

Complaint

124 F.T.C.

IN THE MATTER OF

BRUNO'S, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FAIR CREDIT REPORTING ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3760. Complaint, July 29, 1997--Decision, July 29, 1997*

This consent order requires, among other things, the Alabama-based grocery chain to comply with the provisions of the Fair Credit Reporting Act requiring the consumers to be notified when they are denied credit, insurance or a job based in whole or in part on information in their credit report and requiring the denying company to provide the name and address of the consumer reporting agency that supplied the report.

Appearances

For the Commission: *Tom Carter and William D. Griggs.*

For the respondent: *Mark Taliaserro, Burr & Forman,*
Birmingham, AL.

COMPLAINT

Pursuant to the provisions of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Bruno's, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

DEFINITIONS

For the purposes of this complaint, the following definitions are applicable. The terms "*consumer*," "*consumer report*," and "*consumer reporting agency*" shall be defined as provided in Sections 603(c), 603(d), and 603(f), respectively, of the Fair Credit Reporting Act, 15 U.S.C. 1681a(c), 1681a(d) and 1681a(f).

PARAGRAPH 1. Respondent Bruno's, Inc. is a corporation organized, existing and doing business under and by virtue of the

laws of the State of Alabama, with its office and principal place of business located at 800 Lakeshore Parkway, Birmingham, Alabama.

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

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

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 Respondent, in the ordinary course and conduct of its business, has denied applications or rescinded offers for employment with respondent based in whole or in part on information supplied by a consumer reporting agency, but has failed to advise consumers that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

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

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

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 Dallas Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 615(a) of the Fair Credit Reporting Act and Section 5(a) of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an

admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent Bruno's, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its office and principal place of business located at 800 Lakeshore Parkway, Birmingham, Alabama.

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

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

I.

It is ordered, That respondent Bruno's, 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 any application for employment, do forthwith cease and desist from failing, whenever employment is denied either wholly or partly because of information contained in a consumer report from a consumer reporting agency, to disclose to the

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

II.

It is further ordered, That respondent, and its successors and assigns, shall for at least five (5) years from the date of issuance of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying, documents demonstrating compliance with the requirements of Part I of this order, such documents to include, but not be limited to, all employment evaluation criteria relating to consumer reports, instructions given to employees regarding compliance with the provisions of this order, all written notices or a written or electronically stored notation of the description of the form of notice and date such notice was provided to applicants pursuant to any provisions of this order, and the complete application files for all applicants for whom consumer reports were obtained for whom offers of employment are not made or have been withheld, withdrawn, or rescinded based, in whole or in part, on information contained in a consumer report.

III.

It is further ordered, That respondent shall deliver a copy of this order at least once per year for a period of five (5) years from the date of issuance of this order, to all persons responsible for the respondent's compliance with Section 615(a) of the Fair Credit Reporting Act.

IV.

It is further ordered, That respondent shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed

change in the corporate structure of respondent such as dissolution, assignment, or sale resulting in the emergence of a successor operation, the creation or dissolution of subsidiaries or divisions, or any other change in the corporation which may affect compliance obligations arising out of the order.

V.

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

VI.

It is further ordered, That this order will terminate on July 29, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

CADENCE DESIGN SYSTEMS, INC.

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-3761. Complaint, Aug. 7, 1997--Decision, Aug. 7, 1997

This consent order requires, among other things, the California corporation to allow developers of commercial integrated circuit routing tools to participate in the Cadence "Connection Program" and any other Cadence independent software interface programs that enable independent software developers to develop and sell interfaces to Cadence layout tools and environments. The consent order requires Cadence to offer participation to independent software developers on terms no less favorable than those applicable to any other participant in the program, which currently has approximately 100 partners.

Appearances

For the Commission: *Robert N. Cook and Joseph Krauss.*

For the respondent: *Christopher O.B. Wright, Cooley Godward LLP, Palo Alto, CA.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Cadence Design Systems, Inc. proposes to merge with Cooper & Chyan Technology, Inc. in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, 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:

I. THE RESPONDENT

1. Respondent Cadence Design Systems, Inc. ("Cadence") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2655 Seely Road, San Jose, California. Cadence has annual worldwide sales of approximately

\$741 million, nearly all of which is attributable to electronic design automation products and services, and more than \$70 million of which is attributable to sales of integrated circuit layout environments.

2. At all times relevant herein, the respondent has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44; and at all times relevant herein, the respondent has been, and is now, engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

II. THE PROPOSED MERGER

3. Cooper and Chyan Technology, Inc. ("CCT") is a corporation organized, existing, and doing business under the laws of Delaware. CCT has annual worldwide sales of approximately \$37.6 million, of which approximately \$13 million is attributable to integrated circuit routing tools and related services, with the balance attributable to printed circuit board routing tools and related services.

4. Pursuant to an Agreement and Plan of Merger and Reorganization dated October 28, 1996, Cadence plans to acquire control of CCT by exchanging Cadence voting securities for the outstanding voting securities of CCT in a transaction valued at more than \$400 million (the "Proposed Merger").

III. THE RELEVANT MARKETS

5. Research, development, and sale of constraint-driven, shape-based integrated circuit routing tools constitute one relevant line of commerce within which to analyze the competitive effects of the Proposed Merger. A constraint-driven, shape-based integrated circuit routing tool is software used to automate the determination of the connections between the electronic components within an integrated circuit. An integrated circuit is a complex electronic circuit that consists of as many as five million or more miniature electronic components -- such as transistors, resistors, capacitors, and diodes -- on a piece of semiconductor material smaller than a postage stamp.

6. There are no acceptable substitutes for constraint-driven, shape based integrated circuit routing tools. Routing tools based on other technology cannot accommodate unique problems that arise at deep

submicron scales of integrated circuit design (less than .35 micron). Furthermore, at deep submicron scales of design, it is not commercially feasible to route integrated circuit designs without automation. Given the sheer complexity and density of deep submicron integrated circuit designs, as well as the intense time-to-market pressures faced by semiconductor companies in today's fast-paced electronics industry, hand routing is not an alternative for the timely and accurate design of integrated circuits.

7. Integrated circuit layout environments also constitute a relevant line of commerce in which to analyze the competitive effects of the Proposed Merger. Integrated circuit layout environments are software infrastructures within which integrated circuit designers access integrated circuit layout tools, including constraint-driven, shape-based routing tools. Integrated circuit layout tools and integrated circuit layout environments are used during the physical design stage of the integrated circuit design process. The physical design stage is distinct from, and occurs after, the logical design stage of the integrated circuit design process.

8. The relevant geographic market within which to analyze the Proposed Merger is worldwide.

IV. CONCENTRATION

9. CCT is currently the only firm with a commercially viable constraint-driven, shape-based integrated circuit routing tool. At least one other firm with constraint-driven, shape-based routing technology is in the process of developing a constraint-driven, shape-based integrated circuit routing tool.

10. Cadence is the dominant supplier of integrated circuit layout environments. Cadence's leading competitor in the supply of integrated circuit layout environments is the Avant! Corporation. Avant! and several of its top executives have been charged criminally with conspiracy and theft of trade secrets from Cadence.

V. ENTRY CONDITIONS

11. There are substantial barriers to entry in the market for constraint-driven, shape-based integrated circuit routing tools. Constraint-driven, shape-based integrated circuit routing tools are technologically complex and difficult to develop. *De novo* entry takes approximately two to three and a half years for a company that

already possesses certain underlying core technology that can be used to develop a constraint-driven, shape-based integrated circuit router (such as shape-based routing technology for printed circuit boards). Entry is likely to take even longer for a company that does not possess such technology.

12. In order to achieve the necessary compatibility between the integrated circuit layout tools that they use, integrated circuit designers select integrated circuit layout tools that have interfaces to a common integrated circuit layout environment.

13. Since Cadence is the dominant supplier of integrated circuit layout environments, a constraint-driven, shape-based integrated circuit routing tool that lacks an interface into a Cadence integrated circuit layout environment is less likely to be selected by integrated circuit designers than a constraint-driven, shape-based integrated circuit routing tool that possesses an interface into a Cadence integrated circuit layout environment.

14. An integrated circuit layout environment is not likely to be selected by integrated circuit designers unless a full set of compatible integrated circuit layout tools is available. A full set of integrated circuit layout tools includes at least placement, routing, and analysis and verification tools, each of which must be able to interface into the integrated circuit layout environment that the integrated circuit designer has selected.

VI. EFFECTS OF THE PROPOSED MERGER ON COMPETITION

15. It is in Cadence's interest to make available to users of a Cadence integrated circuit layout environment a complete set of integrated circuit layout tools, because to do so makes the Cadence integrated circuit layout environment more valuable to integrated circuit designers. Cadence historically has provided access to Cadence integrated circuit layout environments to suppliers of complementary integrated circuit layout tools that Cadence does not supply.

16. Cadence does not, however, have incentives to provide access to a Cadence integrated circuit layout environment to suppliers of integrated circuit layout tools that compete with Cadence products. Cadence historically has been reluctant to provide access to Cadence integrated circuit layout environments to suppliers of integrated circuit layout tools that compete with Cadence products.

17. Prior to the Proposed Merger, Cadence did not have a commercially viable constraint-driven, shape-based integrated circuit routing tool. As a result of the Proposed Merger, Cadence will own the only currently available commercially viable constraint-driven, shape-based integrated circuit routing tool. For this reason, the Proposed Merger will make Cadence less likely to permit potential suppliers of competing constraint-driven, shape-based integrated circuit routing tools to obtain access to Cadence integrated circuit layout environments.

18. Without access to Cadence integrated circuit layout environments, developers are less likely to gain successful entry into the market for constraint-driven, shape-based integrated circuit routing tools.

19. The Proposed Merger will make it more likely that successful entry into the constraint-driven, shape-based integrated circuit routing tool market would require simultaneous entry into the market for integrated circuit layout environments. This need for dual-level entry will decrease the likelihood of entry into the market for constraint-driven, shape-based integrated circuit routing tools.

20. The Proposed Merger may substantially lessen competition or tend to create a monopoly in the market for constraint-driven, shape-based integrated circuit routing tools. The Proposed Merger may, among other things, lead to higher prices, reduced service, and less innovation.

VII. VIOLATIONS CHARGED

21. The Proposed Merger of Cadence Design Systems, Inc. and Cooper & Chyan Technology, Inc., described in paragraph four, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45 and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

Commissioner Azcuenaga concurring in part and dissenting in part, and Commissioner Starek dissenting.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Cadence Design Systems, Inc. ("Cadence") of Cooper & Chyan Technology, Inc. ("CCT") and having been furnished thereafter with a copy of a draft

of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; 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 the respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Cadence is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2655 Seely Road, San Jose, 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

I.

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

A. "*Cadence*" means Cadence Design Systems, Inc., its directors, officers, employees, agents and representatives, predecessors,

successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Cadence Design Systems, Inc., and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

B. "*CCT*" means Cooper & Chyan Technology, Inc., a company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1601 South De Anza Boulevard, Cupertino, California.

C. "*Respondent*" means Cadence.

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

E. "*Acquisition*" means the acquisition by Cadence of CCT.

F. "*Independent Software Interface Programs*" means respondent's Connections Program™, any successor program thereto, or other licensing program, promotional program or other arrangement by which respondent enables independent software developers to provide interfaces to respondent's Integrated Circuit Design Tools (including, e.g., licenses to the SKILL Programming Language, the SKILL Development Environment, the Virtuoso Layout Editor, and other intellectual property and documentation made available through such programs).

G. "*Integrated Circuit Design Tool*" means electronic design automation software for integrated circuit design.

H. "*Integrated Circuit Routing Tool*" means an Integrated Circuit Design Tool for the automated routing of connections between electronic components within an integrated circuit.

I. "*Commercial Integrated Circuit Routing Tool*" means an Integrated Circuit Routing Tool marketed for sale or intended by the developer for use other than solely for the developer's internal use.

II.

It is further ordered, That:

A. Respondent shall permit developers of Commercial Integrated Circuit Routing Tools to participate in Independent Software Interface Programs. The terms by which developers of Commercial Integrated Circuit Routing Tools participate in respondent's Independent Software Interface Programs shall be no less favorable than the terms applicable to any other participants in respondent's Independent Software Interface Programs.

B. The purpose of this paragraph II is to enable independent software developers to develop and sell Integrated Circuit Routing Tools for use in conjunction with respondent's Integrated Circuit Design Tools, in competition with Integrated Circuit Routing Tools offered by respondent, and to remedy the lessening of competition resulting from the proposed Acquisition as alleged in the Commission's complaint.

III.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without prior notification to the Commission, directly or indirectly:

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged in the development or sale of Integrated Circuit Routing Tools in the United States within the year preceding such acquisition; provided, however, that an acquisition of such stock, share capital, equity or other interest will be exempt from the requirements of this paragraph if it is solely for the purpose of investment and respondent will hold no more than ten (10) percent of the shares of any class of security; or

B. Acquire any assets used or previously used (and still suitable for use) in the development or sale of Integrated Circuit Routing Tools in the United States; provided, however, that such an acquisition will be exempt from the requirements of this paragraph if the purchase price is less than \$5,000,000 (five million dollars).

The prior notifications required by this paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared, transmitted and kept confidential in accordance with the requirements of that part, except that: no filing fee will be required for any such notification; notification shall be filed with the Secretary of the Commission and a copy shall be delivered to the Bureau of Competition; notification need not be made to the United States Department of Justice; and notification is required only of respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty (30) days prior to the consummation of any such transaction (hereinafter referred to as the "initial waiting period"). If, within the initial waiting

period, the Commission or its staff makes a written request for additional information and documentary material, respondent shall not consummate the transaction until at least twenty (20) days after complying with such request for additional information and documentary material. Early termination of the waiting periods in this paragraph may, where appropriate, be granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

IV.

It is further ordered, That, within sixty (60) days after the date this order becomes final, respondent shall submit to the Commission a verified written report setting forth in detail a full description of the manner and form in which it intends to comply, is complying, and has complied with paragraph II of this order.

V.

It is further ordered, That, one year from the date this order becomes final, annually thereafter for the next nine (9) years, and at other times as the Commission may require, respondent shall file with the Commission verified written reports setting forth in detail the manner and form in which respondent has complied and is complying with this order.

VI.

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

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondent shall permit any duly authorized representative of the Commission:

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

B. Upon five (5) days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

VIII.

It is further ordered, That this order shall terminate on August 7, 2007.

Commissioner Azcuenaga concurring in part and dissenting in part, and Commissioner Starek dissenting.*

INTERIM AGREEMENT

This Interim Agreement is by and between Cadence Design Systems, Inc., a corporation organized and existing under the laws of the State of Delaware ("Cadence"), and the Federal Trade 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.* (the "Commission").

PREMISES

Whereas, Cadence has proposed to acquire all of the voting securities of Cooper & Chyan Technology, Inc. ("CCT") pursuant to the Agreement and Plan of Merger and Reorganization by and between Cadence and CCT, dated October 28, 1996 ("the proposed Merger");

Whereas, the Commission is now investigating the proposed Merger to determine if it would violate any of the statutes the Commission enforces;

Whereas, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement") in this matter, the Commission will place it on the public record for a period of at least sixty (60) days and subsequently may either withdraw such acceptance or issue and serve its complaint and decision in

* Prior to leaving the Commission, former Commissioner Varney registered a vote in the affirmative for issuing the complaint and the decision & order in this matter.

disposition of the proceeding pursuant to the provisions of Section 2.34 of the Commission's Rules;

Whereas, the Commission is concerned that if an understanding is not reached during the period prior to the final issuance of the Consent Agreement by the Commission (after the 60-day public notice period), there may be interim competitive harm;

Whereas, the entering into this Interim Agreement by Cadence shall in no way be construed as an admission by Cadence that the proposed Merger constitutes a violation of any statute; and

Whereas, Cadence understands that no act or transaction contemplated by this Interim 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 Interim Agreement.

