(c) “*Open market system*” means a system in which all eligible infant formula manufacturers may supply infant formula for the WIC program. In contrast, a “*sole source system*” means a system, as described at 7 CFR 246.16(m)(1), in which one infant formula manufacturer supplies substantially all the milk and soy-based infant formula for a state’s WIC program. The state selects the sole source supplier after soliciting sealed bids from all eligible and interested manufacturers. The manufacturer offering the lowest net cost per unit or highest rebate per unit of infant formula receives the contract to supply substantially all infant formula to the state’s WIC program.

RESPONDENTS

2. Respondent Abbott Laboratories 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 One Abbott Park Road, Abbott Park, Illinois. Ross Laboratories, a division of Abbott with its principal place of business in Columbus, Ohio, manufactures and sells infant formula in the United States. In 1990, Ross accounted for more than 50% of U.S. infant formula sales.

INFANT FORMULA INDUSTRY

3. The Infant Formula Council is the industry trade association organized under the laws of the State of Illinois, with its principal place of business located at 5775 Peachtree-Dunwoody Road, Suite 500-G, Atlanta, Georgia. The Infant Formula Council is comprised of those companies that manufacture and market infant formula in the United States.

4. The infant formula produced by infant formula manufacturers for consumption in the United States is substantially similar, being highly regulated by the Infant Formula Act of 1980, 21 U.S.C. 350a. High barriers to entry exist with respect to the manufacturing and sale

of infant formula. The three largest manufacturers have accounted for more than 90% of domestic infant formula sales during the period from 1982 to 1990. Industry performance has been characterized by relatively high profits, limited competition based directly on wholesale prices, and, until the market entry of Carnation Nutritional Products in 1988, virtually no advertising through the mass media directly to the consumer.

5. Infant formula is widely available and sold as a food product through various distribution channels, including supermarkets, mass merchandisers and drug stores. Physician prescription or recommendation is not required in order to purchase infant formula.

JURISDICTION

6. Infant formula is sold and shipped by respondent from its principal place of business and production facilities to customers located throughout the United States. Respondent maintains and has maintained a substantial course of business, including the acts and practices hereinbelow alleged, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

UNFAIR METHODS OF COMPETITION

7. Respondent believed that the absence of mass media advertising direct to the consumer served as an entry barrier and that the introduction of such advertising by respondent or respondent's competitors would result in significantly lower profits for respondent.

8. During the 1980's, respondent entered into a conspiracy with others to refrain from advertising infant formula through the mass media directly to the consumer. In addition, subsequent to 1986, respondent has requested health care professionals to ask certain of its competitors to stop advertising through the mass media direct to the consumer and has urged doctors to stop recommending those competitors' infant formula until those competitors ceased such advertising.

9. As a result of the acts, practices, and methods of competition alleged in the previous paragraph, competition was lessened, consumers have been forced to consult physicians to obtain information relating to infant formula, and consumers have been deprived of the benefits of competition.

10. During the 1980's, respondent and other members of the Infant Formula Council agreed to exchange information concerning each company's marketing practices. The information exchange occurred in the process of drafting marketing guidelines that would have prohibited the use of mass media advertising directly to the consumer.

11. As a result of the acts, practices, and methods of competition described in the previous paragraph, uncertainty relating to the marketing practices of competing manufacturers was reduced and competition was lessened.

VIOLATION

12. The acts, practices, and methods of competition of respondent, as herein alleged, were and are all to the prejudice and injury of the public and constituted unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. The acts, practices and methods of competition herein alleged, or the effects thereof, could recur in the absence of the relief herein requested.

Commissioner Starek recused.*

DECISION AND ORDER

The Federal Trade Commission, having issued a complaint charging respondent, Abbott Laboratories, with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

The respondent having filed an answer to the said complaint denying said charges; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order to cease and desist, an admission by respondent of all jurisdictional facts set forth in the said 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 said complaint, and waivers and other provisions as required by the Commission's Rules; and

* Commissioner Azcuenaga concurs in the issuance of the complaint only insofar as it alleges as an unfair method of competition that during the 1980's, respondent entered into a conspiracy with others to refrain from advertising infant formula through the mass media directly to the consumer.

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

1. Respondent Abbott Laboratories is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at One Abbott Park Road, Abbott Park, 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.

I.

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

A. “*Respondent*” means Abbott Laboratories, a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at One Abbott Park Road, Abbott Park, Illinois, and its successors, assigns, subsidiaries, divisions, groups and affiliates controlled by Abbott Laboratories, and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

B. “*Infant formula*” means a food, as described in 21 U.S.C. 321(aa), which purports to be or is represented for special dietary use solely as a food for infants by reason of simulation of human milk or its suitability as a complete or partial substitute for human milk.

II.

It is ordered, That respondent, in connection with the advertising, offering for sale, sale or distribution of infant formula in commerce, as commerce is defined in the Federal Trade Commission Act, shall

forthwith cease and desist from, directly or indirectly, through subsidiaries or otherwise:

A. Intentionally exchanging information with any other manufacturer of infant formula relating to the advertising in the United States, its territories or possessions of infant formula through the mass media directly to the consumer.

B. Entering into or attempting to enter into any agreement, or enforcing any such agreement, with any other manufacturer of infant formula to refrain from or restrict otherwise legal infant formula marketing practices in the United States, its territories or possessions, including but not limited to requesting any health care professional or other third party to request a competitor of respondent to refrain from or restrict otherwise legal infant formula marketing practices in the United States, its territories or possessions.

C. Soliciting adherence by any competitor to, or adoption by any competitor of, any provision restricting advertising in the United States, its territories or possessions of infant formula through the mass media directly to the consumer, including, but not limited to, such provisions contained in the Infant Formula Council's Draft Policies and Practices, the American Academy of Pediatrics' Marketing Code or policy statements, the World Health Organization International Code of Marketing of Breast-Milk Substitutes, or any other industry-wide policy statement or proposal on domestic infant formula marketing practices; provided, however, that nothing contained in this paragraph shall prevent respondent from discussing or communicating to persons other than intentionally to its competitors, its position concerning the desirability or appropriateness of any such policies, practices, codes or statements, except as otherwise prohibited by this order.

Provided, however, that nothing contained in this order shall be construed to prevent respondent from exercising rights permitted under the First Amendment to the United States Constitution to petition any government executive agency or legislative body concerning legislation, rules, programs or procedures, or to participate in any government administrative or judicial proceeding.

Further provided, however, that nothing contained in this order shall prohibit respondent from exchanging technical, scientific or safety information on infant formula with any other infant formula

manufacturer or from licensing proprietary information or technology, provided that such information does not relate to the advertising of infant formula directly to the consumer through the mass media.

Further provided, however, that nothing contained in this order shall prohibit respondent from taking action to challenge or prevent advertising, promotion or marketing practices that it reasonably believes would be false or deceptive within the meaning of Section 5 of the FTC Act, the Lanham Act or otherwise contrary to law.

III.

It is further ordered, That respondent shall:

A. Within thirty (30) days of the date this order becomes final, provide a copy of this order to all of its directors, officers, management employees, and sales representatives with any responsibility for the manufacture, sale or marketing of infant formula in the United States, its territories and possessions.

B. For a period of five (5) years from the date on which this order becomes final, and within thirty (30) days of the date on which any person becomes a director, officer, management employee, or sales representative of respondent with responsibility for the manufacture, sale or marketing of infant formula in the United States, its territories and possessions, provide a copy of this order to such person.

