Findings, Opinions, and Orders

IN THE MATTER OF

THE MAY DEPARTMENT STORES COMPANY

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

Docket C-3676. Complaint, July 9, 1996--Decision, July 9, 1996

This consent order requires, among other things, a Missouri-based company to cease unwarranted collection activity on certain acquired credit card accounts, to correct the inaccurate or obsolete credit data it sent to credit reporting agencies concerning these accounts, and to take steps to ensure that the information maintained and reported with respect to the acquired accounts is accurate. In addition, the consent order prohibits the respondent from sending credit cards to consumers, except: in response to an oral or written request or application for the credit card; or as a renewal of, or substitute for, an accepted credit card.

Appearances

For the Commission: *Christopher W. Keller* and *David Medine.*

For the respondent: *John M. Manos,* in-house counsel, St. Louis, MO.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 ("FTC Act"), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The May Department Stores Company, a corporation, hereinafter sometimes referred to as respondent or May, has violated the Truth in Lending Act ("TILA"), 15 U.S.C. 1601-1667, its implementing Regulation Z, 12 CFR 226, and the FTC Act, 15 U.S.C. 41-58, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, and alleges as follows:

DEFINITIONS

For the purpose of this complaint, the following definitions apply:

The terms *"open end credit plan"* and *"credit card"* are defined as set forth in Sections 103(i) and (k), respectively, of the Truth in Lending Act, 15 U.S.C. 1602(i) and 1602(k).

The terms *"card issuer," "consumer," "consumer credit,"* and *"credit"* are defined as set forth in Sections 226.2(a)(7), (11), (12), and (14), respectively, of Regulation Z, 12 CFR 226.2(a)(7), 226.2(a)(11), 226.2(a)(12), and 226.2(a)(14).

The term *"consumer reporting agency"* is defined as set forth in Section 603(f) of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681a(f).

PARAGRAPH 1. Respondent The May Department Stores Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York. Respondent's office and principal place of business is located at 611 Olive Street, St. Louis, Missouri.

PAR. 2. Respondent has been and is now engaged in the business of offering consumer credit to the public and is a creditor and card issuer as those terms are defined in the TILA and Regulation Z.

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

COUNT I

PAR. 4. Paragraphs one through three are incorporated herein by reference.

PAR. 5. Respondent, from time to time in the normal course of its business, acquires other retail sellers of consumer goods or services, including the existing open end credit plan accounts of those businesses.

PAR. 6. Respondent, in the course of obtaining and converting the open end credit plan accounts of acquired businesses to its own open end credit plan accounts, including the conversion of Thalhimer's accounts to Hecht Co. accounts, performs various conversion functions. In this process, respondent, among other acts and practices,

engages in the acts and practices alleged in paragraphs seven through twelve, inclusive, to wit.

PAR. 7. Respondent creates a new open end credit plan account and issues a new account number in the name of each consumer having an open end credit plan account in good standing with the retail company acquired by respondent.

PAR. 8. Respondent, in the normal course of its business, furnishes account information concerning its open end credit plan accounts to consumer reporting agencies.

PAR. 9. In the course of converting open end credit accounts of acquired retail companies, respondent incorporates items of information from the acquired account file into the new account file in such a fashion that some entries in the new account file inaccurately reflect the status of the account. Such items of information include but are not limited to (1) derogatory information pertaining exclusively to activity that occurred on the acquired account, and (2) derogatory information pertaining to events antedating the period of obsolescence reflected in Section 605 of the FCRA.

PAR. 10. Respondent fails to record discrete entries within individual open end credit plan accounts in such a fashion that the entries accurately reflect the status of the account, including but not limited to (1) indicating certain identical items of derogatory information more than once, and (2) showing relevant dates on items of information in such a fashion that those items are reported by consumer reporting agencies for periods beyond those permitted by Section 605(a) of the FCRA, thus stating or implying, for example, that accounts were charged to profit and loss more recently than the actual date of charge off.

PAR. 11. Respondent otherwise fails to convert acquired open end credit plan account records accurately to reflect the status of individual accounts.

PAR. 12. Respondent fails to maintain reasonable procedures to monitor, measure, or test its open end credit plan account acquisition, conversion, and maintenance systems to assure the accuracy of the account information it conveys to consumer reporting agencies.

PAR. 13. Despite the fact that respondent knew or should have known that open end credit plan account information that it transmitted to consumer reporting agencies is not accurate,

respondent failed promptly to correct its computer system or implement procedures adequate to reduce the occurrence or reoccurrence of inaccuracies.

PAR. 14. Respondent on some occasions initiates collection activity on purported delinquencies, created in error when respondent creates a second account, as alleged in paragraphs six and seven, without the knowledge or authorization of consumers, and subsequently posts payments and other credits to the incorrect account.

PAR. 15. By and through the acts and practices alleged in paragraphs nine through fourteen, and others not specifically set forth herein, respondent has caused substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers.

PAR. 16. Therefore, the acts and practices alleged in paragraphs nine through fourteen constitute unfair acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

COUNT II

PAR. 17. Paragraphs one through three are incorporated herein by reference.

PAR. 18. Respondent, in connection with telephone marketing of offers of pre-approved open end credit plan accounts, in some cases establishes open end credit accounts for consumers who have not received or approved the offer or who have specifically declined the offer.

PAR. 19. Pursuant to Section 132 of the TILA and Section 226.12(a)(2) of Regulation Z, no credit card shall be issued to any person except: (1) in response to an oral or written request or application for the card; or (2) as a renewal of, or substitute for, an accepted credit card.

PAR. 20. By and through the acts and practices alleged in paragraph eighteen and others not specifically set forth herein, respondent has issued, or caused to be issued, unsolicited credit cards to consumers.

PAR. 21. Therefore, the acts and practices alleged in paragraphs eighteen and twenty violate Section 132 of the TILA, 15 U.S.C. 1643, and Section 226.12(a) of Regulation Z, 12 CFR 226.12(a).

Commissioner Starek recused.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondent with violations of Section 5(a) of the Federal Trade Commission Act and Section 132 of the Truth in Lending Act; and

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

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

1. Proposed respondent May is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York. Respondent's office and principal place of business is located at 611 Olive Street, St. Louis, Missouri.

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

ORDER

DEFINITIONS

For the purpose of this order the following definitions apply:

The terms *"open end credit plan," "credit card,"* and *"cardholder"* are defined as set forth in Sections 103(i), (k), and (m), respectively, of the Truth in Lending Act ("TILA"), 15 U.S.C. 1602(i), 1602(k), and 1602(m).

The term *"consumer reporting agency"* is defined as set forth in Sections 603(f) of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681a(f).

"Fair Credit Billing Act" refers to Chapter 4, Credit Billing, 15 U.S.C. 1666 *et seq.*, of the Consumer Credit Protection Act.

I.

It is hereby ordered, That respondent, The May Department Stores Company, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporate subsidiary, division, or other device, do forthwith cease and desist from failing to follow reasonable procedures to assure the accuracy of the information that respondent maintains with respect to cardholder accounts that respondent has acquired or acquires from other retail sellers of consumer goods or services and that respondent provides to consumer reporting agencies, including but not limited to the accuracy of dates of relevant actions.

II.

It is further ordered, That, to the extent not already accomplished, within ninety (90) days of service of this order, respondent, its successors and assigns, shall identify current cardholders on whom, since January 1, 1992, respondent has reported incorrectly to any consumer reporting agency derogatory information related solely to the cardholder's open end credit plan account with an acquired creditor. Respondent shall instruct each such consumer reporting agency, in writing, to remove or correct any such derogatory information.

III.

It is further ordered, That respondent, its successors and assigns, shall, after written notice from a consumer to its Bill Adjustment Department in accordance with the Fair Credit Billing Act of a failure by respondent accurately to ascribe charges, credits, payments, or other activity to the correct account, cease collection activity as to the disputed amount, either directly or through any third party, on any outstanding balance that is due, in whole or in part, to respondent's failure accurately to ascribe charges, credits, payments, or other activity to the correct account.

IV.

It is further ordered, That respondent, its successors and assigns, in order to give effect to paragraph III of this order, shall institute reasonable procedures to train respondent's collection personnel in the obligations of the Fair Credit Billing Act, and to further train respondent's collection personnel to inform consumers who assert billing errors of the correct address of respondent's Bill Adjustment Department.

V.

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporate subsidiary, division, or other device, in connection with any open end credit plan, do forthwith cease and desist from violating Section 132 of the Truth in Lending Act, 15 U.S.C. 1642, and Section 226.12 of Regulation Z, 12 CFR 226.12, by issuing a credit card to any person except (1) in response to an oral or written request or application for the card; or (2) as a renewal of, or substitute for, an accepted credit card.

VI.

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

documents demonstrating compliance with the requirements of this order.

VII.

It is further ordered, That respondent, its successors and assigns, shall deliver for five (5) years a copy of this order to all present and future personnel, agents, or representatives having responsibilities with respect to the subject matter of this order.

VIII.

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

IX.

This order will terminate on July 9, 2016, or twenty 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 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.

X.

It is further ordered, That respondent, its successors and assigns, shall, within one hundred and eighty (180) days of the date of service of this order, file with the Federal Trade Commission, Division of Enforcement, a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Starek recused.

IN THE MATTER OF

THE LOEWEN GROUP INC., 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-3677. Complaint, July 29, 1996--Decision, July 29, 1996

This consent order requires, among other things, a Kentucky-based company to divest, within 12 months, one of its three funeral homes in Brownsville, Texas, and either a large funeral home in San Benito, Texas, or two smaller funeral homes in Harlingen, Texas, to Commission-approved acquirers. If the transactions are not completed as required, the Commission may appoint a trustee to divest the properties.

Appearances

For the Commission: *Thomas B. Carter, Gary D. Kennedy* and *William Baer*.

For the respondents: *Deborah Feinstein, Arnold & Porter*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that The Loewen Group Inc., a corporation, and Loewen Group International, Inc., a corporation, hereinafter sometimes referred to as respondents, have acquired Garza Memorial Funeral Home, Inc., a corporation, and Thomae-Garza Funeral Directors, Inc., a corporation, in 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; 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 as follows:

I. DEFINITION

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

"Funeral" means a group of services provided at the death of an individual, the focus of which is some form of commemorative ceremony of the life of the deceased at which ceremony the body is present; this group of services ordinarily includes, but is not limited to: the removal of the body from the place of death; its embalming or other preparation; making available a place for visitation and viewing, for the conduct of a funeral service, and for the display of caskets and outside cases; and the arrangement for and conveyance of the body to a cemetery or crematory for final disposition.

II. THE RESPONDENTS

2. Respondent The Loewen Group Inc. ("Loewen Group") is a corporation organized, existing and doing business under and by virtue of the laws of the province of British Columbia, Canada, with its office and principal place of business located at 4126 Norland Avenue, Burnaby, British Columbia, Canada V5G 3S8.

3. Respondent Loewen Group International, Inc. ("Loewen Group International") 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 50 East River Center Boulevard, Covington, Kentucky. Respondent Loewen Group International is a wholly-owned subsidiary of respondent Loewen Group.

4. At the time of the acquisition, Garza Memorial Funeral Home, Inc. ("Garza Memorial") was a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 1025 East Jackson Street, Brownsville, Texas.

5. At the time of the acquisition, Thomae-Garza Funeral Directors, Inc. ("Thomae-Garza") was a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 395 South Houston, San Benito, Texas.

6. Loewen Group, Loewen Group International, Garza Memorial, and Thomae-Garza 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 ACQUISITIONS

7. On or about October 28, 1991, Loewen Group through its wholly-owned subsidiary Loewen Group International acquired 100% of the voting securities of Garza Memorial.

8. On or about July 17, 1992, Loewen Group through its wholly-owned subsidiary Loewen Group International acquired 100% of the voting securities of Thomae-Garza.

IV. THE RELEVANT MARKETS

9. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the acquisitions of Garza Memorial and Thomae-Garza is the provision of funerals.

10. For purposes of this complaint, the relevant section of the country in which to analyze the effects of the acquisition of Garza Memorial is Brownsville, Texas, and its immediate environs; and the relevant section of the country in which to analyze the effects of the acquisition of Thomae-Garza is Harlingen/San Benito, Texas, and its immediate environs.

11. The relevant markets set forth in paragraphs nine and ten are concentrated, whether measured by the Herfindahl-Hirschmann Index or by two-firm and four-firm concentration ratios.

12. Entry into the relevant markets set forth in paragraphs nine and ten is difficult.

13. In the relevant markets, Loewen Group International and Garza Memorial were actual competitors in the provision of funerals, and Loewen Group International and Thomae-Garza were actual competitors in the provision of funerals.

V. EFFECT OF THE ACQUISITIONS

14. The effect of the acquisitions has been to substantially lessen competition 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 FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating actual competition between Loewen Group International and Garza Memorial, and between Loewen Group International and Thomae-Garza;

b. By increasing the likelihood of collusion in the relevant markets; and

c. By increasing the likelihood that Loewen Group International will unilaterally exercise market power in Brownsville, Texas, and its immediate environs.

VI. VIOLATIONS CHARGED

15. The acquisitions described in paragraphs seven and eight constitute violations 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.

Chairman Pitofsky recused.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Dallas Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, as amended; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft 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 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 The Loewen Group Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the province of British Columbia, Canada, with its office and principal place of business located at 4126 Norland Avenue, Burnaby, British Columbia, Canada V5G 3S8.

2. Respondent Loewen Group International, 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 50 East River Center Boulevard, Covington, Kentucky. Proposed respondent Loewen Group International, Inc. is a wholly-owned subsidiary of The Loewen Group Inc.

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

ORDER

I.

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

A. *"Loewen"* means The Loewen Group Inc. and Loewen Group International, Inc., their directors, officers, employees, agents and representatives, predecessors, successors and assigns, their

subsidiaries, divisions, groups and affiliates controlled by Loewen, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. *"Funeral"* means a group of services provided at the death of an individual, the focus of which is some form of commemorative ceremony of the life of the deceased at which ceremony the body is present; this group of services ordinarily includes, but is not limited to: the removal of the body from the place of death; its embalming or other preparation; making available a place for visitation and viewing, for the conduct of a funeral service, and for the display of caskets and outside cases; and the arrangement for and conveyance of the body to a cemetery or crematory for final disposition.

C. *"Funeral establishment"* means any facility that provides funerals.

D. *"Properties to be divested"* means all of the assets, properties, business and goodwill, tangible and intangible, utilized by: (a) either Thomae-Garza Funeral Directors, Inc. or both Pitts, Kriedler-Ashcraft Funeral Directors, Inc. and Garza-Elizondo Funeral Directors in Cameron County, Texas; and (b) either Garza Memorial Funeral Home, Inc., Paragon Trevino Funeral Home, Inc., or Darling-Mouser Funeral Home, Inc. in Cameron County, Texas; including, but not limited to:

1. All right, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits;

2. All machinery, fixtures, equipment, furniture, tools and other tangible personal property;

3. All right, title and interest in the trade name of any funeral establishment;

4. All right, title and interest in the books, records and files pertinent to the properties to be divested;

5. Vendor lists, management information systems, software, catalogs, sales promotion literature, and advertising materials; and

6. All right, title, and interest in and to the contracts entered into in the ordinary course of business with customers (together with associated bids and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, and consignees.

II.

It is further ordered, That:

A. Within twelve (12) months after the date this order becomes final, Loewen shall divest, absolutely and in good faith, the properties to be divested. The properties to be divested are to be divested only to an acquirer or acquirers that receive the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestitures required by this order is to ensure the continued use of the properties to be divested as ongoing viable enterprises providing funerals and to remedy the lessening of competition alleged in the Commission's complaint.

B. Pending divestiture of the properties to be divested, Loewen shall maintain the viability and marketability of the properties to be divested and shall not cause or permit the destruction, removal, or impairment of any assets or business of the properties to be divested, except in the ordinary course of business and except for ordinary wear and tear.