Now, therefore, Cadences agrees, upon the understanding that the Commission has not yet determined whether the proposed Merger will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Consent Agreement for public comment, it will grant early termination of the Hart-Scott-Rodino waiting period, as follows:

1. Cadence agrees to execute the Consent Agreement and be bound by the terms of the order contained in the Consent Agreement, as if it were final, from the date Cadence signs the Consent Agreement.

2. Cadence agrees that, from the date Cadence signs the Consent Agreement until the first of the dates listed in subparagraphs 2.a and 2.b, it will comply with the provisions of this Interim Agreement:

a. Ten (10) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The date the order is final.

3. Cadence waives all rights to contest the validity of this Interim Agreement.

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

a. Access, during the office hours of Cadence 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 Cadence relating to compliance with this Interim Agreement; and

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

5. This Interim Agreement shall not be binding until accepted by the Commission.

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND
COMMISSIONER JANET D. STEIGER¹

The consent agreement negotiated in this matter, which the Commission has issued today, eases competitive concerns raised by Cadence Design Systems, Inc.'s ("Cadence") acquisition of Cooper & Chyan Technology, Inc. ("CCT").

The Commission's complaint alleges that Cadence is the dominant supplier of complete software "layout environments" for the physical design of integrated circuits, or "chips," the postage-stamp sized electronic components used in devices as diverse as personal computers and kitchen appliances. CCT sells a software tool, called a "router," that works within a layout environment and allows users to plot the connections among the millions of components within an integrated circuit. The complaint alleges that CCT is the only firm to have developed a "constraint-driven, shape-based" router, state-of-the-art technology that is expected to solve the next generation of problems that will face integrated circuit producers designing ever more powerful chips.

The Commission's complaint alleges a well-established vertical theory of competitive harm, laid out in the 1984 Merger Guidelines.²

¹ Commissioner Varney participated in this matter and joined Chairman Pitofsky and Commissioner Steiger in an earlier version of this statement, which was issued when the matter was accepted by the Commission for public comment. Commissioner Varney, however, left the Commission before this statement was finalized.

² See U.S. Department of Justice Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,103 (June 14, 1984) (hereinafter "1984 Merger Guidelines"). When the agencies issued the 1992 Horizontal Merger Guidelines, U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (April 7, 1992), they explained that "[s]pecific guidance on non-horizontal mergers is provided in...[the] 1984 Merger Guidelines." U.S. Department of Justice and Federal Trade Commission Statement Accompanying Release of Revised Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (April 2, 1992). See generally Herbert Hovenkamp, Federal Antitrust Policy Sections 9.4, 9.5 (1994) (suggesting that vertical mergers may create barriers to entry when one of the parties is a monopolist or near-monopolist).

The Guidelines explain that a vertical merger can produce horizontal anticompetitive effects by making competitive entry less likely if (1) as a result of the merger, there is a need for simultaneous entry into two or more markets and (2) such simultaneous entry would make entry into the single market less likely to occur.³ While the dissenting Commissioners may take issue in this case with the "dual-level entry" theory of vertical mergers that the 1984 Guidelines articulate, the available evidence suggests that the Cadence/CCT merger, which combines Cadence's dominant position in integrated circuit layout environments with CCT's current monopolistic position in constraint-driven, shape-based integrated circuit routers, presents a straightforward case of anticompetitive effects caused by vertical integration. We believe that this type of competitive harm merits our attention.⁴

When considering the effects of mergers in dynamic, innovative high-tech markets, such as those present here, it is particularly important to investigate whether such mergers will create barriers to entry. New entrants often bring innovation to the market, and the threat of entry leads incumbents to innovate. Therefore, we must be vigilant to preserve opportunities for entry.

As the attached Analysis to Aid Public Comment explains, unless a would-be supplier of routing tools had the ability to develop an interface to the Cadence integrated circuit layout environment, it would not be able to market its routing product effectively to the vast majority of potential customers which use the Cadence layout environment.⁵ Without an expectation that it could design software compatible with Cadence's installed base, a would-be entrant might well decide not to compete.⁶

After the Cadence/CCT merger, Cadence would have had an incentive to impede attempts by companies developing routing

³ See 1984 Merger Guidelines Section 4.21.

⁴ Contrary to Commissioner Starek's assertions that enforcement action here, in the context of a merger, leads logically to enforcement action against internal vertical expansion, *see* Dissenting Statement of Commissioner Roscoe B. Starek, III at n.8 & accompanying text, such unilateral action has been known to present a completely different set of questions under the antitrust laws for more than one hundred years.

⁵ Not only is Cadence the dominant layout environment, but its competitors are in a state of disarray. For example, Cadence's most significant competitor, Avant! Corporation, and several of its top executives have recently been charged with theft of trade secrets from Cadence.

⁶ CCT decided that it was so important to gain access to Cadence's layout environment that when Cadence refused to allow the IC Craftsman product (CCT's constraint-driven, shape-based router technology) to interface with the Cadence layout program through the "Connections" Program, CCT induced a third party that was a Connections partner to write an interface to the Connections Program for IC Craftsman without Cadence's knowledge. Cadence thereafter sought to impede CCT's attempts to gain access to the Cadence integrated circuit layout environment by suing CCT.

technology competitive with CCT's constraint-driven, shape-based router technology, IC Craftsman, to gain access to the Cadence integrated circuit layout environment. Following the merger, successful entry into the routing tool market is more likely to require simultaneous entry into the market for integrated circuit layout environments. Without a consent order that mandates access to Cadence's layout environment, and thus lowers the barriers to entry in the market, a combined Cadence/CCT will face less competitive pressure to innovate or to price aggressively. Thus, competition would likely be reduced as a result of the acquisition.

The remedy in this matter preserves opportunities for new entrants with integrated circuit routers competitive with IC Craftsman by allowing them to interface with Cadence's layout environments on the same terms as developers of complementary design tools.⁷ Specifically, the order requires Cadence to allow independent commercial router developers to build interfaces between their design tools and the Cadence layout environment through Cadence's "Connections Program." The Connections Program is in place now and has more than one hundred participants who have all entered a standard form contract with Cadence.

The separate statements by Commissioners Azcuenaga and Starek question this enforcement action. We respectfully disagree.

First, Commissioner Azcuenaga argues that the Commission should have brought an action based upon a horizontal theory of competitive harm. We certainly agree that horizontal competitive concerns deserve our close attention and recognize that horizontal remedies often cure vertical problems. If we had credible support for the theory that the merger would combine actual or potential horizontal competitors and would substantially lessen competition in an integrated circuit routing market or an innovation market for integrated circuit routers, we would not hesitate to advance that case. But after a thorough investigation by Commission staff, we did not find sufficient evidence to conclude that, absent the acquisition, Cadence would have been able to enter the market for constraint-driven, shape-based integrated circuit routers successfully in the foreseeable future. On the contrary, the staff investigation indicated that Cadence's efforts to develop such technology had

⁷ At the same time, the order preserves any efficiencies of vertical integration resulting from the merger, which may benefit customers.

failed, and therefore there is not sufficient evidence to establish that entry would have occurred but for the acquisition.⁸

The dissenting statements fail to give full weight to all the incentives at work in the vertical case. It is true that Cadence would be motivated by the entry of new, promising routing technology to allow an interface to its layout environment to sell more of its complementary products. And absent the merger, that would be its only incentive. But with the merger, Cadence clearly also has an incentive to prevent loss of sales in its competing products. And while these two incentives may compete as a theoretical matter, the evidence in this case indicated that Cadence has acted historically according to the latter incentive. There is some reason to believe that Cadence in the past has thwarted attempts by firms offering potentially competitive technology to develop interfaces to its layout environment (including at one point, CCT). Now that it has a satisfactory router to offer its customers, there is no reason to think that absent the consent order, Cadence would treat developers of routers that would compete with IC Craftsman any differently than it once treated CCT.

Commissioner Azcuenaga also suggests that the consent order is unnecessary because a company developing a router to compete with IC Craftsman could proceed, as CCT did, without an interface to Cadence's design layout environment. The evidence showed, however, that CCT's management thought that ensuring compatibility with Cadence's layout environment was critical and that marketing without that compatibility, which it had done, was not sufficient.⁹ It took the extreme measure of inducing a third party to write software for CCT to interface IC Craftsman with the Cadence layout environment without Cadence's knowledge. Moreover, despite CCT's success in developing a routing program, its sales of IC Craftsman were quite modest before it obtained an authorized interface with the Cadence environment.¹⁰

⁸ We agree with Commissioner Azcuenaga that claims that a technology has failed made after parties agree to a transaction must be discounted because the incentive to justify the transaction are strong. Rather than rely on such evidence in reaching our conclusion that the technology had failed, we rely upon confidential information from potential customers that tested Cadence's products under development.

⁹ Interfacing with another firm's design layout environment is also not a feasible alternative because of Cadence's dominant position in the market. Without hope of marketing to the vast majority of customers, developers of an alternative router have minimal incentives to compete. In addition, the competitive significance of Cadence's few competitors is questionable.

¹⁰ CCT obtained permission to interface with the Cadence layout environment in the fall of 1996, and CCT's sales of IC Craftsman for all of 1996 were only \$13 million. "Me too" products or products offering incremental innovation rather than the revolutionary breakthrough of IC Craftsman would have an even more difficult time entering.

Commissioner Azcuenaga is further concerned that mandating access to the Connections Program for developers of routing software on terms as favorable as for other Connections participants might have unintended consequences. In particular, she is concerned that the order may prompt Cadence to charge higher prices to all Connections partners. But the Connections Program is an existing program with over one hundred members, and Cadence would have significant logistical difficulties, and would risk injuring its reputation, if it suddenly altered the terms of the program. Also, Cadence has good reasons for having so many Connections partners--they offer Cadence customers valuable tools, most of which do not compete with Cadence products. It seems unlikely that Cadence would be motivated to make the Connections Program less appealing to those partners.

Both Commissioners Azcuenaga and Starek suggest that the remedy may be difficult to enforce. Any time this Commission enters an order, it takes upon itself the burden of enforcing the order, which requires use of our scarce resources. However, we think the order, which simply requires Cadence to allow competitors and potential competitors developing routing technology to participate in independent software interface programs on terms no less favorable than the terms applicable to any other participants in such programs, is a workable approach.¹¹ Connections partners all sign the same standard-form contract and there has been a consistent pattern of conduct with respect to the program to use as a baseline for future comparisons. Moreover, the Commission has had experience with such non-discrimination provisions, and can rely on respondent's compliance reports required under the order as well as complaints from independent software developers to ensure compliance with the consent order. We think the dissenting Commissioners' scenarios about intractable compliance issues are unfounded.

In sum, we believe that the consent order will preserve competition in the market for cutting-edge router technology by reducing barriers to entry.

¹¹ The language of the consent order is clear in requiring that terms for routing companies be no less favorable than for any other participant in the Connections Program. Thus, we do not understand Commissioner Starek's conclusion that the order could be interpreted to require routing companies to pay a "fee no higher than the highest fee." And as his own dissent acknowledges, if the order could be interpreted to allow Cadence to terminate router developers from the Connections Program after thirty days, the order would be meaningless.

ATTACHMENT TO STATEMENT OF CHAIRMAN PITOFSKY AND
COMMISSIONER STEIGER

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Agreement") from Cadence Design Systems, Inc. ("proposed respondent"). The proposed order is designed to remedy anticompetitive effects stemming from Cadence's proposed acquisition of Cooper & Chyan Technology ("CCT"). On October 28, 1996, Cadence and CCT entered into an Agreement and Plan of Merger and Reorganization whereby Cadence will acquire 100 percent of the issued and outstanding shares of CCT voting securities in exchange for shares of Cadence voting securities valued at more than \$400 million (the "Proposed Merger").

The Commission has reason to believe that the Proposed Merger may substantially lessen competition 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, unless an effective remedy eliminates likely anticompetitive effects. The Agreement Containing Consent Order would, if finally accepted by the Commission, settle charges that Cadence's acquisition of CCT may substantially lessen competition or tend to create a monopoly in the research, development, and sale of constraint-driven, shape-based integrated circuit routing tools.

The proposed order has been placed on the public record for sixty (60) days. The Commission invites the submission of comments by interested persons, and comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the Agreement, as well as any comments received, and will decide whether it should withdraw from the Agreement or make final the Agreement's proposed order.

The Proposed Complaint

According to the Commission's proposed complaint, Cadence is a company that sells various electronic design automation products and services, including integrated circuit layout environments. An integrated circuit (more commonly known as a microchip) is a complex electronic circuit that consists of as many as five million or more miniature electronic components on a piece of semiconductor material smaller than a postage stamp. Integrated circuit design

consists of two distinct phases, logical design and physical design. Integrated circuit layout environments, which are used during the physical design phase, are software infrastructures within which integrated circuit designers access integrated circuit layout tools. Approximately \$70 million of Cadence's annual worldwide sales of approximately \$741 million are attributable to sales of integrated circuit layout environments.

The proposed complaint further alleges that CCT is a company that sells integrated circuit routing tools and related services, which account for approximately \$13 million of CCT's annual worldwide sales of approximately \$37.6 million. An integrated circuit routing tool, which is a type of integrated circuit layout tool, is software used to automate the determination of the connections between electronic components within an integrated circuit.

According to the Commission's proposed complaint, a relevant line of commerce within which to analyze the competitive effects of the Proposed Merger is the market for the research, development, and sale of constraint-driven, shape-based integrated circuit routing tools. As integrated circuit designs have become smaller, denser, and faster, the routing of the interconnections between components has become an increasingly important phase of the integrated circuit design process. Routing issues are critical at deep submicron scales of integrated circuit design, which are scales of design smaller than .35 micron (a micron is a millionth of an inch). The current state-of-the-art design scale is .35 micron, but in the future, integrated circuit designs will shrink to .25 micron and then .18 micron design scales. At deep submicron scales of integrated circuit design, routing is complicated by "cross talk" and other types of electrical interference, timing concerns, design density, and other problems. A constraint-driven, shape-based integrated circuit routing tool is the only kind of routing tool that can correctly accommodate these unique deep submicron integrated circuit routing issues.

The proposed complaint further alleges that there are no acceptable substitutes for constraint-driven, shape-based integrated circuit routing tools. Routing tools based on other technology cannot accommodate the unique deep submicron integrated circuit routing issues described above and thus cannot route deep submicron integrated circuit designs accurately. Routing inaccuracies create serious performance problems, and correcting these problems causes significant design delays. Nor is it commercially feasible for integrated circuit design engineers to route integrated circuit designs

without automation (*i.e.*, by "pointing and clicking" between each individual component and each other component to which it must be connected, then going back and correcting any interference or other problems that arise as the routing progresses). Given the sheer complexity and density of deep submicron integrated circuit designs, as well as the intense time-to-market pressures faced by semiconductor companies in today's fast-paced electronics industry, hand routing is not an alternative for the timely and accurate design of integrated circuits.

The proposed complaint further alleges that CCT is currently the only firm with a commercially viable constraint-driven, shape-based integrated circuit routing tool, although at least one other firm is in the process of developing a constraint-driven, shape-based integrated circuit routing tool that would compete with CCT's product. The complaint further alleges that Cadence is the dominant supplier of integrated circuit layout environments. The competitive significance of Avant! Corporation, Cadence's leading competitor in the supply of integrated circuit layout environments, is limited by the fact that Avant! has been charged criminally with conspiracy and theft of trade secrets from Cadence. Several top Avant! executives have been charged criminally as well.