C. Require each person to whom a copy of this order is furnished pursuant to subparagraphs III A. and B. of this order, except directors and sales representatives, to sign and submit to respondent within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of this order; (2) represents that the undersigned has read and understands this order; and (3) acknowledges that the undersigned has been advised and understands that non-compliance with this order may subject respondent to liability.

IV.

It is further ordered, That respondent shall:

A. File a verified, written report with the Commission within ninety (90) days of the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may by written notice to respondent require, setting forth in detail the manner and form in which it has complied and is complying with this order.

B. For a period of five (5) years from the date this order becomes final, maintain and make available to Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by parts I-IV of this order; and

C. Notify the Commission at least thirty (30) days prior to any proposed change in respondent that may affect compliance with 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, change of name, or change of address.

Commissioner Azcuenaga concurring in part and dissenting in part.

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
CONCURRING IN PART AND DISSENTING IN PART

Today the Commission settles its case charging Abbott Laboratories ("Abbott") with an unlawful conspiracy and with an unlawful exchange of information. When the Commission initiated its administrative case in 1992, I supported the complaint only to the extent that it alleged an unlawful "conspiracy with others to refrain from advertising infant formula through the mass media directly to the consumer." Nothing has happened since then to change my view. I concur in the issuance of the consent order only insofar as it prohibits Abbott Laboratories from agreeing with its competitors to refrain from or otherwise restrict the lawful advertising or marketing of infant formula. I dissent from the prohibition against the intentional exchange of information relating to advertising. In some circumstances, a prohibition against exchanging certain kinds of information might be an appropriate fencing-in requirement to remedy an unlawful conspiracy. Here, however, the prohibition relates to a separate cause of action that I cannot support.

Some factual context is useful to understand the theories of the case.¹ Three firms dominate the United States market for infant formula. In 1990, Abbott was the leading firm with a market share of more than 50 percent. Complaint paragraph 2; Abbott Answer.² Mead Johnson & Company was the second largest producer with a share of approximately 30 percent, and American Home Products had a share of approximately 7 percent.³ Two other firms, Loma Linda Foods, Inc., and Milupa, had very small shares of the market.⁴ The Infant Formula Council ("IFC") is the industry trade association and, in the early 1980's, the IFC comprised those five firms.⁵

In selling its formula, Abbott did not market directly to consumers but rather employed so-called "ethical" marketing of formula through health care professionals, including the provision of free formula for use in hospitals, free samples in "discharge kits," free samples and promotional materials to pediatricians, and financial assistance to pediatric facilities.⁶ According to complaint counsel, members of the industry believed that a major barrier to entry was the need to establish a nationwide sales force to call on doctors and hospitals, and mass media, direct-to-consumer advertising was perceived as a means to overcome the barrier.⁷

In the early 1980's, consumer activists criticized some companies, notably Nestle Corporation, for promoting infant formula directly to consumers, especially to poor women in developing countries.⁸ On May 21, 1981, the World Health Organization adopted the International Code of Marketing of Breastmilk Substitutes ("WHO Code"), which restricted both direct-to-consumer advertising and many forms of "ethical" marketing, including

¹ My understanding of the facts of course might be different had they been explored in a full adversary hearing.

² The citations in this statement are to documents in the public record. Because the consent agreement was reached just before the administrative trial was to commence, there is no formal administrative trial record. The parties, however, had filed their trial briefs, their exhibits and objections to exhibits, and a stipulated order admitting exhibits into the record. Order Receiving Exhibits Into Evidence, August 4, 1993. Public Record Vol. 4, at 2932.

³ The market shares of Mead and AHP are alleged in the complaints against those firms that were filed in district court.

⁴ Complaint Counsel's Trial Brief ("CCTB"), Public Record Vol. 4, at 2946.

⁵ *Id.*

⁶ CCTB, Public Record Vol. 4, at 2951.

⁷ *Id.* at 2949-50.

⁸ Respondent's Trial Brief ("RTB"), Public Record Vol. 3, at 2755.

prohibitions against such practices as the provision of free samples, special sales, donations of equipment and materials referring to a brand, and sales bonuses and sales goals for marketing personnel.⁹

After adoption of the WHO Code, over the dissenting vote of the United States, activists increased pressure on domestic producers to adhere to the WHO Code.¹⁰ Legislation to implement provisions of the WHO Code was introduced on the federal and local level.¹¹

On April 30, 1982, then-Surgeon General Koop wrote to the Executive Director of the Infant Formula Council about the WHO Code. Dr. Koop said in his letter that the United States agreed with the basic aims of the Code, but that companies were free to make their own decisions about whether to adopt it. In an appendix to the letter, Dr. Koop stated:

The Department of Justice advises that a unilateral decision by your company to adhere to specific provisions of the Code, in and of itself, should not raise problems under the antitrust laws, and joint adoption of parts of the Code may not necessarily raise such problems. If any questions arise regarding antitrust enforcement intentions in a specific situation, the Department of Justice has a business review procedure to provide prompt guidance. (*See* 28 CFR 50)¹²

After receiving Dr. Koop's letter, the IFC began to develop an industry code to counter the WHO Code. Mr. Gelardi, the IFC's Executive Director, testified that the association's purpose was to develop a code that could be proposed as an alternative if legislative action to implement the WHO Code seemed imminent.¹³ Other testimony suggested that members of the industry believed that voluntary industry adherence to a less restrictive code might blunt the demands for legislative action.¹⁴ From the beginning, the IFC planned to submit its proposed code to the Department of Justice under the business review procedure.¹⁵

⁹ *Id.* at 2756.

¹⁰ Rule 3.24(A)(5) Order Specifying Facts as to Which There is no Substantial Controversy ("Order Specifying Facts"), August 26, 1993, Public Record Vol. 4, at 3088-3090.

¹¹ RTB, Public Record Vol. 3, at 2757-58.

¹² Koop Letter, Public Record Vol. 1, at 115, 120.

¹³ Excerpts from Gelardi Deposition, Public Record Vol. 2, at 1072, 1073-76.

¹⁴ Excerpts from Deposition of Lael Johnson, Public Record Vol. 2, at 1104.

¹⁵ Gelardi Deposition at 1082.

A. The Conspiracy Count

Paragraph 8 of the complaint alleges that “[d]uring the 1980’s, respondent entered into a conspiracy with others to refrain from advertising infant formula through the mass media directly to the consumer.” The statutory prerequisite for imposing a remedy at this stage of the proceeding, no administrative trial having been conducted, is a finding of “reason to believe” that the law has been violated. 15 U.S.C. 45(a).