III.

It is further ordered, That:

A. If Loewen has not divested, absolutely and in good faith and with the Commission's prior approval, the properties to be divested as required by paragraph II of this order within twelve (12) months after the date this order becomes final, the Commission may appoint a trustee to divest the properties to be divested. In the event the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, Loewen 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 Loewen to comply with this order.

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

1. The Commission shall select the trustee, subject to the consent of Loewen, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Loewen has not opposed, in writing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Loewen of the identity of any proposed trustee, Loewen 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 divest the properties to be divested.

3. The trustee shall have the power and authority to abrogate any contract or agreement between Loewen and any individual which restricts, limits or otherwise impairs the ability of such individual to purchase the properties to be divested or to become a director, officer, employee, agent or representative of any acquirer of the properties to be divested.

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

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

6. The trustee shall have full and complete access to the personnel, books, records and facilities relating to the properties to be

divested, or any other relevant information, as the trustee may request. Loewen shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Loewen shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by Loewen shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or for a court-appointed trustee, the court.

7. 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 Loewen's absolute and unconditional obligation to divest at no minimum price. The divestitures shall be made in the manner and to the acquirer or acquirers as set out in paragraph II 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 Loewen from among those approved by the Commission.

8. The trustee shall serve, without bond or other security, at the cost and expense of Loewen, on such reasonable and customary terms and conditions as the Commission or the court may set. The trustee shall have authority to employ, at the cost and expense of Loewen, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestitures 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 Loewen and the trustee's power shall be terminated. The trustee's compensation shall be based at least in a significant part on a commission arrangement contingent on the trustee's divesting the properties to be divested.

9. Loewen 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.

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

11. 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 necessary or appropriate to accomplish the divestitures required by this order.

12. The trustee shall have no obligation or authority to operate or maintain the properties to be divested.

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

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Loewen shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged at the time of such acquisition, or within the two years preceding such acquisition, in the provision of funerals in Cameron County, Texas or within fifteen (15) miles of the Cameron County, Texas line; or

B. Acquire any assets used for or used in the previous two years for (and still suitable for use for) funeral establishments in Cameron County, Texas or within fifteen (15) miles of the Cameron County, Texas line.

Said notification 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 and transmitted 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 Office of the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Loewen and not of any other party to the transaction. Loewen shall provide the Notification to the Commission at least thirty (30) days prior to acquiring any such interest (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, Loewen shall not consummate the acquisition until twenty (20) days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Commission's Bureau of Competition.

Provided, however, that prior notification shall not be required by this paragraph IV of this order for:

1. The construction or development by Loewen of a new funeral establishment; or

2. Any 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.

V.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until Loewen has fully complied with the provisions of paragraphs II or III of this order, Loewen shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order. Loewen shall include in its 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 the divestitures and the identity of all parties contacted. Loewen shall include in its compliance reports copies of all written

communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, Loewen shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraph IV of this order. Such reports shall include, but not be limited to, a listing by name and location of all acquisitions of funeral establishments in the United States located within forty (40) miles of a funeral establishment owned by Loewen at the time of the acquisition, including but not limited to acquisitions due to default, foreclosure proceedings or purchases in foreclosure, made by Loewen during the twelve (12) months preceding the date of the report.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Loewen shall notify the Commission at least thirty (30) days prior to any proposed change in its organization, such as dissolution, assignment or sale resulting in the emergence of a successor, or the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of this order.

VII.

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

A. Access, during the office hours of Loewen 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 Loewen relating to any matters contained in this order; and

B. Upon five (5) days' notice to Loewen and without restraint or interference therefrom, to interview officers or employees of Loewen, who may have counsel present, regarding such matters.

Chairman Pitofsky recused.

IN THE MATTER OF

THE LOEWEN GROUP INC., 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-3678. Complaint, July 29, 1996--Decision, July 29, 1996

This consent order requires, among other things, a Kentucky-based company to divest, within nine months, a funeral home in Castlewood, Virginia to a Commission-approved acquirer. If the transaction is not completed as required, the Commission may appoint a trustee to divest the property.

Appearances

For the Commission: *Gary D. Kennedy* and *James R. Golden.*

For the respondents: *Deborah Feinstein, Arnold & Porter,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that The Loewen Group Inc., a corporation, and Loewen Group International, Inc., a corporation, hereinafter sometimes referred to as respondents, have entered into an agreement with Heritage Family Funeral Services, Inc., a corporation, that violates said Act; that through the agreement respondents have agreed to acquire Heritage Family Funeral Services, Inc. and that such acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the FTC Act; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITION

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

"Funeral" means a group of services provided at the death of an individual, the focus of which is some form of commemorative ceremony of the life of the deceased at which ceremony the body is present; this group of services ordinarily includes, but is not limited to: the removal of the body from the place of death; its embalming or other preparation; making available a place for visitation and viewing, for the conduct of a funeral service, and for the display of caskets and outside cases; and the arrangement for and conveyance of the body to a cemetery or crematory for final disposition.

II. THE RESPONDENTS

2. Respondent The Loewen Group Inc. ("Loewen Group") is a corporation organized, existing and doing business under and by virtue of the laws of the province of British Columbia, Canada, with its office and principal place of business located at 4126 Norland Avenue, Burnaby, British Columbia, Canada V5G 3S8.

3. Respondent Loewen Group International, Inc. ("Loewen Group International"), 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 50 East River Center Boulevard, Covington, Kentucky. Respondent Loewen Group International is a wholly-owned subsidiary of Respondent Loewen Group.

4. Loewen Group and Loewen Group International 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. ACQUIRED COMPANY

5. Heritage Family Funeral Services, Inc. ("Heritage"), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its office and principal place of business located at 300 Broad Street, Citizens Plaza, Suite 300 Elizabethton, Tennessee.

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

IV. THE PROPOSED ACQUISITION

7. On or about January 26, 1993, Loewen Group through its wholly-owned subsidiary Loewen Group International entered into an agreement with Heritage to acquire 100% of the voting securities of Heritage.

V. THE RELEVANT MARKET

8. The relevant line of commerce in which to analyze the proposed acquisition of Heritage is the provision of funerals.

9. The relevant section of the country in which to analyze the proposed acquisition is Castlewood, Virginia, and its immediate environs ("Castlewood area").

10. The relevant market set forth in paragraphs eight and nine is concentrated, whether measured by the Herfindahl-Hirschmann Index or by two-firm concentration ratios.

11. Entry into the market is difficult.

12. In the relevant market, both Loewen Group International and Heritage own funeral establishments and are actual competitors in the provision of funerals. Heritage is the largest firm, and Loewen Group International is the only other firm providing funerals in the Castlewood area.

VI. EFFECT OF THE ACQUISITION

13. The effect of the acquisition may be substantially to lessen competition in the relevant market in 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, in the following ways, among others:

a. By eliminating actual competition between Loewen Group International and Heritage; and

b. By creating a monopoly in the relevant market.

VII. VIOLATION CHARGED

14. The agreement described above in paragraph seven constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and the acquisition described above, if consummated, would violate 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.

Chairman Pitofsky recused.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Dallas Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, as amended; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft 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 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 The Loewen Group Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the province of British Columbia, Canada, with its office and principal place of business located at 4126 Norland Avenue, Burnaby, British Columbia, Canada V5G 3S8.

2. Respondent Loewen Group International, 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 50 East River Center Boulevard, Covington, Kentucky. Proposed respondent Loewen Group International, Inc. is a wholly-owned subsidiary of The Loewen Group Inc.

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

ORDER

I.

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

A. *"Loewen"* means The Loewen Group Inc. and Loewen Group International, Inc., their directors, officers, employees, agents and representatives, predecessors, successors and assigns, their subsidiaries, divisions, groups and affiliates controlled by Loewen, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. *"Funeral"* means a group of services provided at the death of an individual, the focus of which is some form of commemorative ceremony of the life of the deceased at which ceremony the body is present; this group of services ordinarily includes, but is not limited to: the removal of the body from the place of death; its embalming or other preparation; making available a place for visitation and viewing, for the conduct of a funeral service, and for the display of caskets and outside cases; and the arrangement for and conveyance of the body to a cemetery or crematory for final disposition.

C. *"Funeral establishment"* means any facility that provides funerals.

D. *"Property to be divested"* means all of the assets, properties, business and goodwill, tangible and intangible, utilized by the Castlewood Funeral Home located on Highway 58 in Castlewood, Virginia, including, but not limited to:

1. All right, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits;

2. All machinery, fixtures, equipment, furniture, tools and other tangible personal property;

3. All right, title and interest in the trade name of any funeral establishment, provided that the trade name "Heritage" need not be divested;

4. All right, title and interest in the books, records and files pertinent to the property to be divested;

5. Vendor lists, management information systems, software, catalogs, sales promotion literature, and advertising materials; and

6. All right, title, and interest in and to the contracts entered into in the ordinary course of business with customers (together with associated bids and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, and consignees.

II.

It is further ordered, That:

A. Within nine (9) months after Loewen acquires the property to be divested, Loewen shall divest, absolutely and in good faith, the property to be divested. The property to be divested is to be divested only to an acquirer or acquirers that receive the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture required by this order is to ensure the continued use of the property to be divested as an ongoing viable enterprise providing funerals and to remedy the lessening of competition alleged in the Commission's complaint.

B. Pending divestiture of the property to be divested, Loewen shall maintain the viability and marketability of the property to be divested and shall not cause or permit the destruction, removal, or

impairment of any assets or business of the property to be divested, except in the ordinary course of business and except for ordinary wear and tear.

C. Loewen shall comply with the Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I. Said agreement shall continue in effect until Loewen has divested the property to be divested or until such other time as the Agreement to Hold Separate provides.

III.

It is further ordered, That:

A. If Loewen has not divested, absolutely and in good faith and with the Commission's prior approval, the property to be divested as required by paragraph II of this order within nine (9) months after Loewen has acquired the property to be divested, the Commission may appoint a trustee to divest the property to be divested. In the event the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, Loewen 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 Loewen to comply with this order.

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

1. The Commission shall select the trustee, subject to the consent of Loewen, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Loewen has not opposed, in writing, the selection of any proposed trustee within ten (10) days after notice by the staff

of the Commission to Loewen of the identity of any proposed trustee, Loewen 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 divest the property to be divested.

3. The trustee shall have the power and authority to abrogate any contract or agreement between Loewen and any individual which restricts, limits or otherwise impairs the ability of such individual to purchase the property to be divested or to become a director, officer, employee, agent or representative of any acquirer of the property to be divested.

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

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

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

7. 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 Loewen's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II 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 Loewen from among those approved by the Commission.

8. The trustee shall serve, without bond or other security, at the cost and expense of Loewen, on such reasonable and customary terms and conditions as the Commission or the court may set. The trustee shall have authority to employ, at the cost and expense of Loewen, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the 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 Loewen and the trustee's power shall be terminated. The trustee's compensation shall be based at least in a significant part on a commission arrangement contingent on the trustee's divesting the property to be divested.

9. Loewen 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.

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

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

12. The trustee shall have no obligation or authority to operate or maintain the property to be divested.

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

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Loewen shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged at the time of such acquisition, or within the two years preceding such acquisition, in the provision of funerals in Russell County, Virginia or within fifteen (15) miles of the Russell County, Virginia line; or

B. Acquire any assets used for or used in the previous two years for (and still suitable for use for) funeral establishments in Russell County, Virginia or within fifteen (15) miles of the Russell County, Virginia line.

Said notification 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 and transmitted 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 Office of the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Loewen and not of any other party to the transaction. Loewen shall provide the Notification to the Commission at least thirty (30) days prior to acquiring any such interest (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, Loewen shall not consummate the acquisition

until twenty (20) days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Commission's Bureau of Competition.

Provided, however, that prior notification shall not be required by this paragraph IV of this order for:

1. The construction or development by Loewen of a new funeral establishment; or

2. Any 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.

V.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until Loewen has fully complied with the provisions of paragraphs II or III of this order, Loewen shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order. Loewen shall include in its 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 the divestiture and the identity of all parties contacted. Loewen shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, Loewen shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraph IV of this order. Such reports shall include, but not be limited to, a listing by name and location of all acquisitions of funeral establishments in the United States located

within forty (40) miles of a funeral establishment owned by Loewen at the time of the acquisition, including but not limited to acquisitions due to default, foreclosure proceedings or purchases in foreclosure, made by Loewen during the twelve (12) months preceding the date of the report.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Loewen shall notify the Commission at least thirty (30) days prior to any proposed change in its organization, such as dissolution, assignment or sale resulting in the emergence of a successor, or the creation or dissolution of subsidiaries, or any other change that may affect compliance obligations arising out of this order.

VII.

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

A. Access, during the office hours of Loewen 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 Loewen relating to any matters contained in this order; and

B. Upon five (5) days' notice to Loewen and without restraint or interference therefrom, to interview officers or employees of Loewen, who may have counsel present, regarding such matters.

Chairman Pitofsky recused.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and between The Loewen Group Inc. ("Loewen Group"), a corporation organized and existing under the laws of the province of British Columbia, Canada, with its office and principal place of business located at 4126 Norland Avenue, Burnaby, British Columbia, Canada V5G 3S8; Loewen Group International, Inc. ("Loewen Group International"), a wholly-owned subsidiary of Loewen Group, which is a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business located at 50 East River Center Boulevard, Covington, Kentucky; and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, as amended, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

PREMISES

Whereas, on or about January 26, 1993, Loewen Group through its wholly-owned subsidiary Loewen Group International entered into an Agreement with Heritage Family Funeral Services, Inc. ("Heritage"), in which Loewen Group International agreed to acquire Heritage (the "Acquisition"); and

Whereas, both Heritage and Loewen Group International own funeral establishments that provide funerals to consumers; and

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

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

Whereas, the Commission is concerned that if an understanding is not reached preserving the *status quo ante* and holding separate the assets and business of the property to be divested pursuant to paragraph II (hereinafter "Hold Separate Assets") of the Loewen/Heritage Consent Agreement and the order, once it is final ("Consent Order") until the divestiture contemplated by the Consent

Order has been made, divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible or might be less than an effective remedy; and

Whereas, the purposes of this Agreement, the Loewen/Heritage Consent Agreement, and the Consent Order are to:

(1) Preserve the Hold Separate Assets as a viable independent business pending the divestiture described in the Loewen/Heritage Consent Agreement and Consent Order;

(2) Preserve the Commission's ability to require the divestiture of the funeral establishment required by the Consent Order; and

(3) Remedy any anticompetitive aspects of the Acquisition; and

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

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

Now, therefore, the Parties agree, upon the understanding that the Commission has not yet determined whether the Acquisition will be challenged, and 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, as follows:

1. Loewen Group and Loewen Group International agree to execute and be bound by the attached Loewen/Heritage Consent Agreement.

2. Loewen Group and Loewen Group International shall hold the Hold Separate Assets separate and apart from the date this Agreement is accepted until the first to occur of:

a. Three (3) business days after the Commission withdraws its acceptance of the Loewen/Heritage Consent Agreement pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The day after the divestiture required by the consent order is accomplished.