The Commission's proposed complaint further alleges that there are high barriers to entry in the market for constraint-driven, shape-based integrated circuit routing tools, which are technologically complex and difficult to develop. *De novo* entry takes approximately two to three and a half years for a company that already possesses certain underlying core technology that can be used to develop a constraint-driven, shape-based integrated circuit router (for example, shape-based routing technology for printed circuit boards). Entry is likely to take even longer for a company that does not already possess such technology.

According to the Commission's proposed complaint, integrated circuit designers achieve the necessary compatibility between integrated circuit layout tools by selecting tools that have interfaces to a common integrated circuit layout environment. As a result, a constraint-driven, shape-based routing tool that lacks an interface into a Cadence integrated circuit layout environment is less likely to be selected by integrated circuit designers than a constraint-driven, shape-based routing tool that possesses such an interface. Similarly, an integrated circuit layout environment is not likely to be selected by

integrated circuit designers unless a full set of compatible integrated circuit design tools is available.

The proposed complaint further alleges that it is in Cadence's interest to make available to users of Cadence integrated circuit layout environments a complete a set of integrated circuit design tools, because to do so makes a Cadence integrated circuit layout environment more valuable to customers. Historically, Cadence has provided access to its integrated circuit layout environments to suppliers of complementary integrated circuit layout tools that Cadence does not supply. Cadence does not, however, have incentives to provide access to its integrated circuit layout environments to suppliers of integrated circuit layout tools that compete with Cadence products. Cadence historically has been reluctant to provide access to its integrated circuit layout environments to suppliers of competing integrated circuit layout tools.

According to the Commission's proposed complaint, prior to the Proposed Merger, Cadence did not have a commercially viable, constraint-driven, shape-based integrated circuit routing tool. As a result of the Proposed Merger, Cadence will own the only currently available commercially viable constraint-driven, shape-based integrated circuit router. Thus, as a result of the Proposed Merger, Cadence will become less likely to permit potential suppliers of competing constraint-driven, shape-based integrated circuit routing tools to obtain access to Cadence integrated circuit layout environments.

The Commission's proposed complaint alleges that, absent access to Cadence integrated circuit layout environments, developers will be less likely to gain successful entry into the market for constraint-driven, shape-based routing tools. The proposed complaint further alleges that the Proposed Merger will make it more likely that successful entry into the constraint-driven, shape-based integrated circuit routing tool market would require simultaneous entry into the market for integrated circuit layout environments. This need for dual-level entry will further decrease the likelihood of entry into the market for constraint-driven, shape-based integrated circuit routing tools.

The Commission's proposed complaint alleges that the Proposed Merger may substantially lessen competition or tend to create a monopoly in the market for constraint-driven, shape-based routing

tools, which, among other things, may lead to higher prices, reduced services, and less innovation.

The Proposed Order

The proposed order would remedy the alleged violations by eliminating a significant impediment to entry in the market for integrated circuit routing tools. The proposed order would require that Cadence permit developers of commercial integrated circuit routing tools to participate in the Cadence Connections Program™, any successor program thereto, or other licensing programs, promotional programs or other arrangements (collectively, "Independent Software Interface Programs") which enable independent software developers to develop and sell interfaces to Cadence integrated circuit layout tools and Cadence integrated circuit layout environments.

The proposed order would require that Cadence allow independent developers of commercial integrated circuit routing tools to participate in Cadence's Independent Software Interface Programs on terms no less favorable than the terms applicable to other participants. Cadence currently has over 100 partners in its Independent Software Interface Programs.

The purpose of these requirements is to ensure that Cadence's acquisition of CCT's constraint-driven, shape-based integrated circuit routing tool does not create incentives for Cadence to prevent competing suppliers of constraint-driven, shape-based integrated circuit routing tools from participating in Cadence's Independent Software Interface Programs; to prevent a need for dual-level entry in the markets for constraint-driven, shape-based integrated circuit routing tools and integrated circuit layout environments; to ensure that independent software developers will continue to invest the resources necessary to develop and sell constraint-driven, shape-based integrated circuit routing tools that would compete with CCT's constraint-driven, shape-based integrated circuit routing tool; and to remedy the lessening of competition as alleged in the Commission's complaint.

In addition, the proposed order would prohibit Cadence from acquiring certain interests in any other concern which, within the year preceding such acquisition, engaged in the development or sale of integrated circuit routing tools in the United States, and also would prohibit Cadence from acquiring any assets used or previously used (and still suitable for use) in the development or sale of integrated circuit routing tools in the United States, without prior notice to the

Commission, for a period of ten (10) years. Absent this prior notice requirement, Cadence might be able to undermine the purposes of the proposed order by acquiring a developer of integrated circuit routing tools without the Commission's knowledge, where such acquisition would not be subject to the reporting requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

Cadence and the Commission also have entered into an Interim Agreement whereby Cadence has agreed to be bound by the terms of the proposed order, pending and until the Commission's issuance of the proposed order.

The purpose of this analysis is to facilitate public comment on the proposed order. This analysis is not intended to constitute an official interpretation of the Agreement or the proposed order or in any way to modify the terms of the Agreement or the proposed order.

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

The acquisition of Cooper & Chyan Technology, Inc. (Cooper & Chyan), by Cadence Design Systems, Inc. (Cadence), combines the only firm currently marketing a constraint-driven, shape-based integrated circuit routing tool with a firm that was, at least until the acquisition, on the verge of entry into this market. I find reason to believe that the proposed merger would violate Section 7 of the Clayton Act under a horizontal, potential competition theory. On this ground, I support the prior notice provision of paragraph III of the order, which provides a small measure of horizontal relief.¹ I dissent from the allegations in the complaint and the order provisions that address the vertical aspects of the case.

To establish a Section 7 violation based on the actual potential competition theory, the government must show: (1) that the potential entrant "has available feasible means for entering" the relevant market; and (2) that "those means offer a substantial likelihood of ultimately producing deconcentration" of the relevant market. *United States v. Marine Bancorporation*, 418 U.S. 602, 633 (1974). In addressing the first element, courts have looked to whether a firm has

¹ The prior notice provision gives the Commission the opportunity to review a future horizontal acquisition by Cadence of another supplier of integrated circuit routing tools. Although this is a horizontal remedy, the complaint contains no corresponding allegations of liability under a horizontal theory. The remainder of the order addresses the vertical concerns of the majority and does relate to allegations in the complaint.

the capacity, interest and economic incentive to enter.² The Commission has adopted the view that "clear proof [is required] that independent entry would have occurred but for the merger or acquisition" and has emphasized the importance of concrete investment plans approved by top management and studies done before or contemporaneously with the acquisition demonstrating plans to enter. *B.A.T. Industries*, 104 FTC 852, 919-20, 926-27 (1984).

It is a close question whether Cadence was a potential entrant or already an entrant in the relevant market.³ Regardless of the outcome of that question, my review of the confidential file indicates that Cadence's interest and economic incentive to enter the market were clear, even under the strictest legal standard of actual potential competition. In determining whether Cadence had the capacity to enter the relevant market, the Commission should assess the *status quo* before Cadence agreed to acquire Cooper & Chyan. Claims that the technology had failed made after the parties agreed to the transaction should be discounted because the incentives to justify the transaction are strong. To support a conclusion that "Cadence's efforts to develop such technology had failed"⁴ before the Cooper and Chyan transaction, one would expect to have pre-transaction evidence, such as an indication that Cadence had stopped spending money on the project, some efforts by Cadence to dispel any notion that customers may have entertained that they should refrain from buying other products pending the arrival of the Cadence product, or an indication that Cadence's management had included the failure of the product in their business plans. I have not seen such evidence.⁵

² *Mercantile Texas Corp. v. Board of Governors*, 638 F.2d 1255, 1268-69 (5th Cir. 1981); *Brunswick Corp.*, 94 FTC 1174, 1269-72 (1979), *aff'd and modified sub. no. Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

³ A firm that can begin to supply a product within one year may be considered a market participant. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, Section 1.32 (1992).

⁴ See Statement of Chairman Robert Pitofsky and Commissioner Janet D. Steiger at 4.

⁵ In response to my discussion of this point, Chairman Pitofsky and Commissioner Steiger assert that they have relied on "confidential information from potential customers that tested Cadence's products under development," for their conclusion that the technology had failed. Statement of Chairman Pitofsky and Commissioner Steiger, note 8. In so stating, they reveal that Cadence had products under development and that the products were sufficiently advanced for customer testing. Since it is pointless to debate confidential information, suffice it to say that I disagree with this assessment of the project, based on my review of the customer information and on the views of Cadence's technology development partners. Preliminary testing is an ordinary part of the product development process. Software developers commonly seek customer reactions in beta testing and use the customer responses to refine their products.

Cadence satisfied the criterion of capacity to enter. As the Commission has observed, "capacity to achieve independent entry successfully is always somewhat speculative,"⁶ but Cadence was a technological and marketing leader, and it suffered under no apparent impediment to entry. Even if Cadence did not have a "commercially viable" product at the time of the acquisition, the actual potential competition doctrine applies to firms that have not yet perfected a product and completed all the steps necessary to entry.⁷

The second Marine Bancorporation element appears to be satisfied as well. Before the merger, Cooper & Chyan was the only firm selling a constraint driven, shape-based integrated circuit ("IC") router, and entry by Cadence likely would have produced a significant deconcentration of that market.

The vertical theory of violation alleged in the complaint is that the acquisition of Cooper & Chyan by Cadence will make it more difficult for another firm to introduce a constraint driven, shape-based IC router because such an entrant would need its own IC layout environment to enter the market, and that dual level entry is more difficult. Although this is a recognized theory,⁸ I question whether it applies in this case and whether a firm needs to enter both the routing and the environment markets simultaneously.

Cooper & Chyan was successful in developing and marketing its routing program before it gained access to Cadence's environment. In a separate statement, Chairman Pitofsky and Commissioners Varney and Steiger assert that Cooper & Chyan's "sales were modest before the merger announcement." I disagree based on Cooper & Chyan's penetration of the market.⁹ Cadence's willingness to pay more than \$400 million in stock for Cooper & Chyan also suggests a greater

⁶ *Brunswick Corp.*, note 2 *supra*, 94 FTC at 1269.

⁷ Paragraph 17 of the complaint alleges that before the merger, "Cadence did not have a commercially viable constraint-driven, shape-based integrated circuit routing tool."

⁸ U.S. Department of Justice Merger Guidelines, Section 4 (June 14, 1984).

⁹ The public record demonstrates the success of IC Craftsman (the Cooper & Chyan product) before September 12, 1996, when Cooper & Chyan and Cadence agreed to an interface between their products. In a June 3, 1996 press release, Cooper & Chyan said that it had sold the tool to 24 customers, including such familiar firms as AMD, IBM, SGS Thomson, Sun Microsystems, Fujitsu, Motorola, Northern Telecom and Toshiba. Press Release at <http://www.cctech.com/new/press/dacqa.htm>. This appears to be a substantial percentage of the universe of potential customers. Cooper & Chyan reported record second quarter earnings and revenues on July 23, 1996, and expressed pleasure at "the continued market acceptance of our IC product line." Press Release at <http://www.cctech.com/new/press/q296.htm>. The company reported continued improvement during the third quarter, which included the Cadence agreement on September 12, 1996. Press Release at <http://www.cctech.com/new/press/q396.htm>.

competitive significance than the majority concedes.¹⁰ Cooper & Chyan's record indicates that access to a layout environment is not a precondition to successful entry in the market for constraint drive, shape-based integrated circuit routers. It appears, based on the available information, that dual level entry theory does not apply in this market.

In addition, although Cadence initially denied Cooper & Chyan access to its connections program, it subsequently reversed course and granted the access. This suggests that Cadence capitulated to pressure from customers to grant Cooper & Chyan access and that Cadence has little or no power to deny access to its connections program if granting access is the only way to enable its customers to use a product they want to use. Finally, paragraph II of the order is premised on the allegation in paragraph 16 of the complaint that "Cadence does not, however, have incentives to provide access to a Cadence integrated circuit layout environment to suppliers of integrated circuit layout tools that compete with Cadence products." The incentives appear to be at least as likely to go the other way. If another company develops an innovative, advanced router, one would assume that Cadence would have incentives to welcome the innovative product to its suite of connected design tools, thereby enhancing the suite's utility to customers.

Paragraph II of the order may be counterproductive and may result in substantial enforcement costs for the Commission. Because paragraph II bars Cadence from charging developers of "Commercial Integrated Circuit Routing Tools" a higher access fee than developers of other design tools, one possible, unintended consequence of the order is that Cadence may reduce or eliminate discounting of access fees. In addition, enforcement of the provision of the order requiring Cadence to provide access to the connections program to developers of "Commercial Integrated Circuit Routing Tools" on terms "no less favorable than the terms applicable to any other participants" may embroil the Commission unnecessarily in complex commercial disputes.

I concur in paragraph III of the order and dissent from paragraph II of the order.

¹⁰ Richard Goering, "\$420m deal shifts balance of power in board/IC CAD--Cadence acquiring CCT," EE Times, November 4, 1996.

The majority states that sales of the IC Craftsman were "only \$13 million" in 1996. To put that amount in perspective, it should be observed that IC Craftsman was first introduced in the second half of 1995. To put that amount in perspective, it should be observed that IC Craftsman was first introduced in the second half of 1995. Press Release of July 23, 1996 at <http://www.cctech.com/new/press/q296.htm>.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the Commission's decision to issue the complaint and final consent order against Cadence Design Systems, Inc. ("Cadence"), a supplier of software for the design of integrated circuits ("ICs"). The complaint alleges that the merger of Cadence and Cooper & Chyan Technology, Inc. ("CCT") -- a producer of software complementary to Cadence's -- is likely substantially to lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. To justify the complaint and order, the Commission once again invokes the specter of anticompetitive "foreclosure" as a direct consequence of the transaction. As I have made clear on previous occasions,¹ foreclosure theories are generally unconvincing as a rationale for antitrust enforcement. The current case provides scant basis for revising this conclusion.

The theory of harm presented here is the same as -- and thus shares all of the defects of -- that offered in Silicon Graphics, Inc. ("SGI").² In SGI, the Commission alleged that the merger of a computer hardware manufacturer (SGI) and two software vendors (Alias and Wavefront) would result in the post-acquisition "foreclosure" of other independent software suppliers, leading to monopoly prices for graphics software. The Commission claimed that because the acquisition would give SGI its own in-house software producers, SGI no longer would allow unaffiliated software vendors access to its hardware platform.

In the current incarnation of this theory, Cadence is cast in the role of SGI and CCT in the role of the software vendors. The Commission alleges that Cadence no longer will allow independent suppliers of "routing" software -- the type of software sold by CCT -- to write programs that can interface with other IC layout programs in the Cadence suite. To mitigate these supposed anticompetitive incentives, the order requires Cadence to provide independent vendors of routing software access to its "Independent Software Interface Programs" (e.g., to its "Connections Program") on terms "no

¹ See Dissenting Statement of Commissioner Roscoe B. Starek, III, in Time Warner Inc., et al., Docket No. C-3709 (consent order, Feb. 3, 1997); Dissenting Statement of Commissioner Roscoe B. Starek, III, in Waterous Company, Inc. and Hale Products, Inc., Docket Nos. C-3693 & C-3694 (consent orders, Nov. 22, 1996); Dissenting Statement of Commissioner Roscoe B. Starek, III, in Silicon Graphics, Inc. (Alias Research, Inc., and Wavefront Technologies, Inc.), Docket No. C-3626 (consent order, Nov. 14, 1995); Remarks of Commissioner Roscoe B. Starek, III, "Reinventing Antitrust Enforcement? Antitrust at the FTC in 1995 and Beyond," remarks before a conference on "A New Age of Antitrust Enforcement: Antitrust in 1995" (Marina del Rey, California, Feb. 24, 1995).