Although the facts are controverted, a sufficiently clear outline of the evidence exists to support a “reason to believe” determination that at the time the infant formula manufacturers began to draft a proposed code, they agreed to refrain from advertising during the preparation and presentation of the code to the Department of Justice. Dr. Glen Blix, identified by complaint counsel as the witness who would produce direct evidence of a conspiracy,¹⁶ provided an affidavit stating that he was an employee of Loma Linda Foods until 1987 and that he was Loma Linda’s representative to the IFC.¹⁷ He stated that he had attended virtually all IFC board meetings during the relevant period. Dr. Blix also said that the IFC decided to adopt a code to address the concern of activists, but that the proposed code was to be less restrictive than the WHO Code. He stated:

There was a consensus among IFC members early on during discussions of the IFC code that the code would prohibit direct promotions to the consumer. I understood that the little direct advertising that was taking place at that time would be discontinued. Loma Linda did cease its advertisements, not only in consumer publications such as American Baby, but also in church publications, because of this understanding, as did other infant formula manufacturers that may have been advertising at the time. It was generally felt that the cessation of advertising was important in order to demonstrate to the consumer activists and the Department of Justice that the code was simply reiterating current practices in the industry; thereby making a favorable review more likely. Although all IFC members emphasized during these discussions that the code would be voluntary, it was generally understood that all IFC members would abide by the code during these discussions and after the code was completed.¹⁸

¹⁶ CCTB, Public Record, Vol. 4, at 2984-85.

¹⁷ Blix Affidavit, Public Record Vol. 3, at 2221-2.

¹⁸ *Id.* at 2225-26.

Although direct and cross examination of Dr. Blix at trial could have been useful, the affidavit alone distinctly points to the existence of an agreement among competitors to forgo advertising at the outset of the code drafting process. That is a very different matter from developing a code that would bind individual companies only by their voluntary action and only after the code received the blessing of the Department of Justice. Complaint counsel argue that circumstantial evidence also supports an inference that Abbott participated in that conspiracy. They assert that firms discontinued advertising during the discussions of the IFC Code and that a successful presentation to the Department of Justice depended in part on the absence of any change in established marketing practices in the industry.¹⁹ Not surprisingly, Abbott, in its Trial Brief, disagrees strongly with the proposed inferences. Abbott argues that the firms previously had discontinued mass-media advertising in response to activist pressure and were merely engaged in petitioning activities protected by the First Amendment.²⁰ Assuming *arguendo* that the IFC's development of an industry code for presentation to the Department of Justice by way of the business review procedure was protected by the First Amendment, that protection would not extend to an agreement among competitors to refrain from advertising during the pendency of the review process. On balance, I find reason to believe that Abbott engaged in an unlawful conspiracy.

B. *The Exchange of Information Count*

The complaint alleges, as a violation of Section 5 of the Federal Trade Commission Act distinct from the conspiracy theory, that Abbott exchanged information with competitors, and the order prohibits Abbott from "intentionally exchanging information" relating to advertising with other infant formula manufacturers. The finding that exchanging information about advertising is unlawful is a novel and potentially far reaching extension of existing antitrust prohibitions that has the potential to chill, if not prohibit, many competitively neutral or procompetitive discussions.

Paragraph ten of the complaint alleges that Abbott and the other members of the IFC agreed to exchange information "concerning

¹⁹ CCTB, Public Record Vol. 4, at 2972-85.

²⁰ RTB, Public Record Vol. 3, at 2790.

each company's marketing practices," and that the exchanges occurred in the process of drafting guidelines on advertising. Paragraph eleven of the complaint alleges that as a result of the exchanges, "uncertainty relating to the marketing practices of competing manufacturers was reduced and competition was lessened."

Although one might assume from reading the complaint that the firms had exchanged copies of documents or otherwise revealed their most secret marketing strategies, complaint counsel did not pursue any such theory. In fact, complaint counsel's trial brief does not identify any confidential marketing information exchanged at IFC meetings and does not suggest that proof of such an exchange would be offered at trial.²¹

The core of the information exchange claim is that "Abbott and its competitors discussed the various types of marketing that they believed were important to them and the types of marketing practices that they could live without."²² This sort of exchange is inherent in any joint effort to draft a code, and Abbott did not deny its participation in the drafting process. Its defense was that the IFC members disclosed only information that was already public, such as Abbott's firm adherence to ethical marketing.²³

The theory of competitive harm from such an exchange is that it reduced competitive uncertainty. Complaint counsel argued:

There clearly was uncertainty among the companies concerning what their competitors were considering vis-a-vis marketing practices and implementation of the WHO Code during the early 1980's. The companies did not have access to the confidential future marketing plans of their competitors. This uncertainty was reduced during the code discussions and the likelihood of anticompetitive, interdependent behavior was increased. If the code discussions had not taken place, the uncertainty about their competitors' marketing plans may well have led the various companies to develop plans to institute consumer marketing sooner than they actually did.²⁴

The uncertainty was about whether a competitor would begin mass marketing direct to consumers.

²¹ CCTB, Public Record Vol. 4, at 2994-3000.

²² CCTB, Public Record Vol. 4, at 2995.

²³ RTB, Public Record Vol. 3, at 2798-99.

²⁴ CCTB, Public Record Vol. 4, at 2998-98.

Complaint counsel cite no authority for the proposition that exchanging information about advertising plans is unlawful, relying instead on *United States v. Container Corp.*, 393 U.S. 333 (1969). That case, however, involved an agreement to exchange current price information for use in determining whether to reduce prices to meet competition, and the Court found that the exchange had the effect of stabilizing prices. It is a considerable step from prohibiting an ongoing agreement to exchange current prices to prohibiting discussion of an industry code that reveals company positions on advertising.

Complaint counsel cited only one other case, *United States v. Champion International Corp.*, 1979-2 Trade Cas. (CCH) paragraph 62862, at 78,989 (D. Ore. 1979), in which the parties exchanged information that was available from public sources. The district court, however, distinguished between lawful exchanges of information and unlawful agreements:

Meetings between competitors are not illegal even when coupled with the exchange of information about each participant's interest in upcoming sales. A line must be drawn, however, between the mere exchange of information and an implied agreement to act on this information.²⁵

The court's finding of liability was based on finding an unlawful agreement. Its distinction between lawful exchanges of information and unlawful agreements would be eliminated under the theory of this order, for which the Commission has offered no limiting principle.

Before condemning a business practice as an unfair method of competition in violation of Section 5, the Commission should be confident that the practice is competitively harmful and that the remedy will not unnecessarily impair competitively neutral or procompetitive business activity. It is appropriate to use the "penumbra" of Section 5 of the FTC Act to challenge anticompetitive conduct that cannot be challenged under traditional theories derived from the Sherman and Clayton Acts, but in doing so, the Commission has a responsibility to ensure that conduct so outlawed is, in fact, anticompetitive.

Even acceding to the somewhat unlikely assumption that the companies did discuss their confidential advertising plans during the

²⁵ 1979-2 Trade Cas. (CCH) at 78,990.

discussion of the proposed IFC Code, the competitive significance of the discussions seems questionable, because whatever uncertainty may have existed about competitors' advertising plans would be short lived. Advertising is unlike secret discounts or rebates, which a competitor may not be able to verify. Rather, it is the nature of advertising that a competitor will learn almost instantly of a new advertising campaign and can take appropriate competitive steps to respond.

In this case, any competitive harm can be traced directly to the unlawful agreement not to advertise during the drafting of the code, not to an information exchange. Assuming that the infant formula manufacturers agreed not to advertise during the process of developing a code, the agreement would eliminate any uncertainty about their competitors' plans. To the extent that any of the firms harbored any idea of renegeing on the agreement, they presumably would not disclose it during the code discussions. Absent an agreement, it is not clear that the exchange of information would have had any anticompetitive effect.