3. Loewen Group's and Loewen Group International's obligation to hold the Hold Separate Assets separate and apart shall be on the following terms and conditions:

a. The Hold Separate Assets, as they are presently constituted, shall be held separate and apart and shall be operated independently of Loewen Group and Loewen Group International except to the extent that Loewen Group and Loewen Group International must exercise direction and control over the Hold Separate Assets to assure compliance with this Agreement, the Loewen/Heritage Consent Agreement, or the Consent Order.

b. Except as provided herein and as is necessary to assure compliance with this Agreement, the Loewen/Heritage Consent Agreement, and the Consent Order, Loewen Group and Loewen Group International shall not exercise direction or control over, or influence directly or indirectly, the Hold Separate Assets or any of their operations or business.

c. Loewen Group and Loewen Group International shall cause the Hold Separate Assets to continue using their present name and trade name, and shall maintain and preserve the viability and marketability of the Hold Separate Assets and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair their marketability or viability.

d. Loewen Group and Loewen Group International shall refrain from taking any actions that may cause any material adverse change in the business or financial conditions of the Hold Separate Assets.

e. Loewen Group and Loewen Group International shall not change the composition of the management of the Hold Separate Assets, except that Loewen Group and Loewen Group International shall have the power to fill vacancies and remove management for cause.

f. Loewen Group and Loewen Group International shall maintain separate financial and operating records and shall prepare separate quarterly and annual financial statements for the Hold Separate Assets and shall provide the Commission with such statements for the funeral establishment within ten days of their availability.

g. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or litigation, or negotiating agreements to dispose of assets, Loewen Group and Loewen Group International shall not receive or have access to, or the use of, any of the Hold Separate Assets' "material confidential information" not in the public domain, except as such information would be available to Loewen Group and Loewen Group International in the normal course of business if the Acquisition had not taken place. Any such information that is obtained pursuant to this subparagraph shall only be used for the purpose set out in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to Loewen Group and Loewen Group International from sources other than Heritage, and includes but is not limited to pre-need customer lists, prices quoted by suppliers, or trade secrets.)

h. All earnings and profits of the Hold Separate Assets shall be held separately. If necessary, Loewen Group and Loewen Group International shall provide the Hold Separate Assets with sufficient working capital to operate at their current rate of operation.

i. Loewen Group and Loewen Group International shall refrain from, directly or indirectly, encumbering, selling, disposing of, or causing to be transferred any assets, property, or business of the Hold Separate Assets, except that the Hold Separate Assets may advertise, purchase merchandise and sell or otherwise dispose of merchandise in the ordinary course of business.

4. Should the Federal Trade Commission seek in any proceeding to compel Loewen Group and Loewen Group International to divest themselves of the shares of Heritage stock that they may acquire, or to compel Loewen Group and Loewen Group International to divest any assets or businesses of Heritage that they may hold, or to seek any other injunctive or equitable relief, Loewen Group and Loewen Group International shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Loewen Group and Loewen Group International also waive all rights to contest the validity of this Agreement.

5. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to Loewen Group and Loewen Group International made to their principal offices, Loewen Group and Loewen Group International shall make available to any duly authorized representative or representatives of the Commission:

a. All books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Loewen Group and Loewen Group International, for inspection and copying during office hours and in the presence of counsel; and

b. Upon five (5) days' notice to Loewen Group and Loewen Group International and without restraint or interference from Loewen Group or Loewen Group International, officers or employees of Loewen Group and Loewen Group International, who may have counsel present, for interviews regarding any such matters.

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

IN THE MATTER OF

RUSTEVADER CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE MAGNUSON-MOSS WARRANTY ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9274. Complaint, Aug. 30, 1995--Decision, Aug. 15, 1996

This final order adopts the initial decision and order which prohibits, among other things, the Pennsylvania-based corporation from representing, in any manner, that the electronic corrosion control device is effective in preventing or substantially reducing corrosion in motor vehicle bodies, or from making any representations concerning the performance, efficacy or attributes of such products, unless the respondent possesses, at the time of such representations, competent and reliable evidence to substantiate the claims.

Appearances

For the Commission: *Michael Milgrom, Brinley H. Williams* and *Dana C. Barragate.*

For the respondents: *Keith E. Whann, Whann & Associates,* Dublin, OH. and *Jerry W. Cox, Eckert, Seamans, Cherin & Mellott,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that RustEvader Corporation, and David F. McCready, individually and as an officer of RustEvader Corporation (referred to collectively herein as "respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent RustEvader Corporation a/k/a Rust Evader Corporation, sometimes d/b/a REC Technologies ("REC") is a Pennsylvania corporation with its office and principal place of business located at 1513 Eleventh Avenue, Altoona, Pennsylvania.

At times material to the allegations of this complaint, respondent David F. McCready ("McCready") has been the president and an

owner and director of REC. His business address is the same as that of REC. Individually, or in concert with others, McCready has directed, formulated and controlled the acts and practices of REC, including the acts and practices alleged in this complaint.

PAR. 2. Respondents manufacture, label, advertise, offer for sale, sell, and distribute an electronic corrosion control device for use on automobiles, trucks and vans (hereinafter "motor vehicles") under the names Rust Evader, Rust Buster, Electro-Image, Eco-Guard and others (referred to collectively herein as "Rust Evader").

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

PAR. 4. Respondents have disseminated, or have caused to be disseminated, advertisements and promotional materials for the Rust Evader including, but not necessarily limited to, the attached Exhibits A through E. These advertisements and promotional materials contain the following statements:

(a) Rust Buster Electronic Corrosion Control

This is the original multi-patented Electronic Corrosion Control for automobiles. Over a decade of test market experience and Consumer satisfaction guarantees our product as the best in today's hi-tech market.

MOST COMMONLY ASKED QUESTIONS

What can I expect from this product? Corrosion rate is reduced and auto body life is extended.

. . . .

The Rust Buster C.D.O.I. interferes with the rusting process. Since the rusting process is gradual, the amount of energy consumed is very small. Rust Buster C.D.O.I. effectively reduces corrosion rate.

. . . .

Rust Buster C.D.O.I. provides a source of free electrons that interfere with coupling of ferrous metal electrons with oxygen -- reducing the corrosion rate.

. . . .

. . . complete interference in the rusting process cannot be expected, but rust retardation is dramatically demonstrated.

. . . .

You want your car to look good while you're driving it, when you are ready to sell or trade it and particularly if you decide to give the car a major overhaul. If you lease a car, you are responsible to maintain a certain cosmetic standard or pay a penalty. Rust Buster C.D.O.I. wants your car to last and maintain its maximum value.

. . . .

Over a decade of proven effectiveness.

Thousands of satisfied customers.

Inside-out & outside-in corrosion reduction (Exhibit A)

(b) The invisible shield of protection for your vehicle!
The invisible shield of protection used worldwide!
Protect your car, truck or van 24 hours a day -- rain or shine -- with the world leader in electronic automotive rust control! The RustEvader* system retards rust and corrosion, and protects your vehicle with a lifetime guarantee. Common nicks, scratches and abrasions won't deteriorate into rust-through damage from the outside in -- or inside out. The RustEvader* system safeguards your investment. . .
. . . .
- helps increase your car's value at trade-in time
- protection against rust-through damage as result of stone chips, abrasions, salt, snow, sleet and sea-spray
- the original multi-patented electronic corrosion control device
- over 10 years of consumer satisfaction

. . . .
Your best investment in your vehicle's future value!
*See printed warranty for exact description of warranty coverage and exclusions! (Exhibit B)

(c) Rust Evader
ELECTRONIC CORROSION CONTROL
The RustEvader interferes with rusting process. Electro-chemists have made great progress in understanding corrosion. RustEvader Corp. has applied the results of this progress in developing the RustEvader Automotive Corrosion Control System and since the rusting process is gradual, the amount of energy consumed is very small -- RustEvader reduces the corrosion rate.
RustEvader Electronic Corrosion Control gives you unmatched protection from salt, snow, sleet and sea spray corrosion. Rust perforation (rust-through) from either side of the sheet metal is warranted not to occur on your vehicle.
. . . .
THE INTELLIGENT APPROACH TO PRESERVING AUTOMOTIVE APPEARANCE
. . . .
* Established track record in reducing corrosion -- documented by users.
* Recapture your investment at trade-in time . . . for New and Used cars. (Exhibit C)

(d) NOW!! ELECTRONIC CORROSION CONTROL
Rust Evader Automotive Corrosion Control
. . . .
The RustEvader interferes with the rusting process. . . . Environmental conditions that promote rusting also prompt a counter response from the RustEvader system. Energy for the electron bath is provided by the car's battery and since the rusting process is gradual, the amount of energy consumed is very small -- RustEvader reduces the corrosion rate. "The Logical Choice for Controlling Rust" (Exhibit D, reduced copy of dealer display board)

(e) The Rust Buster System Beats Rust!

The Rust Buster System keeps your car, truck or van beautiful for years! Common nicks, scratches and road salt won't deteriorate into rust-through damage, so you'll save on costly autobody repairs and preserve your investment!
The Rust Buster system also offers unmatched protection! Unlike traditional undercoating, it protects hard-to reach, corrosively vulnerable areas by impressing electrons throughout the metal body panels of the vehicle and interferring [sic] with oxygen's natural ability to couple with these ferrous metals. (Exhibit E, reduced copy of dealer display board)

PAR. 5. Through the use of the trade names "Rust Evader" and "Rust Buster" and the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the promotional materials attached as Exhibits A-E, respondents have represented, directly or by implication, that the Rust Evader is effective in substantially reducing corrosion in motor vehicle bodies.

PAR. 6. In truth and in fact, the Rust Evader is not effective in substantially reducing corrosion in motor vehicle bodies. Therefore, respondents' representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the use of the trade names "Rust Evader" and "Rust Buster" and the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the promotional materials attached as Exhibits A-E, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph five, respondents possessed and relied upon a reasonable basis that substantiated such representation.

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

PAR. 9. In connection with the promotion and sale of the Rust Evader, respondents have disseminated or caused to be disseminated to distributors and dealers materials to conduct a demonstration of the efficacy of the Rust Evader. Respondents have also disseminated depictions of the same demonstration, of which Exhibit G, attached hereto, is an example. The demonstration places two pieces of metal in a transparent tank containing salt water. One piece of metal is

connected to a Rust Evader and the other is not. In connection with this demonstration, respondents make, and instruct the distributors and dealers to make the following (or similar) statements:

This Laboratory Test provides the "worst case scenario" to test RustEvader Technology. Two (2) identical pieces of sheet steel are suspended in salt bath. The RustEvader protects Sample "A" while Sample "B" rusts severely. (Exhibit G)

PAR. 10. Through the use of the depictions, materials and statements set forth in paragraph nine, respondents have represented, directly or by implication, that the demonstration described in paragraph nine accurately represents how the Rust Evader protects motor vehicle bodies from corrosion.

PAR. 11. In truth and in fact, the demonstration described in paragraph nine does not accurately represent how the Rust Evader protects a motor vehicle body from corrosion. The process utilized in the demonstration -- impressed current cathodic protection -- is much more effective under water than under conditions that a motor vehicle would normally encounter. Therefore, respondents' representation set forth in paragraph ten was, and is, false and misleading.

PAR. 12. In connection with the promotion and sale of Rust Evader, respondents have disseminated or have caused to be disseminated, to distributors and dealers, reports of laboratory and other tests performed on the Rust Evader. Some of these reports represent, directly or by implication, that the reported test constitutes scientific proof that the Rust Evader is effective in substantially reducing corrosion in motor vehicle bodies. In addition, respondents have represented orally, directly or by implication, that these tests constitute scientific proof that the Rust Evader is effective in substantially reducing corrosion in motor vehicle bodies.

PAR. 13. In truth and in fact, such tests do not constitute, scientific proof that the Rust Evader is effective in substantially reducing corrosion in motor vehicle bodies. Therefore, respondents' representation set forth in paragraph twelve was, and is, false and misleading.

PAR. 14. In connection with the sale of the Rust Evader, respondents have provided purchasers with a limited warranty in the form attached hereto as Exhibit F. That warranty contains the following provision:

INSPECTIONS REQUIRED: The vehicle must be inspected every 24 months within 30 days of anniversary of installation date, by an authorized Rust Evader Dealer who may charge his current labor rate up to one hour for the inspection. FAILURE TO HAVE VEHICLE INSPECTED AS REQUIRED VOIDS THE WARRANTY.

PAR. 15. The warranty provision described in paragraph fourteen is in violation of Section 102(c) of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (15 U.S.C. 2302(c)) because it conditions a warranty pertaining to a consumer product actually costing the consumer more than $5 on the consumer's use of a service (other than a service provided without charge) which is identified by brand, trade, or corporate name.

PAR. 16. In providing advertisements, promotional materials and product demonstrations, such as those referred to in paragraphs four through thirteen, to their distributors and dealers, respondents have furnished the means and instrumentalities to those distributors and dealers to engage in the acts and practices alleged in paragraphs five through thirteen.

PAR. 17. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT A

EXHIBIT B

EXHIBIT B

EXHIBIT C

EXHIBIT C

EXHIBIT D

EXHIBIT E

EXHIBIT F

EXHIBIT G

EXHIBIT G

INITIAL DECISION

BY JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE
MAY 24, 1996

INTRODUCTION

On August 30, 1995, the Commission issued its complaint in this matter, charging RustEvader Corporation ("REC") and David F. McCready with violations of Section 5(a) of the Federal Trade Commission Act in connection with the promotion and sale of the Rust Evader electronic corrosion control device. The complaint charged that respondents represented, falsely and without substantiation, that the Rust Evader is effective in substantially reducing corrosion in motor vehicle bodies. The complaint also alleged that respondents had used a deceptive product demonstration and had misrepresented the validity of tests of the efficacy of the Rust Evader. Finally, the complaint charged that respondents had violated the Magnuson-Moss Warranty -- Federal Trade Commission Improvement Act, 102(c), 15 U.S.C. 2302(c), by using a warranty conditioned on periodic inspections of the Rust Evader unit by an authorized dealer who could charge a fee for the inspections.

On October 6, 1995, respondents filed a joint answer, denying the substantive allegations of the complaint and alleging that the Rust Evader "substantially" reduces corrosion. A discovery schedule was set up by order dated October 17, 1995, with trial scheduled to begin on May 13, 1996. Both sides filed non-binding statements.

On January 23, 1996, complaint counsel moved for sanctions citing respondents' failure to respond to discovery requests. These included *subpoenas duces tecum* issued on October 26, 1995, and interrogatories issued on November 9, 1995. Respondents had also failed to serve complaint counsel with preliminary exhibit and witness lists by January 5, 1996, as required by the pre-trial order. After a telephone conference with all counsel, I granted complaint counsel's motion on February 1, 1996. The order directed respondents to comply with the subpoenas, respond to the interrogatories and serve their preliminary witness and exhibit lists by February 23, 1996. The order specifically warned respondents that, if they failed to

comply, they faced sanctions under the Commission's rules, including the possibility of default.

On April 8, 1996, complaint counsel and respondent McCready, having reached a tentative settlement, filed a joint motion to withdraw this matter from litigation with respect to Mr. McCready. That motion was forwarded to the Secretary on April 9 and the matter was withdrawn from litigation with respect to Mr. McCready on April 11, 1996, by order of the Secretary. The settlement is now before the Commission.

On April 11, 1996, complaint counsel filed a renewed motion for sanctions against REC, stating that REC had failed to comply with the order of February 1 in all respects. Complaint counsel further argued that, since REC's failure to respond to discovery was general and went to all aspects of the litigation, the appropriate response was to strike the answer as permitted by Rule 3.38(b)(5). Because REC had filed a bankruptcy petition complaint counsel's motion was served both on counsel of record for REC and, separately, on the bankruptcy trustee. In view of complaint counsel's motion, I suspended the trial schedule on April 12, 1996. REC did not respond to this motion.

On May 3, 1996, I granted complaint counsel's renewed motion for sanctions, striking REC's answer. On May 22, 1996, complaint counsel filed proposed findings of fact, conclusions of law and a proposed order.

Rule 3.12(c) provides that, where a party has failed to answer the complaint, the Administrative Law Judge is authorized, without further notice to respondents, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and the appropriate order. Rule 3.38(b), which authorizes sanctions for failure to make discovery, permits the Administrative Law Judge to strike all or part of a pleading, render a decision in the proceeding against the party that has been sanctioned, or both. Thus, entry of the following findings, conclusions and order is appropriate under both Rule 3.12(c) and Rule 3.38(b)(5). Under the provisions of Rule 3.12(c) and Rule 3.38(b)(5), for the reasons stated in complaint counsel's Motion for Sanctions and Renewed Motion for Sanctions, I hereby grant default judgment against REC.