² *Supra* note 1.

less favorable" than the terms offered to other independent software vendors.³

The logic of the complaint is fundamentally flawed. Even if we assume *arguendo* -- as the complaint in this case does -- that Cadence is "dominant" in the supply of software components complementary to the router,⁴ the fact remains that it has no incentive to restrict the supply of routers. I noted in SGI that "SGI ha[d] strong incentives to induce expanded supply of SGI-compatible software: increasing the supply of compatible software (or of any complementary product) increases the demand for SGI's workstations."⁵ The same is true here: the introduction of a lower-priced or higher-quality routing program increases the value of Cadence's "dominant" position in the sale of software complementary to the router, because it increases the demand for Cadence design software, thereby allowing Cadence to increase the price and/or the output of these programs. Despite the assertions of Chairman Pitofsky and Commissioner Steiger to the contrary,⁶ this is true whether or not Cadence has vertically integrated

³ Order, ¶ II.A.

⁴ The anticompetitive theory requires Cadence to have substantial monopoly power: if there were numerous good alternatives to Cadence's suite, other independent vendors of routing software could affiliate with them and there would be no "foreclosure."

⁵ Dissenting Statement in SGI, *supra* note 1, at 2. Moreover, as was also true in SGI, the description of the premerger state of competition set forth in the complaint itself tends to exclude the possibility of substantial postmerger foreclosure. In SGI, the complaint alleged that software producers other than Alias and Wavefront were competitively insignificant prior to the merger, and that premerger entry barriers were high. Similarly, the current complaint (¶ 11) alleges that there are substantial premerger barriers to entry into the market for the kind of "router" software that CCT produces. But one cannot find both that the premerger supply elasticity of substitutable software is virtually zero and that the merger would result in the substantial postmerger foreclosure of independent software producers. If entry into constraint-driven, shape-based IC router software is effectively blocked premerger, as the complaint contends, it cannot also be the case that the merger would cause a substantial incremental reduction in entry opportunities.

⁶ Chairman Pitofsky and Commissioner Steiger assert that "Cadence clearly also has an incentive to prevent loss of sales in its competing products." (Statement of Chairman Pitofsky and Commissioner Steiger at 4; emphasis in original.) Similarly, the Analysis of Proposed Consent Order to Aid Public Comment that accompanied the consent agreement simply asserted (at 5) that "Cadence does not... have incentives to provide access to its integrated circuit layout environments to suppliers of integrated circuit layout tools that compete with Cadence products." Because neither the Statement of Chairman Pitofsky and Commissioner Steiger nor the Analysis to Aid Public Comment describes how this conclusion was reached, it is difficult to identify precisely the source of the erroneous reasoning. Chiefly, however, it seems to reflect a manifestation of the "sunk cost fallacy," whereby it is argued that because Cadence has now sunk a large sum of money into acquiring CCT, this in and of itself would provide Cadence with an incentive not to deal with independent vendors of complements. This reasoning, of course, is fallacious: the cost incurred by Cadence in acquiring CCT -- whether a large or a small sum -- is irrelevant to profit-maximizing behavior once incurred, for bygones are forever bygones. The introduction of a superior new router, even if by an independent vendor, will increase the joint profits of Cadence and this vendor (irrespective of the amount spent in acquiring CCT), and both parties will have a profit incentive to facilitate its introduction.

Moreover, the Chairman and Commissioner Steiger also impute a sinister motive to Cadence's reluctance to deal with certain competitors, while failing to acknowledge that this reluctance almost surely represents a legitimate and well-founded interest in protecting its intellectual property. As the

into the sale of routing software, for efficient entry into the production of routing software increases the joint profits of the entrant and Cadence. If the Commission is correct that Cadence is "dominant" in the supply of software components complementary to routers, then of course Cadence may be in a position to expropriate -- e.g., via royalties paid to Cadence by the entrant for the right to "connect" to Cadence's software -- some or all of the "efficiency rents" that otherwise would accrue to an efficient entrant. This, however, would constitute harm to a competitor, not to competition, and Cadence would have no incentive to set any such rates so high as to preclude entry.

The theory of harm and the remedy in this case also share many of the flaws that I pointed out in Time Warner.⁷ In that case the Commission's action was based to a significant degree on the argument that increased vertical integration into cable programming on the part of Time Warner and Tele-Communications, Inc. would increase those firms' incentives to reduce the supply of independently produced television programming. Carried to its logical conclusion, this theory of harm constitutes a basis for challenging any vertical integration by large cable operators or large programmers -- even vertical integration occurring via *de novo* entry by a cable operator into the programming market or *de novo* entry by a programmer into distribution.

Now apply this train of thought to the current matter. Contrary to the analysis presented above, suppose that somehow Cadence could profit anticompetitively from denying interconnection rights to independent router vendors. If that were so, then it would not be sufficient merely to prevent Cadence from acquiring producers of complementary software. Rather, the Commission would have to take the further step of preventing Cadence from developing its own routers; for under the anticompetitive theory advanced in the complaint, any vertical integration by Cadence into routers, whether accomplished by acquisition or through internal expansion, would engender equivalent post-integration incentives to "foreclosure"

Analysis to Aid Public Comment noted (at 4): "...Avant! Corporation, Cadence's leading competitor in the supply of integrated circuit layout environments,....has been charged criminally with conspiracy and theft of trade secrets from Cadence. Several top Avant! executives have been charged criminally as well."

⁷ See my Dissenting Statement in Time Warner Inc., et al., *supra* note 1.

independent vendors of routing software.⁸ Of course, as I noted in Time Warner, there is likely to be little enthusiasm for such a policy because there is a general predisposition to regard internal capacity expansion as procompetitive.⁹

Not only am I unpersuaded that Cadence's acquisition of CCT is likely to reduce competition in any relevant market, but -- as in SGI and Time Warner -- I would find the order unacceptable even were I convinced as to liability. As in Time Warner, the Commission imposes a "most favored nations" clause that requires Cadence to allow all independent router developers to participate in its software interface programs on terms that are "no less favorable than the terms applicable to any other participants in" those interface programs. Even apart from the usual problems with "most favored nations" clauses in consent orders,¹⁰ this order -- as in both SGI and Time Warner -- will require that the Commission continuously regulate the prices and other conditions of access.

Indeed, compared to the order in the present case, the order in Time Warner was a model of clarity and enforceability. What does it mean to mandate treatment "no less favorable than" that granted to others, when Cadence's current Connections Program -- with well over 100 participants -- allows access prices to differ substantially across participants and imposes substantial restrictions on the breadth

⁸ Thus, it is unclear how the Commission should respond, under the logic of its complaint, were Cadence to introduce an internally developed software program (now provided by one or more independent vendors) that is complementary to its "dominant" suite of programs. Obviously Cadence would be in a position (similar to that alleged in the Commission's complaint) to block access to the Cadence design software if it wanted to. Even if Cadence did not terminate the independent vendors, consistent application of the economic logic of the present complaint seemingly would require the Commission to seek a prophylactic "open access" order against Cadence similar to the order sought here. This enforcement policy would of course have a number of adverse competitive consequences, including deterrence of Cadence from efficiently entering complementary software lines through internal expansion.

The observation in the Statement of Chairman Pitofsky and Commissioner Steiger (at note 4) that antitrust law has treated vertical integration by merger differently from internal vertical integration "for more than one hundred years" suggests that I do not recognize that the law provides for differential treatment of mergers and internal expansion. I simply intended to point out the illogic of finding vertical integration with identical economic consequences to be illegal under the Commission's standards of merger review, when that integration would be of no concern (and might even be applauded) if it resulted from simple internal expansion.

⁹ In the present case, as in Time Warner, the Commission has alleged the existence of substantial pre-acquisition market power in both vertically related matters (routing software and the rest of the IC layout "suite" here, see complaint ¶¶ 9-11, and cable television programming and distribution in Time Warner). Under these circumstances, there is a straightforward reason why vertical integration is both profitable and procompetitive (*i.e.*, likely to result in lower prices to consumers): vertical integration would yield only one monopoly markup by the integrated firm, rather than separate markups (as in the pre-integration situation) by Cadence and CCT.

¹⁰ As I noted in Time Warner, these clauses have the capacity to cause all prices to rise rather than to fall. Dissenting Statement, *supra* note 1, at 20. The Chairman and Commissioner Steiger (Statement at 5) seem comfortable with this outcome, provided that all vendors pay the same price.

and scope of the permitted connection rights?¹¹ Does it mean that router vendors pay a connection fee no higher than the highest fee paid by an existing participant? Or would they pay a fee no higher than the current lowest fee? Or does it mean something else? Router vendors surely will argue for the second interpretation -- a view also apparently shared by Chairman Pitofsky and Commissioner Steiger¹² -- yet there is no obvious reason why router vendors should be entitled to such a Commission-mandated preferential pricing arrangement, and neither my colleagues' Statement nor the Analysis to Aid Public Comment has offered one.

Similarly, does the "no less favorable" requirement mandate that the vendors of routing software obtain access rights as broad as the broadest rights now granted, or simply no worse than the narrowest now granted? And since the current Connections contracts are terminable at will by either party with 30 days' notice, does "no less favorable" mean only that router vendors must be given the same termination terms as other software vendors, or does it mean something else (*e.g.*, termination only for cause, where the "reasonableness" of the termination is subject to *ex post* evaluation by the Commission)?¹³ The former interpretation of the order seems the most straightforward; however, it is also one that essentially would nullify the protection of independent router vendors and thus would render the order meaningless.¹⁴

The preceding suggests strongly that the real (albeit unstated) goal of the order is not to nullify any actual anticompetitive effects from the transaction, but rather to invalidate the principal aspects of Cadence's "Connections Program" (*i.e.*, the ability to charge different connection fees and to terminate vendors at will) without demonstrating that the program's provisions violate the law. There is little reason to believe that this program is harmful to competition, and there are strong efficiency reasons for allowing Cadence to set different fees for different vendors. Moreover, setting a uniform fee would result in price increases to at least some vendors.

Because I do not accept the Commission's theory of liability in this case, and because I find the prescribed remedy at best unenforceable and at worst competitively harmful, I dissent.

¹¹ For example, CCT had been permitted to participate in the Connections Program with its printed circuit board router but not with its IC router.

¹² See Statement of Chairman Pitofsky and Commissioner Steiger at note 11.

¹³ Moreover, does the terminability of the Connections contract on 30 days' notice mean that the "no less favorable" requirement might need to be reviewed every 30 days?

¹⁴ The Chairman and Commissioner Steiger imply (Statement at note 11) that the exercise of this right would indeed constitute a violation of the order.

IN THE MATTER OF

CVS 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-3762. Complaint, Aug. 13, 1997--Decision, Aug. 13, 1997

This consent order requires the respondents, among other things, to complete the divestiture of a total of 120 Revco drug stores or pharmacy counters -- 114 stores in Virginia and six pharmacy counters in Binghamton, New York -- in order to restore competition. In addition, the respondents agreed to maintain the assets to be divested to preserve their viability and competitiveness, pending the divestiture.

Appearances

For the Commission: *George Cary, Ernest Elmore, Ann Malester* and *William Baer*.

For the respondents: *Zenon Lankowsky*, in-house counsel for CVS. *Jack Staph*, in-house counsel for Revco. *Ronan Harty, Davis, Polk & Wardwell*, New York, N.Y. and *Louis Sernoff, Baker & Hostetler*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that CVS Corporation, through a wholly-owned subsidiary, North Acquisition Corp., has agreed to acquire Revco D.S., Inc., all corporations subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and 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:

I. DEFINITION

1. For the purposes of this complaint, "MSA" means Metropolitan Statistical Area as defined by the United States Department of Commerce, Bureau of the Census.

II. RESPONDENTS

2. Respondent CVS Corporation ("CVS") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One CVS Drive, Woonsocket, Rhode Island.

3. Respondent Revco D.S., Inc. ("Revco") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1925 Enterprise Parkway, Twinsburg, Ohio.

4. For purposes of this proceeding, respondents are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose businesses are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

5. On February 6, 1997, CVS, through a wholly-owned subsidiary, North Acquisition Corp., entered into an Agreement and Plan of Merger to acquire and merge with Revco ("the Acquisition").

IV. THE RELEVANT MARKETS

6. For purposes of this complaint, the relevant line of commerce in which to analyze the effect of the Acquisition is the retail sale of pharmacy services to third-party payors such as insurance carriers, health maintenance organizations, preferred provider organizations, and corporate employers. Pharmacy services refers to the filling of prescription drugs and related pharmacy service benefits. Third-party payors offer retail pharmacy service benefits to their beneficiaries, typically through intermediaries known as pharmacy benefit management firms or PBMs, who create and administer retail pharmacy networks on behalf of third-party payors, so that the beneficiaries of these third-party payors may go to any pharmacy participating in the retail pharmacy network to have their prescriptions filled.

7. For purposes of this complaint, the relevant sections of the country in which to analyze the effect of the Acquisition are:

- a. The State of Virginia; and
- b. The Binghamton, New York MSA.

8. The relevant markets set forth in paragraphs six and seven are highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

9. Entry into the relevant markets is difficult or unlikely to occur at a sufficient scale to deter or counteract the effect of the Acquisition described in paragraph five.

10. CVS and Revco are actual competitors in the relevant markets.

V. EFFECT OF THE ACQUISITION

11. The effect of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant markets 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, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct actual competition between CVS and Revco in the relevant markets;

b. By increasing the likelihood that CVS will unilaterally exercise market power in the relevant markets; and

c. By increasing the likelihood of collusion in the relevant markets.

12. All of the above increase the likelihood that firms in the relevant markets will increase prices and restrict output both in the near future and in the long term.

VI. VIOLATIONS CHARGED

13. The acquisition agreement described in paragraph five constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

14. The Acquisition described in paragraph five, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of Revco D.S., Inc. ("Revco") by CVS Corporation ("CVS"), and the respondents having been furnished thereafter with a copy of a draft of complaint that the

Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure described 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 CVS Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One CVS Drive, Woonsocket, Rhode Island.

2. Respondent Revco D.S., Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1925 Enterprise Parkway, Twinsburg, Ohio.

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

I.

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

A. "*CVS*" means CVS Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by CVS, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each. CVS, after consummation of the Acquisition, includes Revco.

B. "*Revco*" means Revco D.S., Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by Revco, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

C. "*Respondents*" mean CVS and Revco.

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

E. "*Acquisition*" means CVS's proposed acquisition of all of the outstanding voting securities of and merger with Revco pursuant to the Agreement and Plan of Merger dated February 6, 1997.

F. "*J.C. Penney*" means J.C. Penney Company, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 6501 Legacy Drive, Plano, Texas.

G. "*Eckerd*" means Eckerd Corporation, an affiliate of J.C. Penney. Eckerd is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 8333 Bryan Dairy Road, Largo, Florida.

H. "*Medicine Shoppe*" means Medicine Shoppe International, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 1100 North Lindbergh, St. Louis, Missouri.

I. "*Pharmacy Operations*" means Pharmacy Operations, Inc., a wholly-owned subsidiary of Medicine Shoppe. Pharmacy Operations is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with offices located at 1100 North Lindbergh, St. Louis, Missouri.