The meetings to discuss the IFC Code had a legitimate business purpose, to develop an alternative to the WHO Code that could be used in lobbying legislative bodies. The meetings cannot fairly be analogized to the proverbial meeting of competitors in a smoke-filled room to reach agreement on prices. Abbott's General Counsel recognized the antitrust sensitivity of developing a marketing code at the outset of the process, but believed that the submission of a proposed code to the Department of Justice through the business review process could overcome the problem.²⁶ Dr. Koop's letter to the Infant Formula Council lends support to that view. He suggested that joint adoption of parts of the WHO Code might be lawful and invited the IFC to seek guidance through the business review procedure.²⁷ In an analogous situation, the Commission had issued an advisory opinion to the Wine Institute, which then represented more than half of domestic wine producers, approving the adoption of a Code of Advertising Standards that encouraged the "voluntary forbearance by industry members from the use of advertising themes perceived as socially undesirable" *The Wine Institute*, 91 FTC

²⁶ Excerpts from Johnson transcript, Public Record Vol.2, at 1088, 1091.

²⁷ The code was submitted to the Department under the business review procedure in July 1985, but the request for review was subsequently withdrawn after the Department requested a significant amount of information from the companies.

1190 (1978). Although the wine industry's code did not ban mass media advertising, the commission's advisory opinion clearly accepts industry advertising codes as lawful in some circumstances.

If an exchange of information among competitors that reduces competitive uncertainty is a violation of Section 5, it is difficult to understand how competitors will be able to discuss almost any form of joint activity. In the Container Corp. case, the Court found a violation on the basis of evidence not just of a reduction of uncertainty about discount levels, but also of evidence that prices had been stabilized. In this case, there is no indication that as a result of the exchange of information, as distinguished from the conspiracy, prices were stabilized, output was reduced, or other anticompetitive effects occurred. More importantly, there is no suggestion that the Commission would require such proof before imposing liability. Indeed, it appears that the Commission would not.

Virtually all legitimate discussions among competitors will reduce competitive uncertainty in the same sense that the IFC discussions revealed information about the firms' advertising plans. For example, the recent DOJ/FTC Statements of Antitrust Enforcement Policy in the Health Care Area indicate that certain hospital joint ventures involving high tech or other expensive equipment and certain joint purchasing arrangements do not raise antitrust concerns. In meetings to discuss such proposed joint activities, the competitors almost certainly will make disclosures that reduce competitive uncertainty by revealing their own purchasing plans or plans to acquire high tech equipment. Does the Commission intend to outlaw such discussions, and, if not, by what reasoning does it distinguish them from the instant case?

In creating new causes of action under the FTC Act, the Commission has a responsibility to identify the competitive harm it seeks to prevent and to articulate a theory of liability that does not extend beyond that harm, including whatever limiting principles may be necessary. In this case, I believe the Commission has failed to carry out those serious responsibilities.

IN THE MATTER OF

REDMOND PRODUCTS, INC., ET AL.

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

Docket C-3479. Complaint, Feb. 10, 1994--Decision, Feb. 10, 1994

This consent order prohibits, among other things, a Minnesota-based manufacturer of hair care products and its officer from making unsubstantiated representations regarding the environmental benefits of any cosmetic product in the future.

Appearances

For the Commission: *Michael Dershowitz and Kevin M. Bank.*

For the respondents: *John French, Faegre & Benson, Minneapolis, MN.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Redmond Products, Inc., a corporation, and Thomas M. Redmond, individually and as an officer of said corporation ("respondents"), have violated 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 Redmond Products, Inc. is a Minnesota corporation, with its principal office or place of business at 18930 West 78th Street, Chanhassen, Minnesota.

Respondent Thomas M. Redmond is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporate respondent.

PAR. 2. Respondents have advertised, labeled, offered for sale, sold and distributed certain aerosol hair spray products to the public, including Aussie Mega Styling Spray and New Zealand Hair Paradise

Zapset Hair Spray, which contain the volatile organic compounds (“VOCs”) butane, propane and SD Alcohol 40 (hereinafter “respondents’ products”).

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements, including product labeling, for respondents’ products, including, but not necessarily limited to the attached Exhibits A through D.

The aforesaid product labeling (Exhibits A and B) included the following statements on the front panel of respondents’ products:

ENVIRONMENTAL FORMULA
CONTAINS NATURAL PROPELLANTS AND NO FLUOROCARBONS

The aforesaid product labeling (Exhibit C) included the following statement on the back panel of the Aussie Mega Styling Spray aerosol container:

This advanced environmental formula is a blend of the finest ingredients from nature and science; containing natural propellants and no fluorocarbons.

The aforesaid advertising (Exhibit D) for Aussie Mega Styling Spray included the following statements:

Being Considerate Of Your Environment Doesn’t Mean
Giving Up Sprays And Gels
Environmentally Formulated

PAR. 5. Through the use of the statements contained in the advertisements and product labeling referred to in paragraph four, including but not necessarily limited to the advertisements attached as exhibits A through D, respondents have represented, directly or by implication, that:

1. There are no ingredients in respondents’ products which are damaging to the environment.
2. Because respondents’ products contain natural propellants and no fluorocarbons, respondents’ products do not harm the environment.

PAR. 6. Through the use of statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A through D, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five, respondents possessed and relied upon a reasonable basis that substantiated such representations.

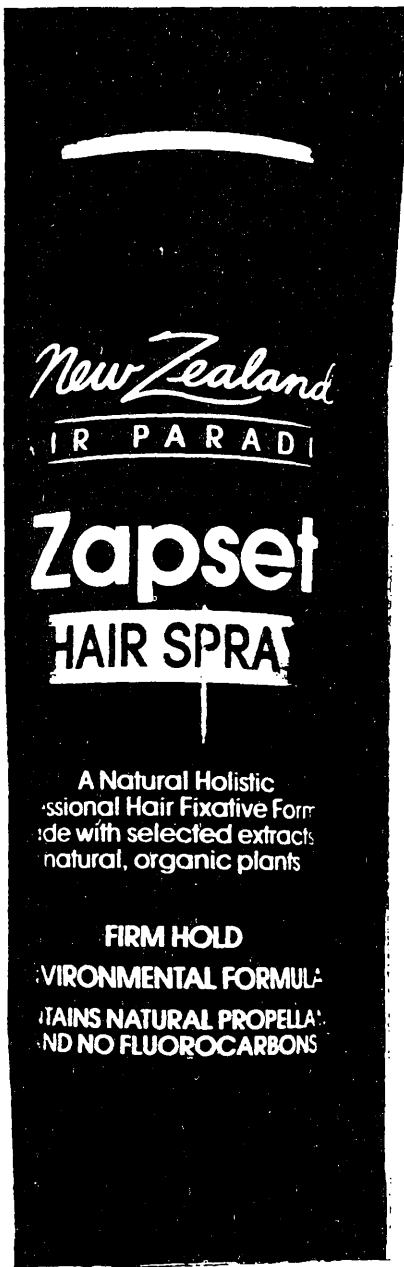
PAR. 7. In truth and in fact, at the time respondents made the representations set forth in paragraph five, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A



EXHIBIT B



Complaint

117 F.T.C.

EXHIBIT C

**What you should know about
AUSSIE MEGA STYLING SPRAY**

A sophisticated salon hair spray with an advanced environmental formula is made with natural ingredients from nature and safe natural propellants and no fluorocarbons. AUSSIE MEGA STYLING SPRAY'S concentration is fast, holding today's new hairstyles in place and wind. This water soluble formula washes and brushes out easily while containing UVB and UVA filters to prevent flyaway hair and protect against discoloration.