FINDINGS OF FACT

1. Respondent RustEvader Corporation a/k/a Rust Evader Corporation, sometimes d/b/a REC Technologies (hereinafter "respondent") is a Pennsylvania corporation with its office and principal place of business located at 1513 Eleventh Avenue, Altoona, Pennsylvania.

2. Respondent has manufactured, labeled, advertised, offered for sale, sold, and distributed an electronic corrosion control device for use on automobiles, trucks and vans (hereinafter "motor vehicles") under the names Rust Evader, Rust Buster, Electro-Image, Eco-Guard and others (referred to collectively hereinafter as "Rust Evader").

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

4. Respondent has disseminated, or has caused to be disseminated, advertisements and promotional materials for the Rust Evader including Exhibits A through E attached to the complaint herein. These advertisements and promotional materials contain the following statements:

(a) Rust Buster Electronic Corrosion Control

This is the original multi-patented Electronic Corrosion Control for automobiles. Over a decade of test market experience and Consumer satisfaction guarantees our product as the best in today's hi-tech market.

MOST COMMONLY ASKED QUESTIONS

What can I expect from this product? Corrosion rate is reduced and auto body life is extended.

. . . .

The Rust Buster C.D.O.I. interferes with the rusting process. Since the rusting process is gradual, the amount of energy consumed is very small. Rust Buster C.D.O.I. effectively reduces corrosion rate.

. . . .

Rust Buster C.D.O.I. provides a source of free electrons that interfere with coupling of ferrous metal electrons with oxygen -- reducing the corrosion rate. . . . .

. . . complete interference in the rusting process cannot be expected, but rust retardation is dramatically demonstrated.

. . . .

You want your car to look good while you're driving it, when you are ready to sell or trade it and particularly if you decide to give the car a major overhaul. If you lease a car, you are responsible to maintain a certain cosmetic standard or pay a penalty. Rust Buster C.D.O.I. wants your car to last and maintain its maximum value.

. . . .

Over a decade of proven effectiveness.

Thousands of satisfied customers.
Inside-out & outside-in corrosion reduction (Exhibit A)

(b) The invisible shield of protection for your vehicle!

The invisible shield of protection used worldwide!
Protect your car, truck or van 24 hours a day -- rain or shine -- with the world leader in electronic automotive rust control! The RustEvader* system retards rust and corrosion, and protects your vehicle with a lifetime guarantee. Common nicks, scratches and abrasions won't deteriorate into rust-through damage from the outside in -- or inside out. The RustEvader* system safeguards your investment. . .
. . . .
- helps increase your car's value at trade-in time
- protection against rust-through damage as result of stone chips, abrasions, salt, snow, sleet and sea-spray
- the original multi-patented electronic corrosion control device
- over 10 years of consumer satisfaction

. . . .
Your best investment in your vehicle's future value!
*See printed warranty for exact description of warranty coverage and exclusions!
(Exhibit B)

(c) Rust Evader

ELECTRONIC CORROSION CONTROL
The RustEvader interferes with rusting process. Electro-chemists have made great progress in understanding corrosion. RustEvader Corp. has applied the results of this progress in developing the RustEvader Automotive Corrosion Control System and since the rusting process is gradual, the amount of energy consumed is very small -- RustEvader reduces the corrosion rate.
RustEvader Electronic Corrosion Control gives you unmatched protection from salt, snow, sleet and sea spray corrosion. Rust perforation (rust-through) from either side of the sheet metal is warranted not to occur on your vehicle.
. . . .
THE INTELLIGENT APPROACH TO PRESERVING AUTOMOTIVE APPEARANCE
. . . .
* Established track record in reducing corrosion -- documented by users.
* Recapture your investment at trade-in time...for New and Used cars. (Exhibit C)

(d) NOW!! ELECTRONIC CORROSION CONTROL

Rust Evader
Automotive Corrosion Control
. . . .
The RustEvader interferes with the rusting process. . . . Environmental conditions that promote rusting also prompt a counter response from the RustEvader system. Energy for the electron bath is provided by the car's battery and since the rusting process is gradual, the amount of energy consumed is very small -- RustEvader reduces the corrosion rate.
"The Logical Choice for Controlling Rust"
(Exhibit D, reduced copy of dealer display board)

(e) The Rust Buster System Beats Rust!

The Rust Buster system keeps your car, truck or van beautiful for years! Common nicks, scratches and road salt won't deteriorate into rust-through damage, so you'll save on costly autobody repairs and preserve your investment!
The Rust Buster system also offers unmatched protection! Unlike traditional undercoatings, it protects hard-to-reach, corrosively vulnerable areas by impressing electrons throughout the metal body panels of the vehicle and interferring [sic] with oxygen's natural ability to couple with these ferrous metals. (Exhibit E, reduced copy of dealer display board)

5. Through the use of the trade names "Rust Evader" and "Rust Buster" and the statements and depictions contained in Exhibits A-E as well as other advertisements and promotional materials, respondent has represented, directly or by implication, that the Rust Evader is effective in substantially reducing corrosion in motor vehicle bodies.

6. In truth and in fact, the Rust Evader is not effective in substantially reducing corrosion in motor vehicle bodies. Therefore, respondent's representation set forth in the previous finding was, and is, false and misleading.

7. Through the use of the trade names "Rust Evader" and "Rust Buster" and the statements contained in the advertisements and promotional materials referred to in Finding 4, including but not necessarily limited to the promotional materials attached to the complaint as Exhibits A-E, respondent has represented, directly or by implication, that at the time it made the representation set forth in Finding 5, respondent possessed and relied upon a reasonable basis that substantiated such representation.

8. In truth and in fact, at the time it made the representation set forth in Finding 5, respondent did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in Finding 7 was, and is, false and misleading.

9. In connection with the promotion and sale of the Rust Evader, respondent has disseminated or caused to be disseminated to distributors and dealers materials to conduct a demonstration of the efficacy of the Rust Evader. Respondent has also disseminated depictions of the same demonstration, of which Exhibit G, attached to the complaint herein, is an example. The demonstration places two pieces of metal in a transparent tank containing salt water. One piece of metal is connected to a Rust Evader and the other is not. In connection with this demonstration, respondent makes, and instructs

the distributors and dealers to make the following (or similar) statements:

This Laboratory Test provides the "worst case scenario" to test RustEvader Technology. Two (2) identical pieces of sheet steel are suspended in salt bath. The RustEvader protects Sample "A" while Sample "B" rusts severely. (Exhibit G to the complaint)

10. Through the use of the depictions, materials and statements set forth in Finding 9, respondent has represented, directly or by implication, that the demonstration set forth in Finding 9 accurately represents how the Rust Evader protects motor vehicle bodies from corrosion.

11. In fact, the demonstration set forth in Finding 9 does not accurately represent how the Rust Evader protects a motor vehicle body from corrosion. The process utilized in the demonstration -- impressed current cathodic protection -- is much more effective under water than under conditions that a motor vehicle would normally encounter. Therefore, respondent's representation set forth in Finding 10 was, and is, false and misleading.

12. In connection with the promotion and sale of the Rust Evader, respondent has disseminated or has caused to be disseminated, to distributors and dealers, reports of laboratory and other tests performed on the Rust Evader. Some of these reports represent, directly or by implication, that the reported test constitutes scientific proof that the Rust Evader is effective in substantially reducing corrosion in motor vehicle bodies. In addition, respondent has represented orally, directly or by implication, that these tests constitute scientific proof that the Rust Evader is effective in substantially reducing corrosion in motor vehicle bodies.

13. In truth and in fact, such tests do not constitute scientific proof that the Rust Evader is effective in substantially reducing corrosion in motor vehicle bodies. Therefore, respondent's representation set forth in Finding 12 was, and is, false and misleading.

14. In connection with the sale of the Rust Evader, respondent has provided purchasers with a limited warranty in the form attached to the complaint as Exhibit F. That warranty contains the following provision:

INSPECTIONS REQUIRED: The vehicle must be inspected every 24 months within 30 days of anniversary of installation date, by an authorized Rust Evader Dealer who may charge his current labor rate up to one hour for the inspection. FAILURE TO HAVE VEHICLE INSPECTED AS REQUIRED VOIDS THE WARRANTY.

15. The warranty provision described in Finding 14 is in violation of Section 102(c) of the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act (15 U.S.C. 2302(c)) because it conditions a warranty pertaining to a consumer product actually costing the consumer more than $5 on the consumer's use of a service (other than a service provided without charge) which is identified by brand, trade, or corporate name.

16. In providing advertisements, promotional materials and product demonstrations, such as those described in Findings 4 through 13, to its distributors and dealers, respondent has furnished the means and instrumentalities to those distributors and dealers to engage in the acts and practices found in Findings 5 through 13.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

2. The acts and practices of respondent as described in Findings 1 through 16 above constitute unfair or deceptive practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

3. The accompanying order, is necessary and appropriate under applicable legal precedent and the facts of this case.

ORDER

DEFINITIONS

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

A. *"Electronic corrosion control device"* shall mean any device or mechanism that is intended, through the use of electricity, static or current, to control, retard, inhibit or reduce corrosion in motor vehicles.

B. *"Rust Evader"* shall mean the electronic corrosion control device sold under the trade names Rust Evader, Rust Buster, Electro-Image, Eco-Guard, and any other substantially similar product sold under any trade name.

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

I.

It is ordered, That respondent RustEvader Corporation, a corporation, its successors and assigns and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, packaging, labeling, advertising, promotion, offering for sale, sale, or distribution of the Rust Evader, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that such product is effective in preventing or substantially reducing corrosion in motor vehicle bodies.

II.

It is further ordered, That respondent RustEvader Corporation, a corporation, its successors and assigns and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, packaging, labeling, advertising, promotion, offering for sale, sale, or distribution of any product for use in motor vehicles in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, concerning the performance, efficacy or attributes of such product unless such representation is true and, at the time such representation is made, respondent possesses and relies upon competent and reliable

evidence, which, when appropriate, must be competent and reliable scientific evidence, that substantiates the representation.

III.

It is further ordered, That respondent RustEvader Corporation, a corporation, its successors and assigns and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, packaging, labeling, advertising, promotion, offering for sale, sale, or distribution of any product for use in motor vehicles in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions, interpretations or purpose of any test, study, or survey.

IV.

It is further ordered, That respondent RustEvader Corporation, a corporation, its successors and assigns and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, packaging, labeling, advertising, promotion, offering for sale, sale, or distribution of any product for use in motor vehicles in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, that any demonstration, picture, experiment or test proves, demonstrates or confirms any material quality, feature or merit of such product.

V.

It is further ordered, That respondent RustEvader Corporation, a corporation, its successors and assigns and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, packaging, labeling, advertising, promotion, offering for sale, sale, or distribution of the Rust Evader in or affecting commerce, as "commerce" is defined in the Federal Trade

Commission Act, do forthwith cease and desist from employing the terms Rust Evader or Rust Buster in conjunction with or as part of the name for such product or the product logo.

VI.

It is further ordered, That:

A. Respondent RustEvader Corporation, a corporation, its successors and assigns and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, packaging, labeling, advertising, promotion, offering for sale, sale, or distribution of any consumer product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act and actually costing the consumer more than $5, do forthwith cease and desist from conditioning any written or implied warranty of such product on the consumer's purchase or use, in connection with such product, of any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name; and

B. Within sixty (60) days after the date of service of this order, respondent shall notify, by first class mail, all Rust Evader dealers and distributors and all other Rust Evader purchasers, that

1) The warranty provision requiring purchasers to pay for semi-annual inspections of their Rust Evader is null and void; and

2) No such warranty will be voided for failure to have an inspection required by the warranty, except for required inspections provided without charge after receipt of the notification provided under this order.

VII.

It is further ordered, That respondent RustEvader Corporation, its successors and assigns, shall:

A. Within thirty (30) days after the date of service of this order, send by first class certified mail, return receipt requested, to each purchaser for resale of Rust Evader with which respondent has done business, a letter informing them of the provisions of the

Commission's complaint and order in this matter and requesting that they cease engaging in practices prohibited by the order. The mailing shall not include any other documents. For purposes of this order, "purchaser for resale" shall mean any purchaser or other transferee of any Rust Evader who acquires or has acquired, with or without valuable consideration, said Rust Evader and resells or has resold the Rust Evader to other purchasers or to consumers;

B. In the event that respondent receives any information that, subsequent to its receipt of the letter sent pursuant to subparagraph A of this part, any purchaser for resale is using or disseminating any advertisement or promotional material that contains any representation prohibited by this order, respondent shall immediately notify the purchaser for resale that respondent will terminate the use of said purchaser for resale if it continues to use such advertisements or promotional materials; and

C. Terminate the use of any purchaser for resale about whom respondent receives any information that such purchaser for resale has continued to use advertisements or promotional materials that contain any representation prohibited by this order after receipt of the notice required by subparagraph B of this part.

VIII.

It is further ordered, That respondent RustEvader Corporation, its successors and assigns, shall, within thirty (30) days after the date of service of this order, provide a copy of this order to each of respondent's current principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order.

IX.

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

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

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

X.

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

XI.

It is further ordered, That respondent RustEvader Corporation, its successors and assigns shall, for five (5) years after the last correspondence to which they pertain, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. Copies of all notification letters sent to purchasers for resale pursuant to subparagraph A of part VII of this order; and

B. Copies of all communications with purchasers for resale pursuant to subparagraphs B and C of part VII of this order.

XII.

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

XIII.

It is further ordered, That this order will terminate twenty (20) years from the date of its issuance, 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 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.

FINAL ORDER

The Administrative Law Judge filed his Initial Decision in this matter on May 24, 1996, finding that the respondent RustEvader Corporation ("REC") engaged in unfair or deceptive practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45, and granting a default judgment against REC.[1] An appropriate order against REC to remedy the violations was appended to the Initial Decision.

Service of the Initial Decision was completed on June 19, 1996. Neither respondent nor complaint counsel filed an appeal.

As support for entering the default judgment, the Administrative Law Judge relied on both Sections 3.12(c) and 3.38(b)(5) of the Commission's Rules of Practice, 16 CFR 3.12(c), 3.38(b)(5) (1996). The Commission has determined that Rule 3.38(b)(5) provides ample authority for the entry of a default judgment in this case and that it is unnecessary to rely on Rule 3.12(c).

Accordingly, the Initial Decision and the order therein shall become effective as provided in Section 3.51(a) and Section 3.56(a) of the Commission's Rules of Practice, 16 CFR 3.51(a), 3.56(a) (1996), subject to the following modifications to the paragraph on page 2 [*see* page 57]that begins with "Rule 3.12(c).":

(1) Delete the first sentence of the paragraph.
(2) Delete the words "both Rule 3.12(c) and" in the third sentence of the paragraph.
(3) Delete the words "Rule 3.12(c) and" in the final sentence of the paragraph.

It is ordered, That the Initial Decision (except as noted above), and the order therein, shall become the Final Order and Opinion of the Commission on the date of issuance of this order.

[1] On April 11, 1996, in response to the joint motion required by Section 3.25(c) of the Commission Rules of Practice, 16 CFR 3.25(c)(1996), the Secretary withdrew this matter from adjudication with respect to respondent David F. McCready for the consideration of a proposed consent agreement. The Commission has now accepted that consent agreement for public comment.

IN THE MATTER OF

FORD MOTOR COMPANY

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

Docket C-3679. Complaint, August 22, 1996--Decision, August 22, 1996

This consent order prohibits, among other things, a Michigan-based automobile manufacturer from making any representation about the efficacy of any automotive cabin air filter in the reduction or removal of pollutants, unless such representations are true and the respondent possesses reliable and competent scientific evidence to substantiate such representations.

Appearances

For the Commission: *Linda Badger* and *Jeffrey Klurfeld.*

For the respondent: *Gerald Durcharme,* in-house counsel, Dearborn, MI.