J. "*Acquirer(s)*" means Eckerd, Medicine Shoppe or Pharmacy Operations, and/or the entity or entities approved by the Commission to acquire: the Virginia Assets to be Divested pursuant to paragraph II.A.1 of this order; the Revco Pharmacy Assets pursuant to paragraph II.B.1 or the New York Assets to be Divested pursuant to

paragraph II.B.2 of this order; the Revco Virginia Assets pursuant to paragraph III.A of this order; or the CVS Binghamton Assets pursuant to paragraph III.B of this order.

K. "*Landlord consents*" means all consents from all landlords that are necessary to effect the complete transfer to the Acquirer(s) of the assets required to be divested pursuant to this order.

L. "*MSA*" means Metropolitan Statistical Area, which refers to geographic areas as defined by the United States Department of Commerce, Bureau of the Census.

M. "*Retail drug store*" means a full-line retail store that carries a wide variety of prescription and nonprescription medicines and miscellaneous items, including, but not limited to, drugs, pharmaceuticals, patent medicines, sundries, tobacco products, and other merchandise.

N. "*Retail drug store assets*" means all assets constituting the retail drug store business, excluding those assets pertaining to either the Revco or CVS trade name, trade dress, trade marks and service marks, and including, but not limited to:

1. Leases and properties;
2. Zoning approvals and registrations;
3. Books, records, reports, dockets and lists relating to the retail drug store business;
4. Retail drug store inventory and storage capacity;
5. All records of stock keeping units ("SKUs"), *e.g.*, all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales;
6. Lists of all customers (including third party insurers) and all files of names, addresses, and telephone numbers of the individual customer contacts, and the unit and dollar amounts of sales, by product, to each customer;
7. All pharmacy files, documents, instructions, papers, books, computer files and records and all other records in any media relating to the retail drug store business;
8. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and all names of prescription drug manufacturers and distributors under contract with Revco, at the Acquirer(s)' option;

9. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property; and
10. Goodwill, tangible and intangible, utilized in retail drug stores.

O. "*Revco Pharmacy Business*" means Revco's business of selling pharmacy services including prescription drugs at any of the retail drug stores listed in Schedule A of this order, but does not include Revco's business of selling other products in those retail drug stores.

P. "*Revco Pharmacy Assets*" means all assets constituting the Revco Pharmacy Business, excluding those assets pertaining to the Revco trade names, trade dress, trade marks and service marks, and including but not limited to:

1. Leases, at Medicine Shoppe's option;
2. Zoning approvals and registrations, at Medicine Shoppe's option;
3. Books, records, manuals, and operations reports, relating to the Revco Pharmacy Business;
4. Inventory instructions, or, at Medicine Shoppe's option, lists of SKUs, *i.e.*, all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales and inventories;
5. Lists of all prescription drug customers, including but not limited to third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, the unit and dollar amounts of sales, by product, to each customer, and store profit and loss statement(s); and
6. Goodwill, tangible and intangible, utilized in the sale of prescription drugs.

Q. "*Virginia Assets to be Divested*" means the Revco Retail Drug Store Assets described in Schedule B of this order.

R. "*Revco Virginia Assets*" means all of Revco's Retail Drug Store Assets located in the State of Virginia.

S. "*New York Assets to be Divested*" means the Revco Retail Drug Store Assets described in Schedule A of this order.

T. "*CVS Binghamton Assets*" means all of the CVS Retail Drug Store Assets located in the Binghamton, New York MSA.

U. "*Eckerd Agreement*" means the Purchase and Sale Agreement between Eckerd and CVS executed on May 16, 1997, for the

divestiture by respondents to Eckerd of the Virginia Assets to be Divested.

V. "*Medicine Shoppe Agreement*" means the Purchase and Sale Agreement between Pharmacy Operations or Medicine Shoppe and CVS executed on May 21, 1997, for the divestiture by respondents to Medicine Shoppe of the Revco Pharmacy Assets to be Divested.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, the Virginia Assets to be Divested to:

1. Eckerd, in accordance with the Eckerd Agreement dated May 16, 1997, no later than,

a. Ten (10) days after the date on which this order becomes final,
or

b. Four (4) months after acceptance of the Agreement Containing Consent Order by the Commission,

whichever is later; or

2. An Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, within three (3) months after the date on which this order becomes final;

provided that the closing date of the Eckerd Agreement or any other agreement pursuant to which the Virginia Assets to be Divested are divested to an Acquirer shall not occur until after respondents have obtained all required Landlord Consents.

B. Respondents shall divest, absolutely and in good faith, either:

1. The Revco Pharmacy Assets to Medicine Shoppe or Pharmacy Operations in accordance with the Medicine Shoppe Agreement May 21, 1997, no later than,

a. Ten (10) days after the date on which this order becomes final,
or

b. Four (4) months after acceptance of the Agreement Containing Consent Order by the Commission,

whichever is later; or

2. The New York Assets to be Divested to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, within three (3) months after the date on which this order becomes final;

provided that the closing date of the Medicine Shoppe Agreement or any other agreement pursuant to which the New York Assets to be Divested are divested to an Acquirer shall not occur until after respondents have obtained all required landlord consents.

C. The purpose of the divestitures described herein is to ensure the continued operation of the divestiture assets as assets engaged in the retail sale of pharmacy services to third party payors, and to remedy any lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

III.

It is further ordered, That:

A. If respondents fail to divest absolutely and in good faith the Virginia Assets to be Divested pursuant to paragraph II.A of this order, the Commission may appoint a trustee to divest the Revco Virginia Assets.

B. If respondents fail to divest absolutely and in good faith either the New York Assets to be Divested or the Revco Pharmacy Assets pursuant to paragraph II.B of this order, the Commission may appoint a trustee to divest the CVS Binghamton Assets.

C. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by respondents to comply with this order.

D. The trustee appointed to accomplish any divestiture pursuant to paragraphs III.A or III.B may be the same person. If a trustee is appointed by the Commission or a court pursuant to paragraphs III.A or III.B of this order, respondents shall consent to the following terms

and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee(s), subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to accomplish the divestitures described in paragraphs III.A and III.B.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission, and in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect each divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.D.3 to accomplish each divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan for each divestiture required by this order or believes that each divestiture required by this order can be achieved within a reasonable time, then that divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend the period for each divestiture only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Revco Virginia Assets and the CVS Binghamton Assets or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of each divestiture. Any delays in any divestiture caused by respondents shall extend the time for that divestiture under this paragraph in an amount

equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to make each divestiture required by this order at no minimum price. Each divestiture shall be made in the manner consistent with the terms of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondents from among those approved by the Commission.

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

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

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 this paragraph.

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

11. The trustee shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability and the viability and competitiveness of the Revco Virginia Assets and the CVS Binghamton Assets.

12. The trustee shall have no obligation or authority to operate or maintain the Revco Virginia Assets or the CVS Binghamton Assets.

13. The trustee shall report in writing to respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish each divestiture required by this order.

IV.

It is further ordered, That:

A. Pending the divestiture of the Virginia Assets to be Divested pursuant to paragraph II.A and either the Revco Pharmacy Assets or the New York Assets to be Divested pursuant to paragraph II.B, the Revco Virginia Assets pursuant to paragraph III.A, or the CVS Binghamton Assets pursuant to paragraph III.B, respondents shall take such actions as are necessary to maintain the viability, marketability and competitiveness of all of these assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of these assets except for ordinary wear and tear.

B. Respondents shall comply with all terms of the Asset Maintenance Agreement, attached to this order and made a part hereof as Appendix I. The Asset Maintenance Agreement shall continue in effect until such time as all the divestitures required by this order have been accomplished.

V.

It is further ordered, That within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until respondents have fully complied with the provisions of paragraphs II

and III of this order, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the requirements of this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for each divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning each divestiture.

VI.

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

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondents shall permit any duly authorized representative of the Commission:

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

B. Upon five days' notice to respondents and without restraint or interference from respondents, to interview officers, directors, or employees of respondents.

SCHEDULE A

REVCO NEW YORK STORE LISTING

Revco Store Number 2000
523 Hooper Road
Endwell, NY 13760

Revco Store Number 2002
133 Front Street
Vestal, NY 13850

Decision and Order

124 F.T.C.

Revco Store Number 2003
4700 Vestal Parkway East
Vestal, NY

Revco Store Number 2005
1318 Front Street
Binghamton, NY 13901

Revco Store Number 2007
1183-85 Vestal Avenue
Binghamton, NY 13903

Revco Store Number 2020
310 Exchange Street
Endicott, NY 13760

SCHEDULE B

REVCO VIRGINIA STORE LISTING

Revco Store Number 842
Interstate Rt 40 & 46
Blackstone, VA 23824

Revco Store Number 2380
4408 West Hundred Road
Chester, VA 23831

Revco Store Number 1160
Colonial Square Shopping Center
12 Colonial Square
Colonial Heights VA 23834

Revco Store Number 389
220 Market Drive
Emporia, VA 23847

Revco Store Number 972
University Square Shopping Center
20825 Woodpecker Road
Ettrick, VA 23803

Revco Store Number 4513
Patrick Henry Center
1506 S. Main Street
Farmville, VA 23901

Revco Store Number 998
5207 Plaza Drive
Hopewell, VA 23860

Revco Store Number 4001
115 Brunswick Square Ct.
Lawrenceville, VA 23868

Revco Store Number 1473
Tanbark Plaza Shopping Center
74 Tanbark Plaza
Lovingson, VA 22949

Revco Store Number 2519
7199 Stonewall Pkwy.
Mechanicsville, VA 23111

Revco Store Number 2522
Atlee Square Shopping Center
9159 Atlee Road
Mechanicsville, VA 23116

Revco Store Number 2517
Rockwood Square
10163 Hull Street Road
Midlothian, VA 23113

Revco Store Number 187
4310 Westgate Drive
Petersburg, VA 23803

Revco Store Number 4504
2733 S. Crater Road
Petersburg, VA 23805

Revco Store Number 2754
9100 Pocahontas Trail
Providence Forge, VA 23140

Revco Store Number 2755
New Kent Crossing Shopping Center
2587 New Kent Hwy.
Quinton, VA 23141

Revco Store Number 383
12000 Ridgefield Pkwy.
Richmond, VA 23233

Revco Store Number 390
6401 Jahnke Road
Richmond, VA 23225

161

Decision and Order

Revco Store Number 398
2805 West Broad Street
Richmond, VA 23230

Revco Store Number 538
Meadowwood Square
5116 Richmond Henrico Turnpike
Richmond, VA 23227

Revco Store Number 553
Cary Village Shopping Center
3142 West Cary Street
Richmond, VA 23221

Revco Store Number 1313
6011 Nine Mile
Richmond, VA 23223

Revco Store Number 1436
2917 North Avenue
Richmond, VA 23222

Revco Store Number 4019
Hungarybrook Shopping Center
1292 Concord Avenue
Richmond, VA 23228

Revco Store Number 4578
Quioccasin Station
8920 Quioccasin Road
Richmond, VA 22560

Revco Store Number 4562
While Oak Shopping Center
1840 Tappahannock Blvd.
Tappahannock, VA 22560

Revco Store Number 4387
Pantops Center
540 Pantops Center
Charlottesville, VA 22911

Revco Store Number 313
Liberty Plaza
1800 Liberty Street
Chesapeake, VA 23324

Revco Store Number 1140
Poplar Hill Plaza
3138 Western Branch Blvd.
Chesapeake, VA 23321

Revco Store Number 505
7127 Staples Mill Road
Richmond, VA 23228

Revco Store Number 551
326 East Broad Street
Richmond, VA 23219

Revco Store Number 1158
Glen Lea Shopping Center
3824 Mechanicsville Pike
Richmond, VA 23223

Revco Store Number 1319
Willow Place Shopping Center
5440 West Broad
Richmond, VA 23230

Revco Store Number 2551
Robious Hall Shopping Center
10030 Robious Road
Richmond, VA 23235

Revco Store Number 4391
Irongate Village Shopping Center
6423 Iron Bridge Road
Richmond, VA 23234

Revco Store Number 4585
1102 Courthouse Road
Richmond, VA 23236

Revco Store Number 4000
West Point Square
100 Winter Street Unit 105
West Point, VA 23181

Revco Store Number 194
1367 Kempsville Road
Chesapeake, VA 23320

Revco Store Number 350
4321 Indian River Road
Chesapeake, VA 23325

Revco Store Number 1186
Wilson Village Shopping Center
328 Battlefield Blvd. S.
Chesapeake, VA 23320

Decision and Order

124 F.T.C.

Revco Store Number 4003
Las Gaviotas Shopping Center
1245 Cedar Road, Suite B
Chesapeake, VA 23320

Revco Store Number 4420
Centersville Crossing Shopping Center
413 Centerville Turnpike
Chesapeake, VA 23320

Revco Store Number 4552
2313 S. Military Hwy.
Chesapeake, VA 23320

Revco Store Number 4541
Southampton Shopping Center
1332 Armory Drive
Franklin, VA 23851

Revco Store Number 426
Kecoughtan Shopping Center
3857 Kecoughtan Road
Hampton, VA 23669

Revco Store Number 1384
4111 West Mercury Blvd.
Hampton, VA 23666

Revco Store Number 4679
Big Bethel Road and Hampton Road
Parkway
Hampton, VA 23666

Revco Store Number 621
Newport Square Shopping Center
846 Newport Square Shop Center
Newport News, VA 23601

Revco Store Number 1143
14865 Warwick Blvd.
Newport News, VA 23608

Revco Store Number 2589
Southeast Shopping Center
2305 Jefferson Avenue
Newport News, VA 23607

Revco Store Number 4020
Taylor Road Plaza
3325 Taylor Road, Suite 118
Chesapeake, VA 23321

Revco Store Number 4530
Woodford Square Shopping Center
701-D North Battlefield
Chesapeake, VA 23320

Revco Store Number 4607
3005 Old Mill Road
Chesapeake, VA 23323

Revco Store Number 1268
Heritage Square Shopping Center
4324 Geo. Washington Memorial
Highway
Grafton, VA 23692

Revco Store Number 1073
1955 E. Pembroke Avenue
Hampton, VA 23663

Revco Store Number 4326
2305 Kecoughtan Road
Hampton, VA 23661

Revco Store Number 2741
York River Shopping Center
2318 York Crs. Drive Pob 1106
Hayes, VA 23072

Revco Store Number 1096
Newmarket Plaza Shopping Center
605 Newmarket Drive Newmarket
Plaza
Newport News, VA 23605

Revco Store Number 1613
13271 Warwick Blvd.
Newport News, VA 23602

Revco Store Number 4022
Richneck Center
12917 Jefferson Avenue
Newport News, VA 23602

161

Decision and Order

Revco Store Number 4501
10451 Jefferson Avenue
Newport News, VA 23605

Revco Store Number 117
Downtown Plaza Shopping Center
32 Downtown Plaza S/C
Norfolk, VA 23510

Revco Store Number 431
Southern Shopping Center
No. 2 Southern S/C
Norfolk, VA 23505

Revco Store Number 493
Midtown Shopping Center
7628 Granby Street
Norfolk, VA 23505

Revco Store Number 500
Colley Village Shopping Center
2301 Colley Avenue
Norfolk, VA 23517

Revco Store Number 550
6204-H N. Military Hwy.
Norfolk, VA 23518

Revco Store Number 595
742-A West 21st Street
Norfolk, VA 23517

Revco Store Number 703
Sewells Point Shopping Center
2330 Azalea Garden Road
Norfolk, VA 23513

Revco Store Number 715
1101 East Little Creek Road
Norfolk, VA 23518

Revco Store Number 882
Ocean View Shopping Center
163 West Ocean View Avenue
Norfolk, VA 23503

Revco Store Number 1029
The Monticello Building
258 Granby Street
Norfolk, VA 23510

Revco Store Number 1068
Suburban Park Shopping Center
7526 Granby Street
Norfolk, VA 23505