SALON DIRECTIONS

Hold upright 8 to 12 inches from hair and spray. Without respraying use damp comb.

WARNING: FLAMMABLE

KEEP AWAY FROM FLAMMABLE. AVOID FIRE. DO NOT USE DURING USE AND UNTIL COMPLETELY DRY. Avoid spraying in enclosed areas. Do not puncture or use at temperature above 120°F. Use only as directed. Intentional or negligent use may be harmful or fatal. KEEP AWAY FROM CHILDREN.

INGREDIENTS

1,1-Dichloroethane, Butane, Propane, Vinyl Acrylate, Vinyl Neodecanoate Copolymer, Ethylhexyl Stearoyl Sulfonate, Panthenol, Lauramide DEA, EXTRACT OF PAW FLOWER, Fragrance, Hydroxyethyl Cellulose, Panthenol, PVP, Ethyl Ester of Hydroxyacetic Acid, Panthenol, PPG-2 Salicylate.



EXHIBIT D

Being Considerate
Of Your Environment Doesn't Mean
Giving Up Sprays And Gels



Environmentally Formulated

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Redmond Products, Inc. is a Minnesota corporation with its office and principal place of business located at 18930 West 78th Street, Chanhassen, Minnesota.

2. Respondent Thomas M. Redmond is an officer of said corporation. He formulates, directs, and controls the acts and practices of said corporation as set forth in the complaint and his address is the same as that of Redmond Products, Inc.

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

ORDER

DEFINITIONS

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

The term “*Volatile Organic Compound*” (“VOC”) means any compound of carbon which participates in atmospheric photochemical reactions as defined by the U.S. Environmental Protection Agency at 40 CFR 51.100(s), and as subsequently amended. When the final rule was promulgated, 57 Fed. Reg. 3941 (February 3, 1992), the EPA definition excluded carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, ammonium carbonate and certain listed compounds that the EPA has determined are of negligible photochemical reactivity.

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

I.

It is ordered, That respondents Redmond Products, Inc., a corporation, its successors and assigns, and its officers, and Thomas M. Redmond, individually and as an officer of said corporation, and respondents’ agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any Redmond hair care product containing any volatile organic compound, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, through the use of such terms as “Environmentally Formulated,” “Environmental Formula Contains Natural Propellants and No Fluorocarbons,” or any other term or expression, that any such product will not harm the atmosphere or the environment, unless at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must

be competent and reliable scientific evidence, that substantiates such representation.

II.

It is further ordered, That respondents, Redmond Products, Inc., a corporation, its successors and assigns, and its officers, and Thomas M. Redmond, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any cosmetic product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that any product offers any environmental benefit, unless at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

III.

Nothing in this order shall prevent respondents from using any of the terms cited in part I, or similar terms or expressions, if necessary to comply with any federal rule, regulation, or law governing the use of such terms in advertising and labeling.

IV.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

1. All materials that were relied upon in disseminating such representation; and
2. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call

into question such representation, or the basis relied upon for such representation, including complaints from consumers.

V.

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

VI.

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

VII.

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

VIII.

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

IN THE MATTER OF

PRESTO FOOD PRODUCTS, INC.

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

Docket C-3480. Complaint, Feb. 23, 1994--Decision, Feb. 23, 1994

This consent order prohibits, among other things, a California corporation from misrepresenting the absolute or comparative amount of total fat, saturated fat, or cholesterol in Mocha Mix, Mocha Mix Lite, or in any milk product or non-dairy substitute and the amount of these nutrients relative to the serving size being advertised for the products.

Appearances

For the Commission: *Rosemary Rosso and Carol Ann Kando.*

For the respondent: *William H. Kitchens, Arnall, Golden & Gregory, Atlanta, GA.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Presto Food Products, Inc. ("respondent"), has violated 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 California corporation with its offices and principal place of business located at 18275 Arenth Avenue, P.O. Box 584, City of Industry, California.

PAR. 2. Respondent has manufactured, advertised, labeled, offered for sale, sold and distributed liquid non-dairy creamers, including Mocha Mix and Mocha Mix Lite, and other food products to consumers. Mocha Mix and Mocha Mix Lite are "foods" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements for Mocha Mix and Mocha Mix Lite, including but not necessarily limited to the advertisements attached as Exhibits A through D. These advertisements contain the following statements and depictions:

A. "There are lots of things people are doing today to take care of their hearts." [Depiction of liquid being poured over a bowl of strawberries followed by a depiction of liquid from a carton of Mocha Mix being poured over a bowl of cereal]. "And one of the ways they start to cut down on cholesterol and saturated fat is with Mocha Mix non-dairy creamer. No cholesterol. Low in saturated fat ... fresh, creamy ... Mocha Mix ... a healthier alternative." [Depiction of a carton of Mocha Mix Lite with a cup of coffee, a bowl of cereal and a bowl of fruit]. (Exhibit A).

B. "Mocha Mix is cholesterol free and low in saturated fat. It's Mocha Mix. The original healthier alternative ..." [Depiction of liquid from a carton of Mocha Mix being poured into bowls of cereal and a cup of coffee] "... that's now available in Lite." [Depiction of a carton of Mocha Mix Lite next to a bowl of cereal, bowl of fruit, and cup of coffee]. (Exhibit B).

C. "The Healthier Alternative" [Depiction of a carton of Mocha Mix and a carton of Mocha Mix Lite and a cup of coffee. The carton of Mocha Mix includes the phrases, "Low in saturated fat" and "For coffee, cereal, fruits, desserts and cooking." The Mocha Mix Lite carton includes the phrases, "Lowfat non-dairy creamer" and "For cereals, fruits, coffee and cooking" and a depiction of liquid being poured into a bowl of cereal next to a cup of coffee]. (Exhibit C).

D. "SAVE \$.25 On The Healthier Alternative." [Depiction of a carton of Mocha Mix next to a cup of coffee and a bowl filled with cereal and strawberry slices; the carton of Mocha Mix includes the phrases "For Coffee, Cereals, Fruits, Desserts and Cooking," "LOW IN SATURATED FAT" and "NO TROPICAL OILS."] "... Use Mocha Mix in place of milk or cream to help your family cut down on cholesterol and saturated fat." (Exhibit D).

PAR. 5. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A through D, respondent has represented, directly or by implication, that:

A. Mocha Mix is a low saturated fat product when consumed in an amount normal for use on cereal, on fruit or in cooking.

B. Mocha Mix is lower in saturated fat than other foods, such as low-fat (1%- or 2%) or whole milk, for which it would be a substitute when used on cereal, on fruit or in cooking.

PAR. 6. In truth and in fact:

A. Mocha Mix is not a low saturated fat product when consumed in an amount normal for use on cereal, on fruit or in cooking.

B. Mocha Mix is not lower in saturated fat than other foods, such as low-fat (1% or 2%) or whole milk, for which it would be a substitute when used on cereal, on fruit or in cooking. A one-half cup serving of Mocha Mix has 2.48 grams of saturated fat, which represents over three times the amount of saturated fat in a one-half cup serving of low-fat (1%) milk (0.79 grams), over one and one-half times the amount of saturated fat in a one-half cup serving of low-fat (2%) milk (1.4 grams) and about the same amount of saturated fat as whole milk (2.5 grams).