COMPLAINT

The Federal Trade Commission, having reason to believe that Ford Motor Company ("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. Respondent Ford Motor Company is a Delaware corporation, with its offices and principal place of business located at The American Road, Dearborn, Michigan.

PAR. 2. Respondent has manufactured, advertised, offered for sale, sold, and distributed automobiles, automotive parts, and other products to consumers. Certain models of Ford automobiles, such as the Mercury Mystique and Lincoln Continental, include an automotive cabin air filter called the "MicronAir Filtration System."

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements for the MicronAir Filtration System, including but not necessarily limited to the attached Exhibits A-C. These advertisements contain the following statements:

A. "Eat No One's Dust.
All-New Mercury Mystique With Exclusive MicronAir Filter.
Here, quite literally, is a breath of fresh air in automotive design. The new Mercury Mystique. The only car in its class with a MicronAir filter that removes virtually all dust, pollen and other impurities from the interior." (Exhibit A: print ad).

B. "MicronAir Filtration System screens out virtually all pollen, road dust and potentially harmful air pollutants before they enter the car. This means allergy sufferers, and anyone concerned with air pollution, can breathe easier." (Exhibit B: promotional material).

C. "Dear Mr. Sample,
Do you like clean air? Mystique's standard MicronAir Filtration System removes virtually all pollen, road dust and other pollutants from air entering the car. It's an especially nice feature if you happen to be bothered by allergies." (Exhibit C: promotional material).

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-C, respondent has represented, directly or by implication, that the MicronAir Filtration System removes virtually all pollutants likely to be encountered by a driver.

PAR. 6. In truth and in fact, the MicronAir Filtration System does not remove virtually all pollutants likely to be encountered by a driver. For example, the MicronAir Filtration System has no effect on gaseous pollutants, such as hydrocarbons, carbon monoxide, and nitrogen oxides. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-C, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representation.

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

the representation set forth in paragraph seven was, and is, false and misleading.

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

EXHIBIT A

EXHIBIT B

EXHIBIT C

0001/0001
Mr. John A. Sample
123 Main Street
Anytown, US 12345-6789

Dear Mr. Sample,

Every now and then an automobile like the all-new Mercury Mystique comes along that is so different, so comfortable and so much fun to drive, you just can't wait for the next excuse to get behind the wheel.

Right now, test drive a Mercury mystique and you'll receive a $50 U.S. Savings Bond! How's that for an excuse to drive? A $50 U.S. Savings Bond *and* the chance to put this terrific new sedan through its paces.

We think you'll find a lot to like as you drive Mystique. It has 21 unique features never before offered by its major competitors.

Do you like clean air? Mystique's standard MicronAir Filtration System removes virtually all pollen, road dust and other pollutants from air entering the car. It's an especially nice feature if you happen to be bothered by allergies.

Speaking of being bothered, taking a car in for service probably isn't one of your top ten favorite things to do. That's why we've designed the standard Zetec DOHC 4-cylinder engine to go 60,000 miles before its first scheduled tune-up. Still too soon? The optional Duratec DOHC V-6 isn't scheduled for its first tune-up until 100,000 miles.

We even wanted to make driving in rain or snow more enjoyable. That's why Mystique is available with an Anti-lock Brake System (ABS) and All-Speed Traction Control which helps you keep from spinning your wheels on slippery surfaces.

Mystique has a few features we hope you'll never use. Like dual air bags and high-tensile, boron-steel door beams which help Mystique meet all 1997 federal safety standards, today.

So get behind the wheel of Mercury Mystique and see what all the excitement is about. Remember to bring the certificate below to the dealership named when you take your test drive and you'll receive a $50 United States Savings Bond. One drive in Mystique and you'll understand -- it's a whole new Mercury.

Sincerely,

Keith C. Magee
Vice President, General Manager
Lincoln-Mercury Division
Ford Motor Company

P.S. A $50 U.S. Savings Bond is yours when you test drive a 1995 Mercury ystique, but only if you act soon. Offer expires January 31, 1995.

- Always wear your safety belt. MicronAir is a registered U.S. trademark of Freudenberg Nonwovens.
01100231

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 comment filed thereafter by an interested person 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 Ford Motor Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at The American Road, in the City of Dearborn, State of Michigan.

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 respondent, Ford Motor Company, a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labelling, advertising, promotion, offering for sale, sale or distribution of the "MicronAir Filtration System" as configured in the 1995 Lincoln Continental or 1995 Mercury Mystique or any substantially similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, that such product removes virtually all pollutants. For the purposes of this order, "substantially similar product" shall mean any automotive cabin air filter which is an electrostatic filter, consisting of layers of non-woven fabric, with at least one layer that has been electrically charged.

II.

It is further ordered, That respondent, Ford Motor Company, a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale or distribution of any automotive cabin air filter, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, about the efficacy of any such product in reducing or removing pollutants, unless such representation is true, and at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence, that substantiates such representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by

persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

III.

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

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

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

IV.

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

V.

It is further ordered, That respondent shall, within ten (10) days from the date of service of this order upon it, distribute a copy of this order to each of its officers, agents, representatives or employees engaged in the preparation, review or placement of advertising or other materials covered by this order.

VI.

It is further ordered, That this order will terminate on August 22, 2016, or twenty 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 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.

VII.

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.

IN THE MATTER OF

YOUNG & RUBICAM INC.

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

Docket C-3680. Complaint, August 22, 1996--Decision, August 22, 1996

This consent order prohibits, among other things, a New York-based advertising agency from making any pollution-removal claims for Ford Motor Company's MicronAir Filtration System or any similar cabin air filtration system, unless such representations are true and the respondent possesses reliable and competent scientific evidence to substantiate such representations.

Appearances

For the Commission: *Linda Badger* and *Jeffrey Klurfeld.*

For the respondent: *Carlos Peña,* in-house counsel, New York, N.Y.

COMPLAINT

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

PARAGRAPH 1. Respondent Young & Rubicam is a New York corporation, with its principal office or place of business located at 285 Madison Avenue, New York, New York.

PAR. 2. Young & Rubicam is now, and at all times relevant to this complaint has been an advertising agency for Ford Motor Company ("Ford") and the Lincoln-Mercury Dealers Associations ("LMDAs"). Young & Rubicam has prepared and disseminated advertising materials to promote the sale of Ford's Mercury Mystique and Lincoln Continental automobiles. These advertisements have included claims regarding the efficacy of the MicronAir Filtration

System, a cabin air filter installed in Mercury Mystique and Lincoln Continental automobiles.

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. Young & Rubicam has prepared and disseminated or has caused to be disseminated advertisements for the MicronAir Filtration System, including but not necessarily limited to the attached Exhibits A-H. These advertisements contain the following statements:

A. "Eat No One's Dust.
All-New Mercury Mystique With Exclusive MicronAir Filter.
Here, quite literally, is a breath of fresh air in automotive design. The new Mercury Mystique. The only car in its class with a MicronAir filter that removes virtually all dust, pollen and other impurities from the interior." (Exhibit A: print ad).

B. "MicronAir Filtration System screens out virtually all pollen, road dust and potentially harmful air pollutants before they enter the car. This means allergy sufferers, and anyone concerned with air pollution, can breathe easier." (Exhibit B: promotional material).

C. "Dear Mr. Sample,
Do you like clean air? Mystique's standard MicronAir Filtration System removes virtually all pollen, road dust and other pollutants from air entering the car. It's an especially nice feature if you happen to be bothered by allergies." (Exhibit C: promotional material).

D. "ANNCR: Introducing, the all-new Mercury Mystique. A car that can help bar pollutants and pollen from your environment. With an air filtration system ordinarily found in cars costing thousands more." (Exhibit D: television commercial).

E. "MALE ANNCR: How about the all-new Mercury Mystique...It's loaded with features unique to its class.
FEMALE ANNCR: (SARCASTICALLY) Magical features?
MALE ANNCR: Well Mystique's air filter does remove dust, pollen and harmful pollutants from the air before they reach the car's interior.
FEMALE ANNCR: Pretty impressive!" (Exhibit E: radio commercial).

F. "And you can breathe easy thanks to the MicronAir Filtration System that removes all pollen and other pollutants...a decided advantage when you're driving in dusty desert air...and an advantage you can't get from either Accord or Altima." (Exhibit F: print ad).

G. "*MicronAir Filtration System
Removes virtually all pollutants from the cabin." (Exhibit G: print ad).

H. "A MicronAir Filtration System to keep the passenger compartment virtually air-pollutant and pollen free." (Exhibit H: print ad).

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not

necessarily limited to the advertisements attached as Exhibits A-H, respondent has represented, directly or by implication, that the MicronAir Filtration System removes virtually all pollutants likely to be encountered by a driver.

PAR. 6. In truth and in fact, the MicronAir Filtration System does not remove virtually all pollutants likely to be encountered by a driver. For example, the MicronAir Filtration System has no effect on gaseous pollutants, such as hydrocarbons, carbon monoxide, and nitrogen oxides. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-H, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representation.

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

PAR. 9. Respondent knew or should have known that the representations set forth in paragraphs five and seven were, and are, false and misleading.

PAR. 10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

79 Complaint

EXHIBIT A

EXHIBIT B

EXHIBIT C

0001/0001
Mr. John A. Sample
123 Main Street
Anytown, US 12345-6789

Dear Mr. Sample,

Every now and then an automobile like the all-new Mercury Mystique comes along that is so different, so comfortable and so much fun to drive, you just can't wait for the next excuse to get behind the wheel.

Right now, test drive a Mercury mystique and you'll receive a $50 U.S. Savings Bond! How's that for an excuse to drive? A $50 U.S. Savings Bond *and* the chance to put this terrific new sedan through its paces.

We think you'll find a lot to like as you drive Mystique. It has 21 unique features never before offered by its major competitors.

Do you like clean air? Mystique's standard MicronAir Filtration System removes virtually all pollen, road dust and other pollutants from air entering the car. It's an especially nice feature if you happen to be bothered by allergies.

Speaking of being bothered, taking a car in for service probably isn't one of your top ten favorite things to do. That's why we've designed the standard Zetec DOHC 4-cylinder engine to go 60,000 miles before its first scheduled tune-up. Still too soon? The optional Duratec DOHC V-6 isn't scheduled for its first tune-up until 100,000 miles.

We even wanted to make driving in rain or snow more enjoyable. That's why Mystique is available with an Anti-lock Brake System (ABS) and All-Speed Traction Control which helps you keep from spinning your wheels on slippery surfaces.

Mystique has a few features we hope you'll never use. Like dual air bags and high-tensile, boron-steel door beams which help Mystique meet all 1997 federal safety standards, today.

So get behind the wheel of Mercury Mystique and see what all the excitement is about. Remember to bring the certificate below to the dealership named when you take your test drive and you'll receive a $50 United States Savings Bond. One drive in Mystique and you'll understand -- it's a whole new Mercury.

Sincerely,

Keith C. Magee
Vice President, General Manager
Lincoln-Mercury Division
Ford Motor Company

P.S. A $50 U.S. Savings Bond is yours when you test drive a 1995 Mercury Mystique, but only if you act soon. Offer expires January 31, 1995.

- Always wear your safety belt. MicronAir is a registered U.S. trademark of Freudenberg Nonwovens.
01100231

79 Complaint

EXHIBIT D

EXHIBIT E

79 Complaint

EXHIBIT F

EXHIBIT G

79 Complaint

EXHIBIT H

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 comment filed thereafter by an interested person 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 Young & Rubicam Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 285 Madison Avenue, in the City of New York, State of New York.

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

ORDER

I.

It is ordered, That respondent, Young & Rubicam, a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising or promotion of the MicronAir Filtration System as configured in the 1995 Lincoln Continental and the 1995 Mercury Mystique or any substantially similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, that such products remove virtually all pollutants. For the purposes of this order, "substantially similar product" shall mean any automotive cabin air filter which is an electrostatic filter, consisting of layers of non-woven fabric, with at least one layer that has been electrically charged.

II.

It is further ordered, That respondent, Young & Rubicam, a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising or promotion of any household or automotive cabin air filter, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, about the efficacy of any such product in reducing or removing pollutants, unless such representation is true, and at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence, that substantiates such representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures

generally accepted in the profession to yield accurate and reliable results.

Provided, however, that it shall be a defense hereunder that the respondent neither knew nor had reason to know of an inadequacy of substantiation for the representation.

III.

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

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

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

IV.

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

V.

It is further ordered, That respondent shall, within ten (10) days from the date of service of this order upon it, distribute a copy of this order to each of its officers, agents, representatives or employees engaged in the preparation or review of advertising or other materials covered by this order.

VI.

It is further ordered, That this order will terminate on August 22, 2016, or twenty 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-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.

VII.

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.

IN THE MATTER OF

RAYTHEON COMPANY

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-3681. Complaint, Sept. 3, 1996--Decision, Sept. 3, 1996

This consent order requires, among other things, a Massachusetts-based high technology company to erect an information "firewall" for the duration of the Navy competition, and prohibits the dissemination of any non-public information concerning Raytheon's procurement of Chrysler Technologies Holding, Inc. ("CTH") officials or employees, or receiving any non-public information concerning the bid.

Appearances

For the Commission: *James H. Holden.*

For the respondent: *Robert D. Paul, White & Case,* Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Raytheon Company ("Raytheon"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the voting securities of Chrysler Technologies Holding, Inc. ("CTH"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would violate 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; 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. DEFINITIONS

For purposes of this complaint the following definitions apply:

1. *"Submarine high data rate satellite communications terminal"* means the system to be procured in the United States Department of the Navy's scheduled competitive procurement of the submarine high data rate satellite communications terminal, a satellite communications system for use on U.S. Navy submarines that is capable of, among other things, transmitting and receiving both super high frequency and extremely high frequency signals.

2. *"Antenna and terminal controls"* means any current or future equipment and services designed, developed, proposed or provided by Electrospace Systems, Inc. in connection with the United States Department of the Navy's procurement of the submarine high data rate satellite communications terminal.

II. RESPONDENT

3. Respondent Raytheon is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal executive offices located at 141 Spring Street, Lexington, Massachusetts.

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

III. ACQUIRED COMPANY

5. Chrysler Technologies Holding, Inc. is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal executive offices located at 1000 Chrysler Drive, Auburn Hills, Michigan. CTH's wholly-owned subsidiary, Electrospace Systems, Inc. ("ESI"), researches and develops, among other things, antenna and terminal controls.

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

IV. THE ACQUISITION

7. On April 4, 1996, Raytheon and CTH entered into a Stock Purchase Agreement whereby Raytheon will acquire all of the voting securities of CTH for approximately $455 million.

V. THE RELEVANT MARKET

8. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the acquisition is the research, development, manufacture and sale of the submarine high data rate satellite communications terminal.

9. For purposes of this complaint, the relevant geographic area in which to analyze the effects of the acquisition is the United States.

VI. TRADE AND COMMERCE

10. The market for the submarine high data rate satellite communications terminal in the United States is highly concentrated whether measured by Herfindahl-Hirschmann Indices ("HHI") or concentration ratios.

11. Respondent and CTH's prime contractor, GTE Corporation, are two of a very small number of competitors in the scheduled procurement of the submarine high data rate satellite communications terminal.

12. Entry into the market for the research, development, manufacture and sale of the submarine high data rate satellite communications terminal would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph thirteen because of the time required to research and develop the necessary technology and because of the timing of the Department of the Navy's scheduled procurement.

VII. EFFECTS OF THE ACQUISITION

13. The effects of the acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant market set forth above 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, by, among others ways, providing a means for respondent or GTE

Corporation to gain access to competitively sensitive non-public information concerning the other's submarine high data rate satellite communications terminal designs and bidding strategies, whereby actual competition between respondent and GTE Corporation would be reduced.