Revco Store Number 1097
1853 East Little Creek Road
Norfolk, VA 23518

Revco Store Number 2375
3212 Tidewater Road
Norfolk, VA 23509

Revco Store Number 2574
890 Kempsville Road
Norfolk, VA 23502

Revco Store Number 4009
475 Wythe Creek Road
Poquoson, VA 23662

Revco Store Number 750
5788 Churchland Blvd.
Portsmouth, VA 23703

Revco Store Number 871
3116 High Street
Portsmouth, VA 23707

Revco Store Number 1061
3531 Airline Blvd.
Portsmouth, VA 23701

Revco Store Number 1113
326 High Street
Portsmouth, VA 23704

Revco Store Number 2704
2004 Victory Blvd.
Portsmouth, VA 23702

Revco Store Number 4327
Manor Village Shopping Center
6219 Portsmouth Blvd.
Portsmouth, VA 23701

Revco Store Number 835
Smithfield Plaza Shopping Center
1280 Smithfield Plaza
Smithfield, VA 23430

Revco Store Number 1376
571 East Constance Road
Suffolk, VA 23434

Revco Store Number 100
1949 Lynnhaven Parkway
Virginia Beach, VA 23456

Revco Store Number 113
1577 General Booth Blvd.
Virginia Beach, VA 23454

Revco Store Number 341
6531 College Park Square
Virginia Beach, VA 23464

Revco Store Number 374
Fairfield Shopping Center
5232 Fairfield S/C
Virginia Beach, VA 23464

Revco Store Number 464
Kemps River Crossing
1309 Fordham Drive
Virginia Beach, VA 23464

Revco Store Number 787
1075 Independence Blvd.
Virginia Beach, VA 23455

Revco Store Number 883
880 S. Military Hwy.
Virginia Beach, VA 23464

Revco Store Number 1183
5610 Princess Anne Road
Virginia Beach, VA 23462

Revco Store Number 1200
3600 South Plaza Trail
Virginia Beach, VA 23452

Revco Store Number 1112
Holland Plaza Shopping Center
1240 Holland Road
Suffolk, Va 23434

Revco Store Number 4385
Suffolk Shopping Center
1405 North Main Street
Suffolk, VA 23434

Revco Store Number 109
4221 Pleasant Valley Road
Virginia Beach, VA 23464

Revco Store Number 116
Linkhorn Shopping Center
980 Laskin Road
Virginia Beach, VA 23451

Revco Store Number 344
3333 Virginia Beach Blvd.
Virginia Beach, VA 23452

Revco Store Number 440
Holland Shopping Center
4324 Holland Road
Virginia Beach, VA 23452

Revco Store Number 603
Hilltop North Shopping Center
750 Hilltop North S/C
Virginia Beach, VA 23451

Revco Store Number 881
Birchwood Mall
3756 Virginia Beach Blvd.
Virginia Beach, VA 23452

Revco Store Number 1188
Pembroke Meadows Shopping Center
748 Independence Blvd.
Virginia Beach, VA 23455

Revco Store Number 1110
2356-C Virginia Beach Blvd.
Virginia Beach, VA 23454

Revco Store Number 1396
Great Neck Shopping Center
1216 Great Neck Village S/C
Virginia Beach, VA 23454

161

Decision and Order

Revco Store Number 1656 Virginia Beach Blvd. and Dorset Street Virginia Beach, VA 23462	Revco Store Number 2725 2005 Sandbridge Road #101 Virginia Beach, VA 23456
Revco Store Number 4406 1012 Fallbrook Bend Virginia Beach, VA 23455	Revco Store Number 45542 Shipp's Corner Shopping Center 3208 Holland Road, Suite 11 Virginia Beach, VA 23456
Revco Store Number 4555 Birdneck Shopping Center 1077 Virginia Beach Blvd. Virginia Beach, VA 23451	Revco Store Number 4599 Lake Shores Plaza Shopping Center 5193 Shore Drive #109 Virginia Beach, VA 23455
Revco Store Number 382 Governor's Green Shopping Center 4511-K John Tyler Hwy. Williamsburg, VA 23185	Revco Store Number 1147 James-York Shopping Center 701 Merrimac Trail Williamsburg, VA 23185
Revco Store Number 2573 124 Waller Mill Road Williamsburg, VA 23185	Revco Store Number 1625 Shoppes at Yorktown US 17 & Goodwin Neck Road York, VA 23692

APPENDIX I

ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement ("Agreement") is by and between CVS Corporation ("CVS"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One CVS Drive, Woonsocket, Rhode Island; Revco D.S., Inc. ("Revco"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1925 Enterprise Parkway, Twinsburg, Ohio (collectively "proposed respondents"); and the Federal Trade Commission ("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, CVS has proposed to acquire all of the outstanding voting securities of and to merge (through a wholly-owned

subsidiary) with Revco D.S., Inc., pursuant to an agreement and plan of merger dated February 6, 1997 ("the proposed Acquisition"); and

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

Whereas, if the Commission accepts the attached Agreement Containing Consent Order ("consent order"), the Commission is required to place it on the public record for a period of sixty (60) days for public comment and may subsequently either withdraw such acceptance or issue and serve its complaint and its decision and final order in disposition of the proceeding pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an agreement is not reached preserving the *status quo ante* of the Revco Virginia Assets, the Virginia Assets to be Divested, the Revco Pharmacy Assets, the New York Assets to be Divested, and the CVS Binghamton Assets as described in the attached consent order (hereinafter sometimes referred to as "Assets") during the period prior to their divestiture, any divestiture resulting from any administrative proceeding challenging the legality of the Acquisition might not be possible, or might produce a less than effective remedy; and

Whereas, the Commission is concerned that prior to any divestitures to the Acquirer(s) approved by the Commission, it may be necessary to preserve the continued viability and competitiveness of the Assets; and

Whereas, the purpose of this Agreement and of the consent order is to preserve the Assets pending the divestitures to the Acquirer(s) approved by the Commission under the terms of the order, in order to remedy any anticompetitive effects of the proposed Acquisition; and

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

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

Now, therefore, in consideration of the Commission's agreement that at the time it accepts the consent order for public comment it will grant early termination of the Hart-Scott-Rodino waiting period, the Parties agree as follows:

TERMS OF AGREEMENT

1. Proposed respondents agree to execute, and upon its issuance to be bound by, the attached consent order. The Parties further agree that each term defined in the attached consent order shall have the same meaning in this Agreement.

2. Proposed respondents agree that from the date proposed respondents sign this Agreement until the earlier of the dates listed in subparagraphs 2.a and 2.b, proposed respondents will comply with the provisions of this Agreement:

a. Three (3) business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The date the divestitures as set out in the consent order have been completed.

3. Proposed respondents shall maintain the viability and marketability of the Assets, and shall not cause the wasting or deterioration of the Assets, nor shall they sell, transfer, encumber or otherwise impair their marketability or viability.

4. Proposed respondents shall maintain the competitiveness of the Assets. This includes, but is not limited to, maintaining promotions and discount policies, and continuing specific store services (such as, for example, hours of operation and operation of specific departments). In particular, proposed respondents shall continue to offer to customers who obtain pharmacy services at the Assets the same type and quality of pharmacy services that are offered at the proposed respondents' retail drug stores that are not subject to the consent order's divestiture provisions.

5. Should the Commission seek in any proceeding to compel proposed respondents to divest themselves of the Assets or to seek any other injunctive or equitable relief, proposed respondents 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 not sought to enjoin the proposed Acquisition. Proposed respondents also waive all rights to contest the validity of this Agreement.

6. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with five (5) days' notice to proposed respondents and

to their principal office(s), proposed respondents shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of proposed respondents, 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 proposed respondents relating to compliance with this Agreement; and

b. To interview officers or employees of proposed respondents, who may have counsel present, regarding any such matters.

7. This Agreement shall not be binding until approved by the Commission.

IN THE MATTER OF

SULZER LIMITED

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

Docket C-3559. Consent Order, Feb. 23, 1995--Modifying Order, Aug. 15, 1997

This order reopens and modifies a 1995 consent order so that the language in paragraph IV.A of the final consent order conforms with the language of the proposed consent agreement that was signed by the respondent and accepted by the Commission for public comment.

ORDER AMENDING CONSENT ORDER

The order in this matter was issued on February 23, 1995. The language in paragraph IV.A of the order does not conform to that contained in paragraph IV.A of the agreement containing consent order ("consent agreement") signed by Sulzer and accepted by the Commission on September 12, 1994, for public comment.

The public interest would be served by conforming the language of the order with that contained in the consent agreement. Sulzer has waived any rights it may have under Section 3.72(b) of the Commission's Rules of Practice and consents to the changes contemplated by this order. Accordingly,

It is ordered, That this matter be, and it hereby is, reopened; and
It is further ordered, That paragraph IV.A of the consent order in Docket No. C-3559, issued on February 23, 1995, be, and it hereby is, amended to read as follows:

A. For a ten (10) year period commencing on the date this order becomes final, Sulzer shall not enter into, obtain, make, carry out or enforce any exclusive agreements with Sumitomo Chemical Company Limited or otherwise take any action whatsoever, directly or indirectly, that would prevent Sumitomo Chemical Company Limited from selling Sumitomo Polyester to any Commission-approved acquirer of the Amdry 2010 Information. Within thirty days after the order becomes final, respondent shall provide a copy of the order to each person at Sumitomo Chemical Company Limited with whom respondent has contact in connection with the purchase of Sumitomo Polyester.

Complaint

124 F.T.C.

IN THE MATTER OF

APPLE COMPUTER, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3763. Complaint, Aug. 18, 1997--Decision, Aug. 18, 1997*

This consent order requires, among other things, the respondent to offer to eligible consumers who purchased the Performa 550 or 560, or the Macintosh LC 550 computers on or after April 1, 1994, the upgrade kits at less than half the original list price and to rebate \$776 to consumers who already have purchased the upgrade. The consent order also prohibits Apple Computer from misrepresenting the availability of any microprocessor upgrade product, and from representing that computer hardware is currently upgradeable unless the upgrade is then available in reasonable quantities.

Appearances

For the Commission: *Matthew Gold, Linda Badger and Jeffrey Klurfeld.*

For the respondent: *James Spears, Gadsby & Hannah,*
Washington, D.C.

COMPLAINT

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

PARAGRAPH 1. Apple is a California corporation with its offices and principal place of business located at One Infinite Loop, Cupertino, California.

PAR. 2. Apple has manufactured, advertised, labeled, offered for sale, sold, and distributed the "Performa 550," "Macintosh LC 550," and "Performa 560" personal computers, and other computer hardware and software to consumers. The Performa 550, Macintosh LC 550, and Performa 560 models are based on the Motorola 68030 microprocessor. While continuing to promote the sale of these computers, respondent introduced a new series of computers based on the faster, more powerful "PowerPC" microprocessor. Beginning approximately April 1, 1994, subsequent to this introduction of the

new chip, respondent advertised Performa 550, Macintosh LC 550, and Performa 560 computers as upgradeable to PowerPC performance.

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 disseminated or caused to be disseminated advertisements for the "PowerPC" upgrade to the Performa 550 and Performa 560 computers, including but not necessarily limited to a red sticker that was placed on the boxes containing these computers, attached as Exhibit A. These advertisements contain the following statement:

"Ready for PowerPC upgrade." [Exhibit A]

PAR. 5. Respondent disseminated or caused to be disseminated advertisements for the "PowerPC" upgrade to the Performa 550, Macintosh LC 550, and Performa 560 computers, including but not necessarily limited to the attached Exhibits B-D. These advertisements contain the following statements:

A. "And when you're ready to expand your [Macintosh LC 550] system for more performance, you can install an optional CD-ROM drive, add an Ethernet card, or upgrade to our new Power Macintosh TM technology."

[Exhibit B (Print: "Apple Education Recommended Products At a Glance")]

B. "Can a personal computer grow up with your family?"

With technology changing so quickly, it's only natural to wonder whether the computer you buy today will become obsolete tomorrow. That's why Apple designed the Macintosh Performa to work as well tomorrow as it does today.

You can even add extra memory or upgrade your Performa to the PowerPC chip (making it virtually impossible to outgrow).

Performa

The Family Macintosh"

[Exhibit C (Print: "Can a personal computer grow up with your family?")]

C. "A PARENT'S GUIDE TO COMPUTERS

Every Performa can grow with your family. Each one has enough memory, power, and storage space to serve your family for years. However, should you decide you want to upgrade in the future, you can expand your Performa's RAM, hard drive storage, and even microprocessor to keep step with improvements in technology (such as the hot new PowerPC chip)."

[Exhibit D (Special Advertising Section insert: "A Parent's Guide To Computers.")]

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that a PowerPC upgrade was available to consumers at the time that they purchased a Performa 550 or Performa 560 computer.

PAR. 7. In truth and in fact, a PowerPC upgrade was not available to consumers at the time that they purchased a Performa 550 or Performa 560 computer. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. Through the use of the statements contained in the advertisements referred to in paragraphs four and five, including but not necessarily limited to the advertisements attached as Exhibits A-D, respondent has represented, directly or by implication, that a PowerPC upgrade would be available within a reasonable period of time after the purchase of a Performa 550, Macintosh LC 550, or Performa 560 computer.

PAR. 9. In truth and in fact, the PowerPC upgrade was not available within a reasonable period of time after the purchase of a Performa 550, Macintosh LC 550, or Performa 560 computer. No such upgrade was offered by respondent for at least one year after it began representing that the Performa 550, Macintosh LC 550, or Performa 560 computers were upgradeable. Indeed, by the time respondent made the upgrade available, the cost of the upgrade approached the cost of an entirely new computer with a PowerPC microprocessor. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraphs four and five, including but not necessarily limited to the advertisements attached as Exhibits A-D, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraphs six and eight, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 11. In truth and in fact, at the time it made the representations set forth in paragraphs six and eight, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

PAR. 12. In its advertising of the Performa 550, Macintosh LC 550, and Performa 560 computers, respondent represented that these computers were upgradeable to PowerPC technology. Respondent failed to disclose that, in order to obtain the PowerPC technology, consumers would need to purchase and install an upgrade package that included not only a PowerPC upgrade card, but also a new logic board. As a result, consumers were not aware that they would have to incur the cost and inconvenience associated with the replacement of the logic board. The fact that a logic board was a component of the upgrade package would be material to consumers in their decision to purchase the computer. The failure to disclose this fact, in light of the representations made, was a deceptive practice.

PAR. 13. 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

124 F.T.C.

EXHIBIT A

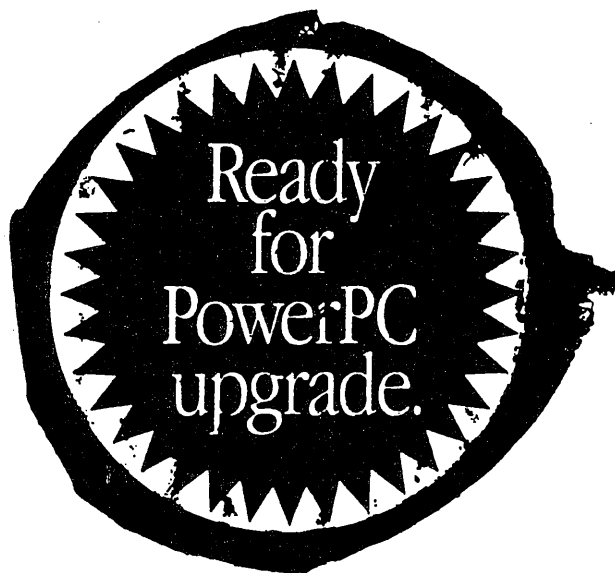




EXHIBIT B

April 1994

Apple Education
Recommended Products

At a Glance

K-12 Institutional purchase only


Macintosh LC 550

Perfect for general student use, the Mac LC 550 combines our all-in-one design with a price that's hard to beat. Our recommended system includes a built-in Sony Trinitron™ 17" RGB color display, stereo speakers and microphone. And when you're ready to expand your system for more performance, you can install an optional CD-ROM drive, add an Ethernet card, or upgrade to our new Power Macintosh™ technology.