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

PAR. 7. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A through D, respondent has represented, directly or by implication, that:

A. Mocha Mix Lite is a low-fat product when consumed in an amount normal for use on cereal, on fruit or in cooking.

B. Mocha Mix Lite is lower in fat than other foods, such as low-fat (1% or 2%) or whole milk, for which it would be a substitute when used on cereal, on fruit or in cooking.

PAR. 8. In truth and in fact:

A. Mocha Mix Lite is not a low-fat product when consumed in an amount normal for use on cereal, on fruit or in cooking.

B. Mocha Mix Lite is not lower in fat than other foods, such as low-fat (1% or 2%) or whole milk, for which it would be a substitute when used on cereal, on fruit or in cooking. A one-half cup serving of Mocha Mix Lite has 6.16 grams of fat, which represents nearly five times the amount of fat in a one-half cup serving of low-fat (1%) milk (1.27 grams), nearly three times the amount of fat in a one-half cup serving of low-fat (2%) milk (2.3 grams) and over one and one-

half times the amount of fat in a one-half cup serving of whole milk (4 grams).

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

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

EXHIBIT A

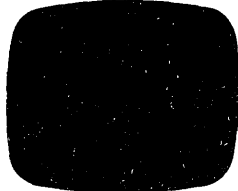
PRESTO FOOD PRODUCTS
Mocha-Mix® Non-Dairy Creamer
"HEARTBEATS" :30 MMCT 7000

Agency: JWT.L.A.

Producer: Coppo Films



SFX: Heartbeats. (Strong Runner's Pulse)
MUSIC THROUGHOUT.



ANNCR: There are lots of things ...



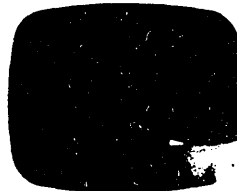
... people are doing today ...



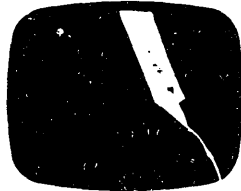
to take care of their hearts.



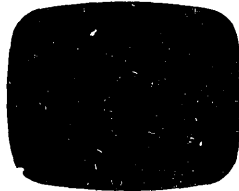
And one of the ways they start to
cut down on ...



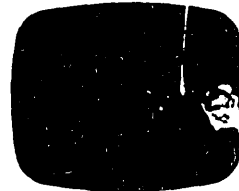
... cholesterol and saturated fat ...



... is with Mocha Mix non-dairy
creamers.



No cholesterol ...



... Low in saturated fat ...



... fresh, creamy ...



... Mocha Mix ...



A Healthier
Alternative

... a healthier alternative.



18275 ARENTH AVENUE P.O. BOX 584 INDUSTRY CALIFORNIA 91747-0584

A000024

EXHIBIT A

Complaint

117 F.T.C.

EXHIBIT B

ALCOHOL

11/18/54

RECEIVED BY THE COMMISSION 11/18/54









	<p>Business deals to take.</p>		<p>Business deals to take.</p>
	<p>So now they're making right use of the "Business Deal" they "bought".</p>		<p>Business deals to take.</p>
	<p>Now he has a big bank And Lord knows he won't be "bought" again.</p>		<p>Business deals to take.</p>
	<p>AND: The "Business Deal" has been "bought" by the MEMBERHOOD</p>		<p>Business deals to take.</p>

EXHIBIT B

Complaint

EXHIBIT B

AT 00035

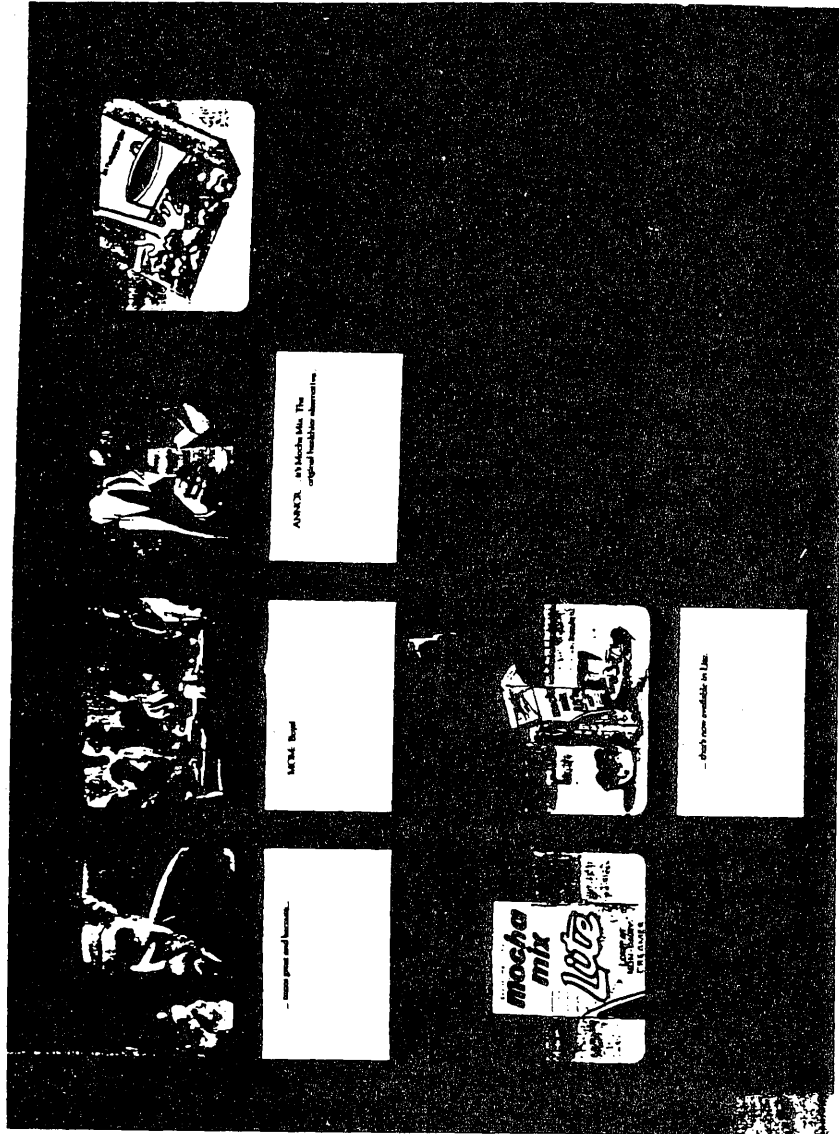


EXHIBIT C

SAVE 40¢
mocha mix.
Lite
 ONE HALF NON-DAIRY CREAMER

© 1991 PH. Most companies in the United States do not use the word "lite" or "light" to describe a product that is significantly lower in calories than the standard product. PH International has introduced a new "lite" mocha mix with a significantly lower calorie content. PH International is pleased to announce this new product. PH International is not responsible for the actions of any other company. PH International is not responsible for the actions of any other company. PH International is not responsible for the actions of any other company.

SAVE 25¢
 ON ANY SIZE
mocha mix.
 NON-DAIRY CREAMER
 ORIGINAL OR LITE

© 1991 PH. Most companies in the United States do not use the word "original" or "lite" to describe a product that is significantly lower in calories than the standard product. PH International has introduced a new "original" mocha mix with a significantly lower calorie content. PH International is pleased to announce this new product. PH International is not responsible for the actions of any other company. PH International is not responsible for the actions of any other company. PH International is not responsible for the actions of any other company.