VIII. VIOLATIONS CHARGED

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

15. The acquisition described in paragraph seven, 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 having initiated an investigation of the proposed acquisition by respondent of all of the voting securities of Chrysler Technologies Holding, Inc. ("CTH"), and the respondent 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 respondent with violations 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

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent 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 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 Raytheon Company ("Raytheon") 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 141 Spring Street, Lexington, Massachusetts.

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. *"Respondent"* or *"Raytheon"* means Raytheon Company, its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Raytheon Company, and the respective directors, officers, employees, agents, representatives, successors and assigns of each. For purposes of paragraph II of this order, Raytheon does not include ESI.

B. *"CTH"* means Chrysler Technologies Holding, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 1000 Chrysler Drive, Auburn Hills, Michigan, its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by CTH, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

C. *"ESI"* means Electrospace Systems, Inc., a wholly-owned subsidiary of Chrysler Technologies Holding, Inc., with its principal office and place of business located at 1301 East Collins Boulevard, Richardson, Texas, or any other entity within or controlled by Chrysler Technologies Holding, Inc. that is engaged in, among other things, the research, development, manufacture or sale of antenna and terminal controls, its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by ESI (or such similar entity), and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

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

E. *"Submarine high data rate satellite communications terminal"* means the system to be procured in the United States Department of the Navy's scheduled competitive procurement of the submarine high data rate satellite communications terminal, a satellite communications system for use on U.S. Navy submarines that is capable of, among other things, transmitting and receiving both super high frequency and extremely high frequency signals.

F. *"Antenna and terminal controls"* means any current or future equipment and services designed, developed, proposed or provided by ESI in connection with the United States Department of the Navy's procurement of the submarine high data rate satellite communications terminal.

G. *"Non-public information of Raytheon"* means any information not in the public domain and in the possession or control of Raytheon relating to the submarine high data rate satellite communications terminal.

H. *"Non-public information of ESI"* means any information not in the public domain and in the possession or control of ESI relating to the submarine high data rate satellite communications terminal, and any information not in the public domain furnished by Rockwell International Corporation or GTE Corporation or any other company to ESI in its capacity as subcontractor to Rockwell International Corporation in connection with the U.S. Navy's procurement of the submarine high data rate satellite communications terminal.

I. *"Acquisition"* means Raytheon's acquisition of all of the voting securities of Chrysler Technologies Holding, Inc.

II.

It is further ordered, That:

A. Raytheon shall not provide, disclose or otherwise make available, directly or indirectly, to ESI any non-public information of Raytheon until either: (1) the United States Department of the Navy selects only one supplier for the submarine high data rate satellite communications terminal; or (2) the United States Department of the Navy cancels its procurement of the submarine high data rate satellite communications terminal entirely.

B. Raytheon shall not obtain or seek to obtain, directly or indirectly, any non-public information of ESI until either: (1) the United States Department of the Navy selects only one supplier for the submarine high data rate satellite communications terminal; or (2) the United States Department of the Navy cancels its procurement of the submarine high data rate satellite communications terminal entirely.

III.

It is further ordered, That respondent shall comply with all terms of the Interim Agreement, attached to this order and made a part hereof as Appendix I. Said Interim Agreement shall continue in effect until the provisions in paragraph II of this order are complied with or until such other time as is stated in said Interim Agreement.

IV.

It is further ordered, That within twenty (20) days of the date this order becomes final, and annually on the anniversary of the date this order becomes final until either the United States Department of the Navy selects only one supplier for the submarine high data rate satellite communications terminal or cancels its procurement of the submarine high data rate satellite communications terminal entirely, and at such other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraph II of this order.

V.

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

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege and applicable United States Government national security requirements, upon written request, and on reasonable notice, respondent shall permit any duly authorized representatives of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and 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 respondent, to interview officers, directors, or employees of respondent, who may have counsel present, regarding any such matters.

VII.

It is further ordered, That respondent's obligations under this order shall terminate when either: (1) the United States Department of the Navy selects only one supplier for the submarine high data rate satellite communications terminal; or (2) the United States Department of the Navy cancels its procurement of the submarine high data rate satellite communications terminal entirely.

APPENDIX I

INTERIM AGREEMENT

This Interim Agreement is by and between Raytheon Company ("Raytheon"), a corporation organized and existing under the laws of the State of Delaware, and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq*.

PREMISES

Whereas, Raytheon has proposed to acquire all of the outstanding voting securities of Chrysler Technologies Holding, Inc.; 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 Agreement Containing Consent Order ("Consent Agreement"), 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 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 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, and divestiture or other relief resulting from a proceeding challenging the legality of the proposed Acquisition might not be possible, or might be less than an effective remedy; and

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

Whereas, Raytheon 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, Raytheon agrees, upon the understanding that the Commission has not yet determined whether the proposed

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

2. Raytheon agrees to deliver, within three (3) days of the date the Consent Agreement is accepted for public comment by the Commission, a copy of the Consent Agreement and a copy of this Interim Agreement to the United States Department of Defense, Rockwell International Corporation, and GTE Corporation.

3. Raytheon agrees to submit, within twenty (20) days of the date the Consent Agreement is signed by Raytheon, an initial report, pursuant to Section 2.33 of the Commission's Rules, signed by Raytheon setting forth in detail the manner in which Raytheon will comply with paragraph II of the Consent Agreement.

4. Raytheon agrees that, from the date Raytheon signs the Consent Agreement until the first of the dates listed in subparagraphs 4.a. and 4.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 Commission finally issues its Complaint and its Decision and Order.

5. Raytheon waives all rights to contest the validity of this Interim Agreement.

6. For the purpose of determining or securing compliance with this Interim Agreement, subject to any legally recognized privilege and applicable United States Government national security requirements, and upon written request, and on reasonable notice, Raytheon shall permit any duly authorized representative or representatives of the Commission:

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

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

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

IN THE MATTER OF

PRECISION MOULDING CO., INC.

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

Docket C-3682. Complaint, Sept. 3, 1996--Decision, Sept. 3, 1996

This consent order prohibits, among other things, a California-based supplier of wood products used to construct frames for artists' canvases from requesting, suggesting, urging or advocating that any competitor raise, fix or stabilize prices or price levels, and from entering into any agreement or conspiracy to fix, raise or maintain prices.

Appearances

For the Commission: *Michael Antalics, William Lanning* and *William Baer.*

For the respondent: *Bruce Ryan, Paul, Hastings, Janofsky & Walker*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Precision Moulding Co., Inc., a corporation, hereinafter sometimes referred to as respondent or "Precision," has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Precision Moulding Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 3308 Cyclone Court, Cottonwood, California, and its mailing address at P.O. Box 406, Cottonwood, California.

PAR. 2. Respondent is now, and for some time has been, engaged in the manufacture, advertising, offering for sale, sale and distribution

of stretcher bars and other wood products. A "stretcher bar" is an art supply wood product which when assembled with three other stretcher bars comprises a rectangular frame over which a canvas used for painting is stretched. Stretcher bars come in various lengths and widths, but are usually between 6" to 120" in length. Precision is the dominant supplier of commercial stretcher bars in the United States.

PAR. 3. Respondent maintains and has maintained a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Between January and May of 1995, respondent became aware that a new competitor was soliciting the business of its customers. These customers provided respondent with written documentation that the competitor was offering stretcher bars at prices below those offered by respondent. Upon reviewing the information concerning the competitor's prices, the President of the respondent stated that the competitor's prices were "ridiculous."

PAR. 5. At all times relevant herein, respondent perceived the competitor as a competitive threat because of the competitor's low prices. Between January and May of 1995, respondent intentionally delayed a scheduled across-the-board increase in the price of its stretcher bars because of the competitive threat posed by the competitor.

PAR. 6. In May of 1995, the President and General Manager of the respondent planned to travel to the eastern United States, in part, to make an unannounced visit to its competitor.

PAR. 7. On or about June 23, 1995, the President and General Manager of respondent visited the headquarters of the new competitor and met with an officer thereof. During the meeting, the General Manager of respondent told the competitor that its prices for stretcher bars were "ridiculously low." He also told the competitor that he did not "have to give the product away." This was understood by the competitor to be an invitation to fix prices. At this point, the competitor advised the respondent's representatives that he was aware that price fixing was illegal and did not want to get "contaminated." The competitor then implored the respondent's representatives to refrain from further discussion concerning prices.

PAR. 8. After a brief discussion about equipment, the respondent's representatives returned to a discussion about prices. The General Manager of the respondent threatened the competitor with a price war and told the competitor that the competitor would not be able to survive a price war with Precision. At this point, the competitor reiterated that the respondent's discussion of prices was "dangerous" from a legal perspective, and the competitor advised the respondent that the conversation was over.

PAR. 9. After the June 1995 meeting and throughout the remainder of 1995, respondent continued to delay the implementation of its scheduled across-the-board price increase for its stretcher bars until it could ascertain whether the competitor would continue to be a competitive threat.

PAR. 10. The conduct described in paragraphs seven and eight constituted an implicit invitation by respondent to its competitor to raise prices of stretcher bars and refrain from competition. The invitation, if accepted, would have constituted an agreement in restraint of trade.

PAR. 11. The aforesaid acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices herein alleged are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

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

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

admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; 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, 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 Precision Moulding Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 3308 Cyclone Court, Cottonwood, California, and its mailing address at P.O. Box 406, Cottonwood, 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.

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

A. *"Respondent"* means Precision Moulding Co., Inc., its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, and groups, and affiliates controlled by Precision Moulding Co., Inc., and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. *"Stretcher bar products"* means an art supply wood product which when assembled comprises a rectangular frame over which a canvas used for painting is stretched, and includes any size of stretcher bar.

II.

It is ordered, That respondent, directly or indirectly, through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of any stretcher bar products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

A. Requesting, suggesting, urging, or advocating that any competitor raise, fix or stabilize prices or price levels, or engage in any other pricing action; and

B. Entering into, attempting to enter into, adhering to, or maintaining any combination, conspiracy, agreement, understanding, plan or program with any competitor to fix, raise, establish, maintain or stabilize prices or price levels.

Provided, that nothing in this order shall prohibit respondent from: (1) agreeing to sell or distribute its stretcher bar products to its competitors, and (2) negotiating or agreeing upon the price which any of its stretcher bar products will be sold to its competitors.

III.

It is further ordered, That respondent shall:

A. Within thirty (30) days of the date on which this order becomes final, provide a copy of this order to all of its directors, officers, and management employees;

B. For a period of three (3) years after the date on which this order becomes final, and within ten (10) days after the date on which any person becomes a director, officer, or management employee of respondent, provide a copy of this order to such person; and

C. Require each person to whom a copy of this order is furnished pursuant to subparagraphs III.A and B of this order to sign and submit to Precision Moulding Co., Inc. withing thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the order; (2) represents that the undersigned has read and understands the order; and (3) acknowledges that the undersigned has been advised and

understands that non-compliance with the order may subject Precision Moulding Co., Inc. to penalties for violation of the order.

IV.

It is further ordered, That respondent shall:

A. Within sixty (60) days from the date on which this order becomes final, and annually thereafter for three (3) years on the anniversary date of this order, and at such other times as the Commission may by written notice to the respondent require, file with the Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with this order;

B. For a period of three (3) years after the order becomes final, maintain and make available to the staff of the Federal Trade Commission for inspection and copying, upon reasonable notice, all records of communications with competitors of respondent relating to any aspect of pricing for stretcher bar products, and records pertaining to any action taken in connection with any activity covered by Parts II, III and IV, of this order; and

C. Notify the Commission at least thirty (30) days prior to any change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this order.

V.

It is further ordered, That this order shall terminate on September 3, 2016.

IN THE MATTER OF

COCA-COLA BOTTLING CO. OF THE SOUTHWEST

Docket 9215. Interlocutory Order, September 9, 1996

ORDER RETURNING MATTER TO ADJUDICATION AND DISMISSING COMPLAINT

In 1984, Coca-Cola Bottling Company of the Southwest ("CCSW") acquired the Dr Pepper and Canada Dry carbonated soft drink franchises for the San Antonio, Texas area from the San Antonio Dr Pepper Bottling Company, a wholly-owned subsidiary of the parent Dr Pepper concentrate company. On July 29, 1988, the Commission issued an administrative complaint alleging, *inter alia*, that this acquisition was likely substantially to lessen competition, in violation of Section 5 of the FTC Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18. The Notice of Contemplated Relief in the administrative complaint included a provision that would have required divestiture of the Dr Pepper and Canada Dry licenses.

Hearings on the complaint were held before an administrative law judge ("ALJ") from July to October 1990. On June 14, 1991, the ALJ issued an initial decision dismissing the complaint. Applying Clayton Act standards, the ALJ concluded that the relevant product market included all carbonated soft drinks and other similar non-carbonated beverages; that the relevant geographic market was broader than the 10-county San Antonio area pleaded in the complaint; that entry was not difficult; that competition had been significant; that no customer had complained; and that there was accordingly no likelihood of anticompetitive effects from the transaction.

FTC counsel for the complaint appealed that decision to the full Commission. On August 31, 1994, the Commission issued a Final Order and Opinion in which the Commission concluded, *inter alia*, that CCSW's acquisition of the Dr Pepper franchise violated the FTC Act and the Clayton Act, and reversed the ALJ's initial decision. The Commission concluded that the relevant product market was branded carbonated soft drinks; that the relevant geographic market was the 10-county San Antonio area; that entry into the market was difficult; that the acquisition had raised CCSW's market share from 44.7% to 54.5%; that the market was highly concentrated; and that the

acquisition substantially increased the likelihood of collusion among soft drink bottlers. For reasons differing from those of the ALJ, the Commission also concluded that CCSW's acquisition of the Canada Dry franchise did not violate the FTC Act or the Clayton Act.

In its decision, the Commission expressly rejected CCSW's contention that the legality of the transaction should be judged under the Soft Drink Interbrand Competition Act of 1980 ("SDICA"), 15 U.S.C. 3501-3503. That Act provides that "[n]othing contained in any antitrust law shall render unlawful the inclusion and enforcement in any [soft drink] trademark licensing contract" of "provisions granting the licensee the sole and exclusive right to manufacture, distribute, and sell such product in a defined geographic area," so long as "such product is in substantial and effective competition with other products of the same general class in the relevant market or markets." 15 U.S.C. 3501. The Commission concluded, however, that the SDICA was designed to establish the standard for judging the legality of a concentrate manufacturer's grant of exclusivity to a licensee, rather than to establish the legality of a bottler's acquisition of licenses to bottle competing soft drink brands. The Commission issued a Final Order requiring CCSW to divest the Dr Pepper license and related assets, and requiring CCSW to obtain prior Commission approval for future soft drink license acquisitions.

Following issuance of the Commission's opinion, CCSW filed a petition for review with the United States Court of Appeals for the Fifth Circuit. On June 10, 1996, the Fifth Circuit entered a decision vacating and remanding the Commission's decision. The Court of Appeals held that the standards of the SDICA governed the transaction, and hence that the Commission had used the wrong legal standard in concluding that Section 5 of the FTC Act prohibited this change in distribution. The court vacated the Commission’s divestiture order and remanded the case to the Commission for further proceedings to determine the transaction's validity under the SDICA's "substantial and effective competition" standard.

The Commission disagrees with the Fifth Circuit's application of the SDICA in this case. The SDICA -- an amendment to the antitrust laws passed in 1980 -- was designed to terminate the Commission's 1970's challenge to the use of exclusive territories in soft drink bottling licenses, and to govern any future challenges to the use of exclusivity provisions in soft drink franchises. The statute has

accomplished that purpose. *See, Coca-Cola Co. v. FTC*, 642 F.2d 1387 (D.C. Cir. 1981). Nothing in the language or legislative history of the statute suggests that it was intended to govern Clayton Act challenges to the acquisition by a soft drink bottler of the license to bottle a competing brand, where the challenge is not premised on the exclusivity of the license whose acquisition is being challenged. Notwithstanding our view that the Court of Appeals has misapplied the SDICA in this case, the Commission has determined not to seek further review of the court's decision. The court's decision, by its express terms, "hold[s] only that the Soft Drink Act applies in a case such as this one in which the manufacturer sells its wholly-owned bottling subsidiary and then enters the downstream market by licensing an independent distributor for the first time" (emphasis added). Given market conditions in the soft drink bottling industry, the circumstances described in the court's holding are not likely to present themselves in any future case. For this reason, the Court of Appeals's decision is highly unlikely to affect the Commission's future enforcement of the Clayton Act against combinations of competing soft drink brands, even in markets within the Fifth Circuit. Accordingly, the Commission has concluded that seeking further review of the decision would be unwarranted.