- 33MHz 68030 processor
- 4MB memory (expandable to 36MB)
- 160MB hard drive
- Apple SuperDrive™ (reads and writes Macintosh, Windows, DOS, and OS/2 files with optional Macintosh PC Exchange software)
- LC-compatible processor direct expansion slot for high-speed Ethernet networking, Apple IIe compatibility, or video input/output card
- Ready for PowerPC™ processor upgrade
- Expressway bus for built-in CD-ROM drive upgrade
- Sony Trinitron high-resolution 17" display (256 colors)

Macintosh LC 550 Color System includes Mac LC 550 + 160 with built-in Sony Trinitron 17" color display, stereo speakers, microphone, Apple Keyboard II and mouse. Without setup (#B189011A) \$1199. With setup (#B189111A) \$1259.



Macintosh LC 575

The new Macintosh LC 575 whips through math problems, science experiments, class recording, and multimedia presentations up to 300 percent faster than a Mac LC III. Which makes this an ideal system for classrooms, labs, and teacher desktops alike. Its monitor, speakers, microphone, hard drive, and CD-ROM are all inside a single case—there's just one cord to plug in, and no tangle of wires to contend with. Upgradable to our new RISC-based Power Macintosh™ technology.

- 33MHz 68030 processor
- 5MB memory (expandable to 36MB)
- 160MB hard drive
- Apple SuperDrive™ (reads and writes Macintosh, Windows, DOS, and OS/2 files with optional Macintosh PC Exchange software)
- Internal AppleCD™ 300i Plus dual-speed CD-ROM drive
- Two expansion slots—one for LC-type PDS cards (for video capture and display, for example) and one for either low-cost Ethernet networking or a modem
- Ready for PowerPC™ processor upgrade
- Sony Trinitron high-resolution 17" display (over 2,000 colors)

Macintosh LC 575 CD Color System includes Mac LC 575 + 160 with CD-ROM drive, built-in Sony Trinitron 17" color display, stereo speakers, microphone, Apple Keyboard II and mouse. Without setup (#B189211A) \$1699. With setup (#B189311A) \$1759.

EXHIBIT C

Can a personal computer grow up with your family?



With technology changing so quickly, it's only natural to wonder whether the computer you buy today will become obsolete tomorrow. That's why Apple designed the Macintosh® Performa® to work as well tomorrow as it does today.

You grow with your Performa.

Performa comes with all the software you're ever likely to need — enough to write letters, do a household budget, bring work home from the office and more.

Performa is also easy to learn and use, right out of the box. So this computer can help your kids from the first day of kindergarten through the last day of college.

If your interests grow or change, there are thousands of different programs available to meet your needs. Plus, since more homes and schools use Apple® computers

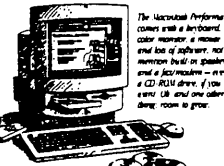
than any other brand, you're assured access to the newest, most exciting software.

Performa grows with you.

Apple's unique plug-and-play philosophy makes it easy to add new capabilities to your Macintosh Performa — today, tomorrow, even years down the road.

Plug-and-play means just what it sounds like. If you want to add a printer, just plug it in. If you need more storage space, just plug in a hard drive. And so on.

There are no cards to fool with. There



The Macintosh Performa comes with a keyboard, a color monitor, a mouse, and lots of software. Not to mention built-in speakers and a facsimile — even a CD-ROM drive. If you want, it's easy to add other things, room to grow.

are no AUTOEXEC.BAT or CONFIG.SYS files to modify. No other computer makes it this simple to add what you need.

You can even add extra memory or upgrade your Performa to the PowerPC™ chip (making it virtually impossible to outgrow).

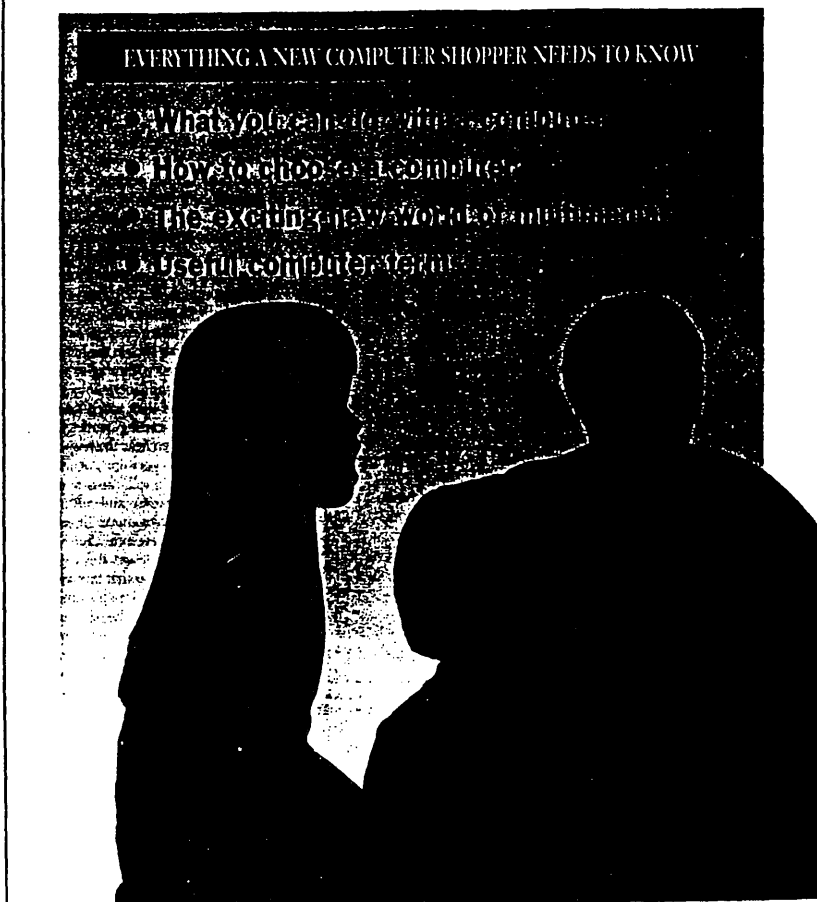
And every Performa also comes with a full year of in-home service and a lifetime of toll-free telephone support (making your future virtually worry-free).

So year after year, your family can enjoy the kind of power you buy a computer for in the first place. The power to be your best.

Performa 
The Family Macintosh

© 1994 Apple Computer, Inc. All rights reserved. Apple, the Apple logo, Macintosh, Performa, and The Family Macintosh are trademarks of Apple Computer, Inc., registered in the U.S. and other countries. PowerPC is a trademark of International Business Machines Corporation. All other trademarks are the property of their respective owners.

A PARENT'S GUIDE TO COMPUTERS



Complaint

124 F.T.C.

EXHIBIT D

Special Advertising Section

THE MACINTOSH PERFORMA

THE PERFECT CHOICE

THE POWER AND SIMPLICITY of the Mac makes it the perfect choice for everyone in the family. More students use Apple personal computers than any other brand, so chances are your kids are already using them in school. The Macintosh's easy-to-use point-and-click operation opens computing to any kid—or adult—who can use a mouse.

The Performa family is designed to be right at home with your family. It's easy to buy, easy to set up, and easy to use. And each Performa can run any of the literally thousands of educational, business, home productivity, and entertainment programs available.

EVERYTHING YOU NEED TO GET STARTED

A PERFORMA MAKES computer shopping as easy as can be. All you have to decide is which model best suits your needs. Apple has done all the rest. Everything you need is in one box: the computer, a color monitor, a keyboard, a mouse, a fax/modem, up to 16 software programs, digital sound, and speaker(s). Some models even have

CD-ROM drive built right in.

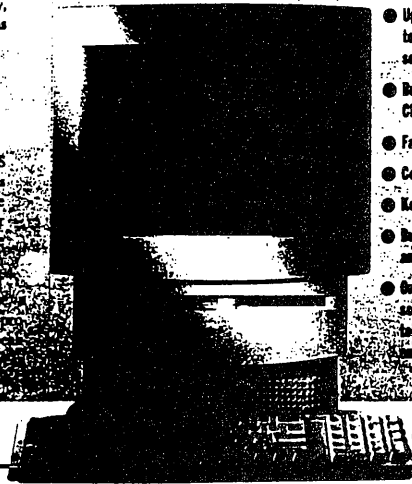
Your work and play springs to life in brilliant color on the Performa's high-resolution color monitor. Its 14-inch screen gives you plenty of workspace.

The built-in fax/modem not only can connect you to the vast realm of telecommunications and on-line services, but you can also send faxes directly from your computer to any fax machine.

Every Performa can grow with your family. Each one has

enough memory, power, and storage space to serve your family for years. However, should you decide you want to upgrade in the future, you can expand your Performa's RAM, hard drive storage, and even microprocessor to keep step with improvements in technology (such as the hot new PowerPC chip). Adding another hard drive, scanner, or CD-ROM drive is as simple as plugging one into a socket in back of the computer.

A COMPLETE COMPUTER SYSTEM:



- Up to 16 top-of-the-line software programs
- Built-in or optional CD-ROM drive
- Fax/modem
- Color monitor
- Keyboard and mouse
- Built-in digital sound and speaker(s)
- One year of in-home service, lifetime toll-free help, and a one year warranty

DECISION AND ORDER

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

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true 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 a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, and having modified the order in several respects, 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 Apple Computer, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California with its offices and principal place of business located at One Infinite Loop, in the City of Cupertino, 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.

Decision and Order

124 F.T.C.

ORDER

I.

It is ordered, That respondent, Apple Computer, Inc., a corporation, its successors and assigns, and respondent's officers, 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 computer hardware product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the availability of any microprocessor upgrade product.

II.

It is further ordered, That respondent, Apple Computer, Inc. a corporation, its successors and assigns, and respondent's officers, 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, or sale of any computer hardware product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any such product is currently upgradeable, unless at the time such representation is made, the upgrade is then available, in reasonable quantities to the public, given good-faith projections of anticipated demand.

III.

It is further ordered, That respondent, Apple Computer, Inc., a corporation, its successors and assigns, and respondent's officers, 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, or sale of any microprocessor upgrade product that incorporates a new logic board as part of the upgrade product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall not represent that such product is an "upgrade," in any manner, expressly or by implication, unless it discloses, clearly and prominently, and in close proximity to the

representation, that a new logic board is a component of the upgrade product.

IV.

A. Within fourteen (14) days of the date of service on respondent of this order, respondent shall publish notice of this redress provision in a nationally circulated newspaper. This notice shall be in the form set out in Appendix A.

B. Within ten (10) days of the date of service on respondent of this order, respondent shall compile:

1. A mailing list containing the name and last known address of each consumer who purchased a Performa 550, Macintosh LC 550, or Performa 560 computer in the United States or in a territory of the United States on or after April 1, 1994; and

2. A mailing list containing the name and last known address of each consumer who purchased a PowerPC upgrade for a Performa 550, Macintosh LC 550, or Performa 560 computer in the United States or in a territory of the United States.

C. Respondent shall compile the lists required by Parts IV.B.1 and IV.B.2 from all customer service records under its control, including, but not limited to, registration cards, telephone logs, electronic mail logs, and written correspondence.

D. Within fifteen(15) days of the date of service of this order, respondent shall send via first class-mail, postage prepaid, a notice in the form set forth in Appendix B to this order, to all Performa 550, Macintosh LC 550, or Performa 560 purchasers listed on the mailing list required by Part IV.B.1. Respondent shall send the items set forth in Appendix B via electronic mail to any purchaser for whom respondent has only an electronic mail address. No information other than that contained in Appendix B shall be included. No additional materials, other than a postage pre-paid envelope for return of the offer form, shall be transmitted therewith.

E. The envelope containing the items set forth in Appendix B shall be in the form set forth in Appendix C to this order. For each mailing returned by the U.S. Postal Service as undeliverable for which respondent thereafter obtains a corrected address, respondent shall, within fifteen (15) business days after receiving the corrected address, send the items set forth in Appendix B to the corrected address.

F. Any consumer who, within seventy-five (75) days of the date of service of this order, returns to respondent both: 1) the form contained in Appendix A or Appendix B; and 2) payment in the amount of five hundred and ninety-nine (599) dollars, will be eligible to receive a PowerPC Upgrade Kit, or its equivalent. Apple will not be required to honor any request that is postmarked after the seventy-fifth day.

G. Respondent shall send, delivery charges prepaid, the PowerPC Upgrade Kit (or product equivalent) by common carrier appropriate to the fragility of the product, within ninety (90) days of the date of service of this order.

H. If respondent chooses to provide a product equivalent to the PowerPC Upgrade Kit to some consumers, those consumers will be chosen at random.

I. Respondent shall extend the warranty on the Performa 550, Macintosh LC 550, and Performa 560 to include all parts and labor charges necessary for installation of a PowerPC Upgrade Kit. Within thirty (30) days of the date of service of this order, respondent shall arrange for its authorized service locations to perform this installation. Respondent shall also provide each location with any installation instructions that they might not otherwise possess which are unique to the installation of a PowerPC Upgrade Kit.

J. Within fifteen (15) days of the date of service of this order, respondent shall send via first class-mail, postage prepaid, a notice in the form set forth in Appendix D to this order to each purchaser listed on the mailing list required by Part IV.B.2. No information other than that contained in Appendix D shall be included. No additional materials, other than a postage pre-paid envelope for return of the offer form, shall be transmitted therewith. Respondent shall send seven hundred and seventy-six (776) dollars to each consumer who, within seventy-five (75) days of service of this order, returns the form contained in Appendix D and either: (1) has previously submitted the registration card included in the PowerPC upgrade; or (2) provides reasonable proof of purchase of the PowerPC upgrade.

K. The envelope containing the items set forth in Appendix D shall be in the form set forth in Appendix E to this order. For each mailing returned by the U.S. Postal Service as undeliverable for which respondent thereafter obtains a corrected address, respondent shall, within fifteen (15) business days after receiving the corrected address, send the items set forth in Appendix D.

L. Respondent shall adequately staff an 800 number to answer questions from any consumer who receives a notice described in this redress provision, and any questions resulting from the publication of the notice described in Part III.A.

M. Within two hundred forty (240) days of the date of service of this order, respondent shall furnish to Commission staff the following:

1. In computer readable form and in computer print out form, the following:

a. A list of the names and addresses of all purchasers who obtain a PowerPC Upgrade Kit (or the equivalent) pursuant to this order;

b. A list of the names and addresses of all recipients of rebate checks;

c. A copy of the records used to identify these purchasers or recipients; and

d. A description of what respondent sent to each purchaser or recipient (including the check number if applicable) and the mailing date of every upgrade or rebate sent.

2. Copies of all notices returned to respondent as undeliverable (previously described in Parts IV.E and IV.K of this order); and

3. All other documents and records evidencing efforts made and actions taken by respondent to identify, locate, contact and provide rebates or upgrades to consumers.

N. For the purposes of this Part, "PowerPC Upgrade Kit" includes a 575 logic board, an upgrade card, four megabytes of RAM, Macintosh System 7.5 Operating System software, the most recent version of Claris Works for PowerPC, and a coupon for free installation of the hardware components of the PowerPC Upgrade Kit. The term "equivalent" means a computer based on the PowerPC microprocessor along with all the hardware necessary to supply a Performa 550, Macintosh LC 550, or Performa 560 owner with a complete computer system, including but not limited to a comparable keyboard and monitor. The term "consumer" includes an educational institution or any other organization.