COUPON DROP JANUARY 6, 1991
ORDER EXTRA PRODUCT

A000015

SAVE 25¢ ON THE HEALTHIER ALTERNATIVE™

MOCHA MIX™ THE FRESH-TASTING
LIQUID NON-DAIRY CREAMER

For Coffee, Cereals,
Fruits, Desserts
and Cooking



- LOW IN CHOLESTEROL
- LOW IN SATURATED FAT
- NO TROPICAL OILS
- 100% MILK-FREE
- LOW IN SODIUM

Take this coupon to your grocer for 25¢ off any size carton. Use Mocha Mix® in place of milk or cream to help your family cut down on cholesterol and saturated fat.

25¢ OFF ANY SIZE CARTON

A000000

mocha mix®

NON-DAIRY CREAMER



RETAILER: Mail coupons to Presto Food Products, P.O. Box #7000, Elgin, IL 60120. You will be charged 25¢ per coupon. No cash value. Coupon must be used on any size carton of Mocha Mix® liquid non-dairy creamer. Void where prohibited. © 1990 Presto Food Products. Limit one coupon per purchase. Any other use constitutes fraud.

MANUFACTURER COUPON

Were in your grocers dairy EXHIBIT D

DECISION AND ORDER

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

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

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

1. Respondent Presto Food Products, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 18275 Arenth Avenue, P.O. Box 584, City of Industry, State of 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

DEFINITIONS

For purposes of this order, the term "*milk product*" shall mean any product for which a federal standard of identity has been established under 21 CFR 131 as currently in effect as of the date of this order.

For purposes of this order, the term "*non-dairy substitute*" shall mean any product which is commonly used as a substitute for a milk product.

I.

It is ordered, That Presto Food Products, Inc., its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, labelling, promotion, offering for sale, sale or distribution of Mocha Mix, Mocha Mix Lite or any other food, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting in any manner, directly or by implication, through numerical or descriptive terms or any other means, the absolute or comparative amount of total fat, saturated fat, or cholesterol in any milk product or any non-dairy substitute; and

B. Misrepresenting in any manner, directly or by implication, through numerical or descriptive terms or any other means, the existence or amount of total fat, saturated fat, or cholesterol in any milk product or non-dairy substitute relative to the serving size or amount customarily consumed for any particular use being advertised or promoted.

Provided, however, that nothing in provisions A and B above shall prohibit any representation as to the amount of total fat, saturated fat or cholesterol in any milk product or non-dairy substitute if such representation is specifically permitted in labeling, for the serving size advertised or promoted for such product, by regulations promulgated by the U.S. Food and Drug Administration pursuant to the Federal Food, Drug and Cosmetic Act.

II.

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

A. All materials that were relied upon by the respondent in disseminating any representation covered by this order; and

B. All test reports, studies, surveys, demonstrations or other evidence in its possession or control that contradict, qualify, or call into question any representation that is covered by this order.

III.

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

IV.

It is further ordered, That respondent shall, within thirty (30) days after service upon it of this order, distribute a copy of this order to each of its operating divisions, to each of its managerial employees, and to each of its officers, agents, representatives, or employees engaged in the preparation or placement of advertising or other material covered by this order.

V.

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

IN THE MATTER OF

BALTIMORE METROPOLITAN PHARMACEUTICAL
ASSOCIATION, INC., ET AL.

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

Docket 9262. Complaint, Sept. 28, 1993--Decision, Feb. 25, 1994

This consent order prohibits, among other things, two Maryland associations from entering into, or organizing or encouraging any agreement among pharmacy firms to refuse to participate in third-party payer prescription drug reimbursement plans and prohibits, for five years, the respondents from providing comments or advice to any pharmacist or pharmacy on the desirability, profitability, or appropriateness of participating in any existing or proposed participation agreement.

Appearances

For the Commission: *John R. Hoagland and Michael D. McNeely.*

For the respondents: *Joseph Kaufman, Fedder & Garten, P.A., Baltimore, MD.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Baltimore Metropolitan Pharmaceutical Association and the Maryland Pharmacists Association, Inc. (hereinafter sometimes referred to as "BMPA" and "MPhA," respectively, or as "respondents," collectively), have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Baltimore Metropolitan Pharmaceutical Association, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland. Respondent Maryland Pharmacists Association, Inc., is

a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland. Both respondents have their offices and principal places of business located at 650 West Lombard Street, Baltimore, Maryland. Respondents are associations of pharmacists who practice or reside in the State of Maryland. In 1988, respondents were, and still are, affiliated.

PAR. 2. Respondents share common offices and staff, including a common executive director. Most of respondent BMPA's members are also members of respondent MPhA.

PAR. 3. Members of respondents hold ownership interests in or manage pharmacy firms that, except to the extent that competition has been restrained as alleged herein, have been and are now in competition with each other and with other pharmacy firms and other health care providers in the State of Maryland.

PAR. 4. Respondents' general business or activities, and the acts and practices described below, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondents are and have been, at all times relevant to this complaint, corporations organized for the profit of their members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 6. Customers often receive prescriptions through health benefit programs under which a third-party payer compensates the pharmacy directly for the prescription according to a predetermined formula ("prescription drug benefit plan"). A pharmacy that has agreed to accept reimbursements under this formula is called a "participating pharmacy." One of the primary consumer benefits of such programs is that the customer is required to pay only a small set amount, known in the industry as the "customer co-pay," to the participating pharmacy for each prescription, regardless of the actual price of the prescription.

PAR. 7. PCS Plan #354 ("Plan") was a prescription drug benefit plan made available by the City of Baltimore, Maryland, ("City") to its employees, its retirees, and their dependents. There were approximately 100,000 beneficiaries covered by the Plan in 1988. Between August 1, 1987, and June 30, 1989, The Prudential Insurance Company of America ("Prudential") insured the Plan, and PCS, Inc. ("PCS") administered the Plan. While the contract between the City and Prudential did not set the reimbursement terms of the Plan, thus permitting Prudential to change the reimbursement rate at

any time, the contract did require Prudential to have at least 100 participating pharmacies within the City.

PAR. 8. Pharmacies were initially solicited to participate in the Plan for the period August 1, 1987, to June 30, 1989. Participating pharmacies in the Plan accepted as payment in full a reimbursement of the ingredient cost of the drug and a professional fee for dispensing the drug. A portion of the professional fee was in the form of the customer co-pay. The Plan set the Average Wholesale Price ("AWP") of the drug as the upper limit for the reimbursement of the ingredient cost of drugs dispensed. Prior to August 15, 1988, most pharmacies in the State of Maryland billed PCS at AWP for the drugs dispensed under the Plan.

PAR. 9. In 1988, respondents' members held ownership interests in pharmacy firms that participated in many prescription drug benefit plans offered by third-party payers, including the Plan as it existed prior to August 15, 1988. These pharmacy firms would have suffered a significant loss of customers had their competitors participated in the Plan when they were not participating.

PAR. 10. On August 5, 1988, PCS sent letters to all of the pharmacies participating in the Plan announcing that, on August 15, 1988, Prudential would reduce the upper limit of the reimbursement rate for ingredient costs for drugs to AWP minus 10%. The proposed reduction was intended to minimize costs by reducing the price paid the pharmacies for serving City employees, retirees, and their dependents, while offering a reimbursement rate high enough to attract a sufficient number of pharmacies to ensure that there were at least 100 participating pharmacies within the City.