With respect to the present case, the Commission has concluded that, in light of the age of the challenged transaction, the limited size of the market, and the age of the record evidence regarding the competitive impact of the challenged acquisition, further expenditure of resources on this case would not be in the public interest.

For these reasons, the Commission has determined not to seek further judicial review, to return the matter to adjudication, and to dismiss the complaint. Therefore,

It is ordered, That this matter be, and it hereby is, returned to adjudication, and

It is further ordered, That the complaint in this matter be, and it hereby is, dismissed.

Commissioner Azcuenaga and Commissioner Starek recused.

IN THE MATTER OF

HARPER & ROW PUBLISHERS, INC.

Docket 9217. Interlocutory Order, September 10, 1996

ORDER RETURNING MATTERS TO ADJUDICATION AND DISMISSING COMPLAINTS

The complaints in these matters, issued on December 20, 1988, allege that the respondents -- six of the country's largest book publishers -- violated Sections 2(a), 2(d), and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a),(d),(e), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The core of the complaints is that the respondents gave certain national bookstore chains price and promotional concessions that they did not make available to independent bookstores, to the detriment of competition and consumers.

On November 12, 1992, the Secretary issued an order withdrawing these matters from adjudication so that the Commission could evaluate non-public proposed consent agreements signed by complaint counsel and each of the respondents. Since that time, the Commission has considered additional information concerning developments in the industry and what, if any, Commission action is appropriate. Having examined the proposed consent agreements, and having considered significant developments that have occurred in the industry since the complaints were issued -- including the initiation of private litigation addressing many of the same issues -- the Commission has concluded that it is in the public interest to reject the proposed consent agreements and dismiss the complaints.

Although the proposed consent agreements prohibit most of the practices that led to the complaints, the industry has changed appreciably since the consent agreements were signed. For example, the dynamics and structure of the book distribution market have evolved in significant ways, reflecting the growth of "superstores" and warehouse or "club" stores. Moreover, it appears that major book publishers generally have modified pricing and promotional practices. Finally, the respondents generally have replaced the principal forms of alleged price discrimination that prompted the complaints -- unjustified quantity discounts on trade books and secret discounts on

mass market books -- with other pricing strategies. These developments may limit the potential benefits of the proposed consent agreements.

The Commission could attempt to evaluate the economic and legal significance of changes in industry structure and practices, and respond to the effects of these industry changes, by directing the Commission staff to conduct additional investigation and, if appropriate, to negotiate revised consent agreements. Further investigation would be time-consuming and resource-intensive, however, and even more resources would be needed in the event that litigation became necessary. In addition, even if the Commission were to issue litigated or consent orders against these respondents, such orders might not effectively prevent the respondents from adopting, pursuant to the "meeting competition" defense, practices used by other publishers that are not subject to a Commission order. Finally, since the time that the proposed consent agreements were signed, the American Booksellers Association has filed several private actions challenging alleged discrimination in this industry, and has already obtained consent decrees against four publishers. In view of these developments, further investigation, and possibly litigation, by the Commission does not appear to be a necessary or prudent use of scarce public resources.

For these reasons, the Commission has determined to reject the proposed consent agreements, return the matters to adjudication, and dismiss the complaints. Therefore,

It is ordered, That these matters be, and they hereby are, returned to adjudication, and

It is further ordered, That the complaints in these matters be, and they hereby are, dismissed.

Chairman Pitofsky recused and Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

These cases against six book publishers all involve allegations of unlawful price discrimination in connection with the sale of books to resellers. Although all six respondents reached agreement with complaint counsel on proposed settlements several years ago, the Commission inexplicably has failed to act on the proposed consent

orders. Now, almost four years after the matters were removed from adjudication to consider the proposed consent agreements,[1] the Commission has decided to dismiss the complaints. I do not understand and certainly cannot endorse this decision.

The most obvious justification for dismissing the complaints, a conclusion that the respondents did not engage in the unlawful price discrimination alleged in the complaints, is noticeably absent from the Commission's order. The majority instead cites four reasons for its order. The first reason the majority offers is the evolving industry "dynamics and structure . . . reflecting the growth of 'superstores' and warehouse or 'club' stores." It is not at all clear how such changes might mitigate the practice, alleged in the Commission's complaints, of unlawfully discriminating in price among retailers of books. Indeed, one could speculate that the growth of significant discount retailers would result in more rather than less price discrimination against disfavored retailers.[2] This is simply not a valid reason to dismiss the complaints.

Second, the majority suggests that the "principal forms" of discriminatory practices that led to the complaints have been replaced with other pricing strategies that "may limit the potential benefits of the proposed consent agreements." This rationale for dismissal does not suggest a conclusion that the respondents did not violate the law but rather appears to reflect a concern about the remedial effectiveness of the proposed orders.[3] Traditionally, an order of the Commission addressing unlawful price discrimination requires the respondent to cease and desist from such conduct in the future.[4] Such an order is not easily outmoded by changing fashions in discriminatory practices. To the extent that the proposed consent orders were inadequate, the usual options have been available to the Commission to seek appropriate relief. The Commission could have

[1] Proposed consent agreements having been executed by the respondents and complaint counsel, the matters were withdrawn from adjudication by the Secretary pursuant to Section 3.25(c) of the Commission's Rules of Practice on November 12, 1992.

[2] The private Robinson-Patman actions brought by the American Booksellers Association against several book publishers tend to suggest that unlawful price discrimination is not a thing of the past in the industry.

[3] To the extent that the majority may intend to suggest that the specific practices that led to the complaints have been abandoned, it should be noted that abandonment is not a sufficient basis, under well-established precedent, to avoid a Commission order. *See, e.g., Warner Communications, Inc.*, 105 FTC 342 (1985).

[4] *E.g., YKK (U.S.A.) Inc.*, 98 FTC 25 (1981). *See also* the form of notice order the Commission issued with each of the complaints in these six cases: "[R]espondent shall . . . cease and desist from discriminating in price" by selling to two purchasers at different prices.

sought appropriate revisions in the proposed consent orders, or it could have rejected the orders and returned the matters to adjudication.

Third, the majority expresses dismay that orders against the six book publishers may be ineffective, because the respondents would be free to use the "meeting competition" defense[5] to meet the prices of publishers not subject to Commission order. Of course, the respondents would be free to meet competition. That is what the defense is for. If what the majority means to suggest is that book publishers not under order also are engaging in discriminatory pricing, the solution would appear to be to initiate additional investigations, not to dismiss these complaints. As far as I know, the Commission never before has deemed enforcement of the Robinson-Patman Act fruitless on the ground that a respondent under order could lawfully meet the presumptively lawful prices of its competitors, and it seems a very odd proposition to adopt.

Finally, the majority cites the success that the American Booksellers Association has had in its private Robinson-Patman suits against several publishers. The Association has negotiated settlements with four publishers. The implication is that the Association's success should somehow stand in for the Commission's law enforcement. This is very confusing, when the same majority suggests that a mere six FTC orders would have been ineffective.

The unfortunate choice to dismiss the complaints may indeed save "scarce public resources" from further expenditure in these cases, but it is an imprudent waste of the substantial law enforcement resources that this agency already has expended.

I dissent.

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[5] Section 2(b) of the Robinson-Patman Act, 15 U.S.C. 13(b).

IN THE MATTER OF

MACMILLAN, INC.

Docket 9218. Interlocutory Order, September 10, 1996

ORDER RETURNING MATTERS TO ADJUDICATION AND DISMISSING COMPLAINTS

The complaints in these matters, issued on December 20, 1988, allege that the respondents -- six of the country's largest book publishers -- violated Sections 2(a), 2(d), and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a),(d),(e), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The core of the complaints is that the respondents gave certain national bookstore chains price and promotional concessions that they did not make available to independent bookstores, to the detriment of competition and consumers.

On November 12, 1992, the Secretary issued an order withdrawing these matters from adjudication so that the Commission could evaluate non-public proposed consent agreements signed by complaint counsel and each of the respondents. Since that time, the Commission has considered additional information concerning developments in the industry and what, if any, Commission action is appropriate. Having examined the proposed consent agreements, and having considered significant developments that have occurred in the industry since the complaints were issued -- including the initiation of private litigation addressing many of the same issues -- the Commission has concluded that it is in the public interest to reject the proposed consent agreements and dismiss the complaints.

Although the proposed consent agreements prohibit most of the practices that led to the complaints, the industry has changed appreciably since the consent agreements were signed. For example, the dynamics and structure of the book distribution market have evolved in significant ways, reflecting the growth of "superstores" and warehouse or "club" stores. Moreover, it appears that major book publishers generally have modified pricing and promotional practices. Finally, the respondents generally have replaced the principal forms of alleged price discrimination that prompted the complaints -- unjustified quantity discounts on trade books and secret discounts on

mass market books -- with other pricing strategies. These developments may limit the potential benefits of the proposed consent agreements.

The Commission could attempt to evaluate the economic and legal significance of changes in industry structure and practices, and respond to the effects of these industry changes, by directing the Commission staff to conduct additional investigation and, if appropriate, to negotiate revised consent agreements. Further investigation would be time-consuming and resource-intensive, however, and even more resources would be needed in the event that litigation became necessary. In addition, even if the Commission were to issue litigated or consent orders against these respondents, such orders might not effectively prevent the respondents from adopting, pursuant to the "meeting competition" defense, practices used by other publishers that are not subject to a Commission order. Finally, since the time that the proposed consent agreements were signed, the American Booksellers Association has filed several private actions challenging alleged discrimination in this industry, and has already obtained consent decrees against four publishers. In view of these developments, further investigation, and possibly litigation, by the Commission does not appear to be a necessary or prudent use of scarce public resources.

For these reasons, the Commission has determined to reject the proposed consent agreements, return the matters to adjudication, and dismiss the complaints. Therefore,

It is ordered, That these matters be, and they hereby are, returned to adjudication, and

It is further ordered, That the complaints in these matters be, and they hereby are, dismissed.

Chairman Pitofsky recused and Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

These cases against six book publishers all involve allegations of unlawful price discrimination in connection with the sale of books to resellers. Although all six respondents reached agreement with complaint counsel on proposed settlements several years ago, the Commission inexplicably has failed to act on the proposed consent

orders. Now, almost four years after the matters were removed from adjudication to consider the proposed consent agreements,[1] the Commission has decided to dismiss the complaints. I do not understand and certainly cannot endorse this decision.

The most obvious justification for dismissing the complaints, a conclusion that the respondents did not engage in the unlawful price discrimination alleged in the complaints, is noticeably absent from the Commission's order. The majority instead cites four reasons for its order. The first reason the majority offers is the evolving industry "dynamics and structure . . . reflecting the growth of 'superstores' and warehouse or 'club' stores." It is not at all clear how such changes might mitigate the practice, alleged in the Commission's complaints, of unlawfully discriminating in price among retailers of books. Indeed, one could speculate that the growth of significant discount retailers would result in more rather than less price discrimination against disfavored retailers.[2] This is simply not a valid reason to dismiss the complaints.

Second, the majority suggests that the "principal forms" of discriminatory practices that led to the complaints have been replaced with other pricing strategies that "may limit the potential benefits of the proposed consent agreements." This rationale for dismissal does not suggest a conclusion that the respondents did not violate the law but rather appears to reflect a concern about the remedial effectiveness of the proposed orders.[3] Traditionally, an order of the Commission addressing unlawful price discrimination requires the respondent to cease and desist from such conduct in the future.[4] Such an order is not easily outmoded by changing fashions in discriminatory practices. To the extent that the proposed consent orders were inadequate, the usual options have been available to the Commission to seek appropriate relief. The Commission could have

[1] Proposed consent agreements having been executed by the respondents and complaint counsel, the matters were withdrawn from adjudication by the Secretary pursuant to Section 3.25(c) of the Commission's Rules of Practice on November 12, 1992.

[2] The private Robinson-Patman actions brought by the American Booksellers Association against several book publishers tend to suggest that unlawful price discrimination is not a thing of the past in the industry.

[3] To the extent that the majority may intend to suggest that the specific practices that led to the complaints have been abandoned, it should be noted that abandonment is not a sufficient basis, under well-established precedent, to avoid a Commission order. *See, e.g., Warner Communications, Inc.*, 105 FTC 342 (1985).

[4] *E.g., YKK (U.S.A.) Inc.*, 98 FTC 25 (1981). *See also* the form of notice order the Commission issued with each of the complaints in these six cases: "[R]espondent shall . . . cease and desist from discriminating in price" by selling to two purchasers at different prices.

sought appropriate revisions in the proposed consent orders, or it could have rejected the orders and returned the matters to adjudication.

Third, the majority expresses dismay that orders against the six book publishers may be ineffective, because the respondents would be free to use the "meeting competition" defense[5] to meet the prices of publishers not subject to Commission order. Of course, the respondents would be free to meet competition. That is what the defense is for. If what the majority means to suggest is that book publishers not under order also are engaging in discriminatory pricing, the solution would appear to be to initiate additional investigations, not to dismiss these complaints. As far as I know, the Commission never before has deemed enforcement of the Robinson-Patman Act fruitless on the ground that a respondent under order could lawfully meet the presumptively lawful prices of its competitors, and it seems a very odd proposition to adopt.

Finally, the majority cites the success that the American Booksellers Association has had in its private Robinson-Patman suits against several publishers. The Association has negotiated settlements with four publishers. The implication is that the Association's success should somehow stand in for the Commission's law enforcement. This is very confusing, when the same majority suggests that a mere six FTC orders would have been ineffective.

The unfortunate choice to dismiss the complaints may indeed save "scarce public resources" from further expenditure in these cases, but it is an imprudent waste of the substantial law enforcement resources that this agency already has expended.

I dissent.

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[5] Section 2(b) of the Robinson-Patman Act, 15 U.S.C. 13(b).

IN THE MATTER OF

THE HEARST CORPORATION, ET AL.

Docket 9219. Interlocutory Order, September 10, 1996

ORDER RETURNING MATTERS TO ADJUDICATION AND DISMISSING COMPLAINTS

The complaints in these matters, issued on December 20, 1988, allege that the respondents -- six of the country's largest book publishers -- violated Sections 2(a), 2(d), and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a),(d),(e), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The core of the complaints is that the respondents gave certain national bookstore chains price and promotional concessions that they did not make available to independent bookstores, to the detriment of competition and consumers.

On November 12, 1992, the Secretary issued an order withdrawing these matters from adjudication so that the Commission could evaluate non-public proposed consent agreements signed by complaint counsel and each of the respondents. Since that time, the Commission has considered additional information concerning developments in the industry and what, if any, Commission action is appropriate. Having examined the proposed consent agreements, and having considered significant developments that have occurred in the industry since the complaints were issued -- including the initiation of private litigation addressing many of the same issues -- the Commission has concluded that it is in the public interest to reject the proposed consent agreements and dismiss the complaints.

Although the proposed consent agreements prohibit most of the practices that led to the complaints, the industry has changed appreciably since the consent agreements were signed. For example, the dynamics and structure of the book distribution market have evolved in significant ways, reflecting the growth of "superstores" and warehouse or "club" stores. Moreover, it appears that major book publishers generally have modified pricing and promotional practices. Finally, the respondents generally have replaced the principal forms of alleged price discrimination that prompted the complaints -- unjustified quantity discounts on trade books and secret discounts on

mass market books -- with other pricing strategies. These developments may limit the potential benefits of the proposed consent agreements.