V.

It is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondent 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.

VI.

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

VII.

It is further ordered, That respondent, and its successors and assigns, shall deliver a copy of this order to all current and future principals and directors; to all current and future officers and managers with responsibilities or duties affecting compliance with the terms of this order; and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and, for a period of five (5) years from the date of issuance of this order, to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VIII.

It is further ordered, That this order will terminate on August 18, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging

any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IX.

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

By the Commission.¹

APPENDIX A

[Newspaper Notice]

NOTICE TO PURCHASERS OF APPLE PERFORMA 550,
MACINTOSH LC 550 AND PERFORMA 560 COMPUTERS:

IF YOU PURCHASED AN APPLE PERFORMA 550, A MACINTOSH LC550 OR A PERFORMA 560 COMPUTER ON OR AFTER APRIL 1, 1994, YOU ARE ENTITLED TO PURCHASE A POWERPC UPGRADE KIT OR ITS EQUIVALENT FOR THE SUM OF \$599.00.

When we sold you your Apple computer, we advertised that it was "Ready for PowerPC upgrade." While a PowerPC upgrade was

¹ Prior to leaving the Commission, former Commissioner Varney registered her vote in the affirmative for issuing the complaint and decision and order in this matter.

subsequently offered for these models, the Federal Trade Commission ("FTC") and Apple have examined the representations that Apple made in connection with the sales of these models. While Apple believes that the upgrade representations were appropriate, customer satisfaction is our highest priority and, to this end, we have reached a settlement with the FTC that gives purchasers of these computers who would like to upgrade their computers an opportunity to secure a PowerPC upgrade at an attractive price.

For a limited time, Apple is offering its Performa 550/560 and Macintosh LC 550 customers a PowerPC upgrade kit for \$599. This upgrade kit will include the components necessary to make the PowerPC upgrade, and will also include an additional 4 megabytes of RAM. In addition, the kit will contain System 7.5 (the operating system for the PowerPC), and a PowerPC upgrade for Claris Works. Included in the upgrade kit will be a coupon for the installation of the hardware components of the upgrade at no additional cost to you.

To take advantage of this offer, please fill out the information on the attached form and return it, along with a payment in the amount of \$599. You may wish to make a copy of the form for your records. Upon receipt of payment and a properly completed form, Apple will ship the upgrade kit directly to you within approximately 90 days.

For customers who purchased a PowerPC upgrade for their Performa 550/560 or Macintosh LC 550 prior to [date of service of order], Apple is offering a cash rebate upon certification and proof of purchase. For additional information on this rebate offer, please contact Apple at the toll-free number noted below.

Please note that these offers are being made for a limited time only. To receive an upgrade kit at this price, customers must respond with payment and a properly completed form, postmarked no later than [70 days from date of publication]. You should also note that this upgrade opportunity is only available to customers who purchased Performa 550/560 and Macintosh LC 550 computers after April 1, 1994.

Should you have any questions regarding this upgrade offer, please call 1-800- ____ - ____

APPLE COMPUTER, INC.

[Form to be Attached to Newspaper Notice]

RETURN THIS FORM WITH YOUR PAYMENT TO THE FOLLOWING ADDRESS:
[ADDRESS]

I am the purchaser of a Performa 550/ Performa 560/ Macintosh LC 550 (circle the correct model number) computer. I understand that I must have purchased my computer after April 1, 1994 to participate in this offer and that I must include the serial number of my computer with my order. I would like to order a PowerPC Upgrade Kit. Please deliver my purchase to the following address:

NAME: _____
 STREET ADDRESS: _____
 CITY AND STATE: _____ ZIP CODE: _____

____ My check for \$599.00 is enclosed (make checks payable to Apple Computer, Inc.)

__ Please charge my ____ Visa __ MasterCard __ American Express

 Credit Card Number Expiration Date (Month/Year)

CREDIT CARD HOLDER: PLEASE PROVIDE THE FOLLOWING INFORMATION:

NAME: _____
 BILLING ADDRESS _____
 ZIP CODE: ____ DAYTIME TELEPHONE NUMBER: _____

I hereby certify that I bought an Apple Performa 550, Performa 560 or Macintosh LC 550 in _____ (month you purchased your computer), ____ (year you purchased your computer). The serial number of my computer is _____ .

DATED: _____, 1997.

 Signature

APPENDIX B

[Apple Computer, Inc. Letterhead]

[Date]

Re: Performa 550/560/Macintosh LC 550 Upgrade Offer

Dear [Customer Name]:

Our records show that during 1994 or 1995, you purchased a Performa 550, a Macintosh LC 550 or a Performa 560 from Apple Computer, Inc.

When we sold you your Apple computer, we advertised that it was "Ready for PowerPC upgrade." While a PowerPC upgrade was subsequently offered for these models, the Federal Trade Commission ("FTC") and Apple have examined the representations that Apple made in connection with the sales of these models. While Apple believes that the upgrade representations were appropriate, customer satisfaction is our highest priority and, to this end, we have reached a settlement with the FTC that gives purchasers of these computers who would like to upgrade their computers an opportunity to secure a PowerPC upgrade at an attractive price.

For a limited time, Apple is offering its Performa 550/560 and Macintosh LC 550 customers a PowerPC upgrade kit for \$599. This upgrade kit will include the components necessary to make the PowerPC upgrade, and will also include an additional 4 megabytes of RAM which will allow the PowerPC chip to operate effectively. In addition, the kit will contain two key software packages: System 7.5, the operating system for the PowerPC; and the PowerPC upgrade for Claris Works. Included in the upgrade kit will be a coupon which will cover the cost of installing the upgrade's hardware components. Upon receiving your upgrade kit, you will only need to take your computer, the upgrade kit and the upgrade coupon to your local authorized Apple dealer, who will install the hardware for you at not additional cost.

To take advantage of this offer, please fill out the information on the enclosed form and return it, along with a payment in the amount of \$599 in the enclosed envelope or in an envelope addressed to Apple Computer, Inc. [address] You may wish to make a copy of the form for your records. Upon receipt of payment and a properly completed form, Apple will ship the upgrade kit directly to you within approximately 75 days.

Please note that this offer is being made for a limited time only and that to receive an upgrade kit at this price, customers must respond with payment and a properly completed form by no later than [75 days from date of service of order]. Because of the limited availability of upgrade kits, we will not be able to extend this deadline, and we will not be offering this upgrade opportunity in the future. You should also note that this upgrade opportunity is only available to customers who purchased Performa 550/560 and Macintosh LC 550 computers after April 1, 1994. Should you have any questions regarding this upgrade offer, please call our information line at 1(800) --. As always, we at Apple view customer

Decision and Order

124 F.T.C.

APPENDIX C

Apple Computer, Inc.

[address]

FORWARDING AND RETURN POSTAGE GUARANTEED

[ADDRESS]

ATTENTION: IMPORTANT POWERPC UPGRADE OFFER FOR YOUR
PERFORMA 550, MACINTOSH LC 550, OR PERFORMA 560 COMPUTER
INSIDE

APPENDIX D

[Apple Computer, Inc. Letterhead]

[Date]

Re: Performa 550/560/Macintosh LC 550 Upgrade Rebate

Dear [Customer Name]:

Our records show that during 1994 or 1995, you purchased a PowerPC upgrade for either a Performa 550, a Macintosh LC 550 or a Performa 560 computer.

When we sold you your Apple computer, we advertised that it was "Ready for PowerPC upgrade." For the past several months, the Federal Trade Commission ("FTC") and Apple have examined the upgrade representations that Apple made in connection with the sales of these models. While Apple believes that the upgrade representations were appropriate, customer satisfaction is our highest priority and, to this end, we have reached a settlement with the FTC which will give purchasers of these computers who have not yet upgraded their computers an opportunity to secure a PowerPC upgrade at an attractive price.

Both we and the FTC believe that it is appropriate and fair to provide customers who have already purchased a PowerPC upgrade a cash rebate in order to put them on an equal footing with customers taking advantage of the new upgrade offer. Accordingly, we would ask that you fill out the enclosed form, verifying that you did, in fact, purchase a PowerPC upgrade for a Performa 550, a Macintosh LC 550 or a Performa 560 computer. Upon receipt of your completed form and proof of purchase, Apple will mail you a check in the amount of \$776 to the address designated on your form. (Proof of purchase is not required for customers who filled out and mailed to Apple the registration card included in the PowerPC upgrade). Please

note that this offer is being made for a limited time only and that to receive a cash rebate qualified customers must respond with a completed form and proof of purchase by no later than [75 days from date of service of order]. Should you have any questions regarding this rebate offer, please call our information line at 1(800) --.

As always, we at Apple view customer satisfaction as our most important product. We appreciate your choosing Apple and look forward to serving you again in the future.

Sincerely,

David Manovich
Executive Vice-President for Global Sales
Apple Computer, Inc.

[Form to be Enclosed with Above Letter]

RETURN THIS FORM TO RECEIVE REBATE
(AN ENVELOPE IS ENCLOSED FOR YOUR CONVENIENCE)

My name is _____. I purchased a PowerPC upgrade for a Performa 550 / 560 / Macintosh LC 550 computer (circle the correct model number). I understand that Apple is prepared to provide a rebate of \$776.00 for those who purchased PowerPC upgrades for these computers and that to be entitled to the rebate, customers must have either registered the upgrade with Apple at the time of purchase or now provide proof of purchase.

Please Check One:

- I previously filled out and mailed the registration card that accompanied my Power PC upgrade to Apple Computer, Inc.
- I did not fill out the registration card when I received my PowerPC upgrade, but I have enclosed proof-of-purchase (receipt, canceled check, credit card charge, or original packing list or original label from PowerPC upgrade box).

Please deliver my rebate check to the following address:

NAME:

STREET ADDRESS:

CITY/STATE/ZIP

Signature

Decision and Order

124 F.T.C.

APPENDIX E

Apple Computer, Inc.

[address]

FORWARDING AND RETURN POSTAGE GUARANTEED

[Address]

ATTENTION: CASH REBATE OFFER ENCLOSED FOR POWERPC UPGRADE
PURCHASERS

IN THE MATTER OF

ALDI, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FAIR CREDIT REPORTING ACT AND SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-3764. Complaint, Sept. 5, 1997--Decision, Sept. 5, 1997*

This consent order requires, among other things, the Illinois-based grocery chain to comply with the provisions of the Fair Credit Reporting Act requiring the consumers to be notified when they are denied credit, insurance or a job based in whole or in part on information in their credit report and requiring the denying company to provide the name and address of the consumer reporting agency that supplied the report.

Appearances

For the Commission: *John Hallerud* and *C. Steven Baker*.

For the respondent: *Keith Reed, Seyfarth, Shaw, Fairwether & Geraldson*, Chicago, IL.

COMPLAINT

Pursuant to the provisions of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Aldi, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

DEFINITIONS

For the purposes of this complaint, the following definitions are applicable. The terms "*consumer*," "*consumer report*," and "*consumer reporting agency*" shall be defined as provided in Sections 603(c), 603(d), and 603(f), respectively, of the Fair Credit Reporting Act, 15 U.S.C. 1681a(c), 1681a(d) and 1681a(f).

PARAGRAPH 1. Respondent Aldi, Inc. 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 1200 N. Kirk Road, Batavia, Illinois.

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

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

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

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

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

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

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an

admission by the respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent Aldi, Inc. 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 1200 N. Kirk Road, Batavia, Illinois.

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

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

I.

It is ordered, That respondent Aldi, 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 any application for employment, do forthwith cease and desist from:

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

2. Failing, within ninety (90) days after the date of service of this order, to mail two (2) copies of the letter attached hereto as Appendix A, completed to provide the name and address of the consumer reporting agency supplying the report to each applicant who was denied employment by Aldi, Inc. between January 1, 1994, and the date this order is issued, based in whole or in part on information contained in a consumer report from a consumer reporting agency, such copies of the letter to be sent first class mail to the last known address of the applicant that is reflected in respondent's files, and accompanied by a copy of the Federal Trade Commission brochure attached hereto as Appendix B, copies of which are to be provided by respondent. Copies of the letters attached as Appendix A need not be sent to any applicant who is denied employment with respondent during the time period specified above if the applicant's application file clearly shows that respondent Aldi Inc. has previously given the applicant notification that complies in all respects with the provisions of paragraph I.(1) of this order.

II.

It is further ordered, That respondent and its successors and assigns shall, for five (5) years from the date of issuance of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying, documents demonstrating compliance with the requirements of Part I of this order, such documents to include, but not be limited to, all employment evaluation criteria relating to consumer reports, instructions given to employees regarding compliance with the provisions of this order, all notices or a written or electronically stored notation of the description

of the form of notice and date such notice was provided to applicants pursuant to any provisions of this order, and records of all applicants for whom consumer reports were obtained for whom offers of employment are not made or have been withheld, withdrawn, or rescinded based, in whole or in part, on information contained in a consumer report.

III.

It is further ordered, That respondent and its successors and assigns shall, for five (5) years from the date of issuance of this order, deliver a copy of this order at least once per year to all persons responsible for the respondent's compliance with Section 615(a) of the Fair Credit Reporting Act.

IV.

It is further ordered, That respondent and its successors and assigns shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporation that may affect compliance obligations arising under this order, including, but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that with respect to any proposed change in the corporation about which respondent learns less than thirty days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent and its successors and assigns shall, within sixty (60) days of the date of service of this order, and at such other times as the Federal Trade 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.

VI.

It is further ordered, That this order will terminate on September 5, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

APPENDIX A

Dear Employment Applicant:

Our records show that you applied for employment at Aldi, Inc., at some time after January 1, 1994. In assessing your job application, in which you authorized us to check your credit record, our decision may have been based, at least in part, on information obtained from the credit bureau identified below:

[NAME OF CONSUMER REPORTING AGENCY]

[ADDRESS]

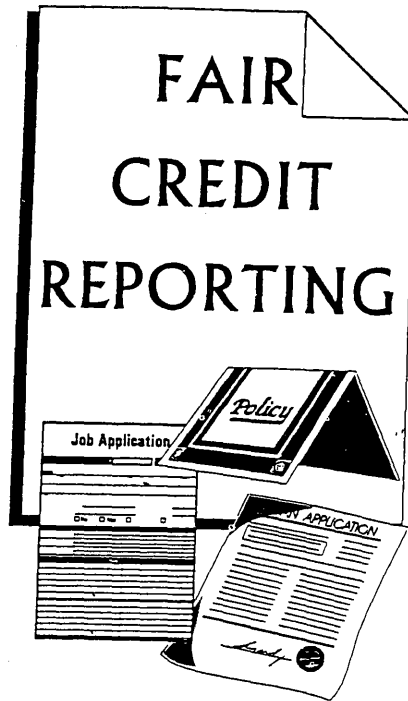
It is important for you to know that a federal law, the Fair Credit Reporting Act, gives persons who are denied employment the right to know if the denial was based, in whole or in part, on information supplied by a consumer reporting agency, commonly known as a "credit bureau." If so, the name and address of the credit bureau must be disclosed to the applicant.

Information in your credit report may have led us, at least in part, to deny your application. Based on our actions you are entitled to a free disclosure of your credit report if you contact the credit bureau within (30) days. An extra copy of this notice is enclosed so that you may give it to the agency when you request to review your file.

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

Thank you.

APPENDIX B



Federal Trade Commission
Bureau of Consumer Protection
Office of Consumer & Business Education
(202) 326-3650

September 1997

APPENDIX B