PAR. 11. Absent collusion between or among pharmacy firms, each pharmacy firm would have decided independently whether to participate in the Plan, and the City would have enjoyed the benefits of competition among pharmacy firms.

PAR. 12. On about August 12, 1988, respondents' members began informing respondents of the proposed reduction in the Plan's reimbursement rate. Respondents held meetings where the reimbursement rate reduction and possible action in response to it were discussed. Respondents communicated to pharmacists the need for pharmacies within the City to refuse to participate in the Plan so that Prudential would be in violation of its contractual obligation to have at least 100 participating pharmacies within the City and thus be forced to raise the reimbursement rate to its original level.

Respondents requested pharmacists to notify them if their pharmacies did not intend to participate in the Plan. Respondents kept a list identifying those pharmacies that intended to stop participating in the Plan and communicated this information to their members. Through these exchanges of information, respondents' members were informed that a sufficient number of pharmacies had agreed to stop participating in the Plan to reduce the number of participating pharmacies within the City to below 100.

PAR. 13. At some point in late September or early October, 1988, many of respondents' members agreed to stop participating in the Plan as of November 1, 1988. Respondent BMPA sent a letter to City pharmacists in late October, 1988, which urged member pharmacists to "follow through with your November 1 commitment to no longer accept discounted AWP reimbursements." By October 31, 1988, more than 75 pharmacies operated by member pharmacists within the City had agreed to stop participating in the Plan. On November 1, 1988, these pharmacies began to boycott the Plan.

PAR. 14. As a result of the activities described above and the resulting boycott, Prudential was placed in violation of its contract with the City and was forced to raise the reimbursement rate back to AWP on November 5, 1988.

PAR. 15. Respondents have restrained competition among pharmacy firms by conspiring with their members and with others, and by acting as a combination of their members, to increase the price paid to participating pharmacies under the Plan.

PAR. 16. The combination or conspiracies and the acts and practices described above have unreasonably restrained competition among pharmacists and pharmacies in the State of Maryland, and have injured consumers in the following ways, among others:

A. Price competition among pharmacy firms with respect to prescription drug benefit plans has been and continues to be reduced; and

B. The cost of providing prescription drug benefit plans was increased.

PAR. 17. The combination or conspiracies and the acts and practices described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The combination or conspiracies, or the

effects thereof, are continuing, will continue, or will recur in the absence of the relief herein requested.

DECISION AND ORDER

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

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

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

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

1. Respondent Baltimore Metropolitan Pharmaceutical Association is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland. Respondent Maryland Pharmacists Association is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland. Both respondents have their offices and principal places of business at 650 West Lombard Street, Baltimore, Maryland.

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 purposes of this order, the following definitions shall apply:

A. "*BMPA*" means the Baltimore Metropolitan Pharmaceutical Association, Inc., and its directors, committees, officers, agents, representatives, employees, successors and assigns;

B. "*MPhA*" means the Maryland Pharmacists Association, Inc., and its directors, committees, officers, agents, representatives, employees, successors and assigns;

C. "*Third-party payer*" means any person or entity that provides a program or plan pursuant to which such person or entity agrees to pay for prescriptions dispensed by pharmacies to individuals described in the plan or program as eligible for coverage ("Covered Persons"), and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Cross and Blue Shield plans; health maintenance organizations; preferred provider organizations; prescription service administrative organizations; and health benefits programs for government employees, retirees and dependents;

D. "*Participation agreement*" means any existing or proposed agreement, oral or written, in which a third-party payer agrees to reimburse a pharmacy firm for the dispensing of prescription drugs to Covered Persons, and the pharmacy firm agrees to accept such payment from the third-party payer for such prescriptions dispensed during the term of the agreement;

E. "*Pharmacy firm*" means any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, that owns, controls or operates one or more pharmacies, including the directors, officers, employees, and agents of such partnership, sole proprietorship or corporation, as well as the directors, officers, employees, and agents of such partnership's, sole proprietorship's or corporation's subsidiaries, affiliates, divisions and joint ventures. The words "subsidiary," "affiliate," and "joint venture" refer to any firm in which there is partial (10% or more) or total ownership or control between corporations.

II.

It is ordered, That BMPA and MPhA, directly, indirectly, or through any corporate or other device, in or in connection with their activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, forthwith cease and desist from:

A. Entering into, threatening or attempting to enter into, organizing, encouraging, continuing, cooperating in, or carrying out any agreement between or among pharmacy firms, either express or implied, to withdraw from, threaten to withdraw from, refuse to enter into, or threaten to refuse to enter into, any participation agreement;

B. For a period of five (5) years after the date this order becomes final, continuing a formal or informal meeting of representatives of pharmacy firms after 1) any person makes any statement concerning one or more firms' intentions or decisions with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement and BMPA or MPhA fails to eject such person from the meeting, or 2) two persons make any such statements;

C. For a period of five (5) years after the date this order becomes final, communicating in any way to, or soliciting in any way from, any pharmacist or pharmacy firm any information concerning any pharmacy firm's intention or decision with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement; and

D. For a period of five (5) years after the date this order becomes final, providing comments or advice to any pharmacist or pharmacy firm on the desirability, profitability or appropriateness of participating in any existing or proposed participation agreement. However, nothing in this paragraph shall prohibit BMPA or MPhA from communicating purely factual information describing the terms and conditions of any participation agreement or operations of any third-party payers.

Provided that nothing in this order shall be construed to prevent BMPA or MPhA from exercising rights protected under the First

Amendment to the United States Constitution to petition any federal, state, or local government executive agency or legislative body concerning legislation, rules, programs, procedures, or plans, or to participate in any federal, state, or local administrative or judicial proceeding.

III.

It is further ordered, That:

A. BMPA distribute by first-class mail a copy of this order and the accompanying complaint to each of its members within sixty (60) days after the date this order becomes final;

B. MPhA distribute by first-class mail a copy of this order and the accompanying complaint to each of its members that is not also a member of BMPA, within sixty (60) days after the date this order becomes final;

C. MPhA publish this order and the accompanying complaint in an issue of *The Maryland Pharmacist* or in any successor publication published no later than ninety (90) days after the date this order becomes final, in the same type size normally used for articles that are published in *The Maryland Pharmacist* or successor publication;

D. BMPA and MPhA, for a period of five (5) years after the date this order becomes final, provide each new BMPA member and MPhA member with a copy of this order at the time the member is accepted into membership of BMPA or MPhA;

E. BMPA and MPhA each file a verified, written report with the Commission within ninety (90) days after the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may, by written notice to BMPA or MPhA, require, setting forth in detail the manner and form in which it has complied and is complying with the order;

F. BMPA and MPhA for a period of five (5) years after the date this order becomes final, maintain and make available to Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by parts II and III of this order, including, but not limited to, all documents generated by BMPA or MPhA or that come into BMPA's or MPhA's possession, custody, or control regardless

of source, that embody, discuss or refer to the terms or conditions of any participation agreement; and

G. BMPA and MPhA notify the Commission at least thirty (30) days prior to any proposed change in BMPA or MPhA such as, assignment or sale resulting in the emergence of a successor corporation or association, change of name, change of address, dissolution, or any other change that may affect compliance with this order.