The Commission could attempt to evaluate the economic and legal significance of changes in industry structure and practices, and respond to the effects of these industry changes, by directing the Commission staff to conduct additional investigation and, if appropriate, to negotiate revised consent agreements. Further investigation would be time-consuming and resource-intensive, however, and even more resources would be needed in the event that litigation became necessary. In addition, even if the Commission were to issue litigated or consent orders against these respondents, such orders might not effectively prevent the respondents from adopting, pursuant to the "meeting competition" defense, practices used by other publishers that are not subject to a Commission order. Finally, since the time that the proposed consent agreements were signed, the American Booksellers Association has filed several private actions challenging alleged discrimination in this industry, and has already obtained consent decrees against four publishers. In view of these developments, further investigation, and possibly litigation, by the Commission does not appear to be a necessary or prudent use of scarce public resources.

For these reasons, the Commission has determined to reject the proposed consent agreements, return the matters to adjudication, and dismiss the complaints. Therefore,

It is ordered, That these matters be, and they hereby are, returned to adjudication, and

It is further ordered, That the complaints in these matters be, and they hereby are, dismissed.

Chairman Pitofsky recused and Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

These cases against six book publishers all involve allegations of unlawful price discrimination in connection with the sale of books to resellers. Although all six respondents reached agreement with complaint counsel on proposed settlements several years ago, the Commission inexplicably has failed to act on the proposed consent

orders. Now, almost four years after the matters were removed from adjudication to consider the proposed consent agreements,[1] the Commission has decided to dismiss the complaints. I do not understand and certainly cannot endorse this decision.

The most obvious justification for dismissing the complaints, a conclusion that the respondents did not engage in the unlawful price discrimination alleged in the complaints, is noticeably absent from the Commission's order. The majority instead cites four reasons for its order. The first reason the majority offers is the evolving industry "dynamics and structure . . . reflecting the growth of 'superstores' and warehouse or 'club' stores." It is not at all clear how such changes might mitigate the practice, alleged in the Commission's complaints, of unlawfully discriminating in price among retailers of books. Indeed, one could speculate that the growth of significant discount retailers would result in more rather than less price discrimination against disfavored retailers.[2] This is simply not a valid reason to dismiss the complaints.

Second, the majority suggests that the "principal forms" of discriminatory practices that led to the complaints have been replaced with other pricing strategies that "may limit the potential benefits of the proposed consent agreements." This rationale for dismissal does not suggest a conclusion that the respondents did not violate the law but rather appears to reflect a concern about the remedial effectiveness of the proposed orders.[3] Traditionally, an order of the Commission addressing unlawful price discrimination requires the respondent to cease and desist from such conduct in the future.[4] Such an order is not easily outmoded by changing fashions in discriminatory practices. To the extent that the proposed consent orders were inadequate, the usual options have been available to the Commission to seek appropriate relief. The Commission could have

[1] Proposed consent agreements having been executed by the respondents and complaint counsel, the matters were withdrawn from adjudication by the Secretary pursuant to Section 3.25(c) of the Commission's Rules of Practice on November 12, 1992.

[2] The private Robinson-Patman actions brought by the American Booksellers Association against several book publishers tend to suggest that unlawful price discrimination is not a thing of the past in the industry.

[3] To the extent that the majority may intend to suggest that the specific practices that led to the complaints have been abandoned, it should be noted that abandonment is not a sufficient basis, under well-established precedent, to avoid a Commission order. *See, e.g., Warner Communications, Inc.*, 105 FTC 342 (1985).

[4] *E.g., YKK (U.S.A.) Inc.*, 98 FTC 25 (1981). *See also* the form of notice order the Commission issued with each of the complaints in these six cases: "[R]espondent shall . . . cease and desist from discriminating in price" by selling to two purchasers at different prices.

sought appropriate revisions in the proposed consent orders, or it could have rejected the orders and returned the matters to adjudication.

Third, the majority expresses dismay that orders against the six book publishers may be ineffective, because the respondents would be free to use the "meeting competition" defense[5] to meet the prices of publishers not subject to Commission order. Of course, the respondents would be free to meet competition. That is what the defense is for. If what the majority means to suggest is that book publishers not under order also are engaging in discriminatory pricing, the solution would appear to be to initiate additional investigations, not to dismiss these complaints. As far as I know, the Commission never before has deemed enforcement of the Robinson-Patman Act fruitless on the ground that a respondent under order could lawfully meet the presumptively lawful prices of its competitors, and it seems a very odd proposition to adopt.

Finally, the majority cites the success that the American Booksellers Association has had in its private Robinson-Patman suits against several publishers. The Association has negotiated settlements with four publishers. The implication is that the Association's success should somehow stand in for the Commission's law enforcement. This is very confusing, when the same majority suggests that a mere six FTC orders would have been ineffective.

The unfortunate choice to dismiss the complaints may indeed save "scarce public resources" from further expenditure in these cases, but it is an imprudent waste of the substantial law enforcement resources that this agency already has expended.

I dissent.

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[5] Section 2(b) of the Robinson-Patman Act, 15 U.S.C. 13(b).

IN THE MATTER OF

THE PUTNAM BERKLEY GROUP, INC.

Docket 9220. Interlocutory Order, September 10, 1996

ORDER RETURNING MATTERS TO ADJUDICATION AND DISMISSING COMPLAINTS

The complaints in these matters, issued on December 20, 1988, allege that the respondents -- six of the country's largest book publishers -- violated Sections 2(a), 2(d), and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a),(d),(e), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The core of the complaints is that the respondents gave certain national bookstore chains price and promotional concessions that they did not make available to independent bookstores, to the detriment of competition and consumers.

On November 12, 1992, the Secretary issued an order withdrawing these matters from adjudication so that the Commission could evaluate non-public proposed consent agreements signed by complaint counsel and each of the respondents. Since that time, the Commission has considered additional information concerning developments in the industry and what, if any, Commission action is appropriate. Having examined the proposed consent agreements, and having considered significant developments that have occurred in the industry since the complaints were issued -- including the initiation of private litigation addressing many of the same issues -- the Commission has concluded that it is in the public interest to reject the proposed consent agreements and dismiss the complaints.

Although the proposed consent agreements prohibit most of the practices that led to the complaints, the industry has changed appreciably since the consent agreements were signed. For example, the dynamics and structure of the book distribution market have evolved in significant ways, reflecting the growth of "superstores" and warehouse or "club" stores. Moreover, it appears that major book publishers generally have modified pricing and promotional practices. Finally, the respondents generally have replaced the principal forms of alleged price discrimination that prompted the complaints -- unjustified quantity discounts on trade books and secret discounts on

mass market books -- with other pricing strategies. These developments may limit the potential benefits of the proposed consent agreements.

The Commission could attempt to evaluate the economic and legal significance of changes in industry structure and practices, and respond to the effects of these industry changes, by directing the Commission staff to conduct additional investigation and, if appropriate, to negotiate revised consent agreements. Further investigation would be time-consuming and resource-intensive, however, and even more resources would be needed in the event that litigation became necessary. In addition, even if the Commission were to issue litigated or consent orders against these respondents, such orders might not effectively prevent the respondents from adopting, pursuant to the "meeting competition" defense, practices used by other publishers that are not subject to a Commission order. Finally, since the time that the proposed consent agreements were signed, the American Booksellers Association has filed several private actions challenging alleged discrimination in this industry, and has already obtained consent decrees against four publishers. In view of these developments, further investigation, and possibly litigation, by the Commission does not appear to be a necessary or prudent use of scarce public resources.

For these reasons, the Commission has determined to reject the proposed consent agreements, return the matters to adjudication, and dismiss the complaints. Therefore,

It is ordered, That these matters be, and they hereby are, returned to adjudication, and

It is further ordered, That the complaints in these matters be, and they hereby are, dismissed.

Chairman Pitofsky recused and Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

These cases against six book publishers all involve allegations of unlawful price discrimination in connection with the sale of books to resellers. Although all six respondents reached agreement with complaint counsel on proposed settlements several years ago, the Commission inexplicably has failed to act on the proposed consent

orders. Now, almost four years after the matters were removed from adjudication to consider the proposed consent agreements,[1] the Commission has decided to dismiss the complaints. I do not understand and certainly cannot endorse this decision.

The most obvious justification for dismissing the complaints, a conclusion that the respondents did not engage in the unlawful price discrimination alleged in the complaints, is noticeably absent from the Commission's order. The majority instead cites four reasons for its order. The first reason the majority offers is the evolving industry "dynamics and structure . . . reflecting the growth of 'superstores' and warehouse or 'club' stores." It is not at all clear how such changes might mitigate the practice, alleged in the Commission's complaints, of unlawfully discriminating in price among retailers of books. Indeed, one could speculate that the growth of significant discount retailers would result in more rather than less price discrimination against disfavored retailers.[2] This is simply not a valid reason to dismiss the complaints.

Second, the majority suggests that the "principal forms" of discriminatory practices that led to the complaints have been replaced with other pricing strategies that "may limit the potential benefits of the proposed consent agreements." This rationale for dismissal does not suggest a conclusion that the respondents did not violate the law but rather appears to reflect a concern about the remedial effectiveness of the proposed orders.[3] Traditionally, an order of the Commission addressing unlawful price discrimination requires the respondent to cease and desist from such conduct in the future.[4] Such an order is not easily outmoded by changing fashions in discriminatory practices. To the extent that the proposed consent orders were inadequate, the usual options have been available to the Commission to seek appropriate relief. The Commission could have

[1] Proposed consent agreements having been executed by the respondents and complaint counsel, the matters were withdrawn from adjudication by the Secretary pursuant to Section 3.25(c) of the Commission's Rules of Practice on November 12, 1992.

[2] The private Robinson-Patman actions brought by the American Booksellers Association against several book publishers tend to suggest that unlawful price discrimination is not a thing of the past in the industry.

[3] To the extent that the majority may intend to suggest that the specific practices that led to the complaints have been abandoned, it should be noted that abandonment is not a sufficient basis, under well-established precedent, to avoid a Commission order. *See, e.g., Warner Communications, Inc.*, 105 FTC 342 (1985).

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sought appropriate revisions in the proposed consent orders, or it could have rejected the orders and returned the matters to adjudication.

Third, the majority expresses dismay that orders against the six book publishers may be ineffective, because the respondents would be free to use the "meeting competition" defense[5] to meet the prices of publishers not subject to Commission order. Of course, the respondents would be free to meet competition. That is what the defense is for. If what the majority means to suggest is that book publishers not under order also are engaging in discriminatory pricing, the solution would appear to be to initiate additional investigations, not to dismiss these complaints. As far as I know, the Commission never before has deemed enforcement of the Robinson-Patman Act fruitless on the ground that a respondent under order could lawfully meet the presumptively lawful prices of its competitors, and it seems a very odd proposition to adopt.

Finally, the majority cites the success that the American Booksellers Association has had in its private Robinson-Patman suits against several publishers. The Association has negotiated settlements with four publishers. The implication is that the Association's success should somehow stand in for the Commission's law enforcement. This is very confusing, when the same majority suggests that a mere six FTC orders would have been ineffective.

The unfortunate choice to dismiss the complaints may indeed save "scarce public resources" from further expenditure in these cases, but it is an imprudent waste of the substantial law enforcement resources that this agency already has expended.

I dissent.

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[5] Section 2(b) of the Robinson-Patman Act, 15 U.S.C. 13(b).

IN THE MATTER OF

SIMON & SCHUSTER, INC.

Docket 9221. Interlocutory Order, September 10, 1996

ORDER RETURNING MATTERS TO ADJUDICATION AND DISMISSING COMPLAINTS

The complaints in these matters, issued on December 20, 1988, allege that the respondents -- six of the country's largest book publishers -- violated Sections 2(a), 2(d), and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a),(d),(e), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The core of the complaints is that the respondents gave certain national bookstore chains price and promotional concessions that they did not make available to independent bookstores, to the detriment of competition and consumers.

On November 12, 1992, the Secretary issued an order withdrawing these matters from adjudication so that the Commission could evaluate non-public proposed consent agreements signed by complaint counsel and each of the respondents. Since that time, the Commission has considered additional information concerning developments in the industry and what, if any, Commission action is appropriate. Having examined the proposed consent agreements, and having considered significant developments that have occurred in the industry since the complaints were issued -- including the initiation of private litigation addressing many of the same issues -- the Commission has concluded that it is in the public interest to reject the proposed consent agreements and dismiss the complaints.

Although the proposed consent agreements prohibit most of the practices that led to the complaints, the industry has changed appreciably since the consent agreements were signed. For example, the dynamics and structure of the book distribution market have evolved in significant ways, reflecting the growth of "superstores" and warehouse or "club" stores. Moreover, it appears that major book publishers generally have modified pricing and promotional practices. Finally, the respondents generally have replaced the principal forms of alleged price discrimination that prompted the complaints -- unjustified quantity discounts on trade books and secret discounts on

mass market books -- with other pricing strategies. These developments may limit the potential benefits of the proposed consent agreements.

The Commission could attempt to evaluate the economic and legal significance of changes in industry structure and practices, and respond to the effects of these industry changes, by directing the Commission staff to conduct additional investigation and, if appropriate, to negotiate revised consent agreements. Further investigation would be time-consuming and resource-intensive, however, and even more resources would be needed in the event that litigation became necessary. In addition, even if the Commission were to issue litigated or consent orders against these respondents, such orders might not effectively prevent the respondents from adopting, pursuant to the "meeting competition" defense, practices used by other publishers that are not subject to a Commission order. Finally, since the time that the proposed consent agreements were signed, the American Booksellers Association has filed several private actions challenging alleged discrimination in this industry, and has already obtained consent decrees against four publishers. In view of these developments, further investigation, and possibly litigation, by the Commission does not appear to be a necessary or prudent use of scarce public resources.

For these reasons, the Commission has determined to reject the proposed consent agreements, return the matters to adjudication, and dismiss the complaints. Therefore,

It is ordered, That these matters be, and they hereby are, returned to adjudication, and

It is further ordered, That the complaints in these matters be, and they hereby are, dismissed.

Chairman Pitofsky recused and Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

These cases against six book publishers all involve allegations of unlawful price discrimination in connection with the sale of books to resellers. Although all six respondents reached agreement with complaint counsel on proposed settlements several years ago, the Commission inexplicably has failed to act on the proposed consent

orders. Now, almost four years after the matters were removed from adjudication to consider the proposed consent agreements,[1] the Commission has decided to dismiss the complaints. I do not understand and certainly cannot endorse this decision.

The most obvious justification for dismissing the complaints, a conclusion that the respondents did not engage in the unlawful price discrimination alleged in the complaints, is noticeably absent from the Commission's order. The majority instead cites four reasons for its order. The first reason the majority offers is the evolving industry "dynamics and structure . . . reflecting the growth of 'superstores' and warehouse or 'club' stores." It is not at all clear how such changes might mitigate the practice, alleged in the Commission's complaints, of unlawfully discriminating in price among retailers of books. Indeed, one could speculate that the growth of significant discount retailers would result in more rather than less price discrimination against disfavored retailers.[2] This is simply not a valid reason to dismiss the complaints.

Second, the majority suggests that the "principal forms" of discriminatory practices that led to the complaints have been replaced with other pricing strategies that "may limit the potential benefits of the proposed consent agreements." This rationale for dismissal does not suggest a conclusion that the respondents did not violate the law but rather appears to reflect a concern about the remedial effectiveness of the proposed orders.[3] Traditionally, an order of the Commission addressing unlawful price discrimination requires the respondent to cease and desist from such conduct in the future.[4] Such an order is not easily outmoded by changing fashions in discriminatory practices. To the extent that the proposed consent orders were inadequate, the usual options have been available to the Commission to seek appropriate relief. The Commission could have

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[2] The private Robinson-Patman actions brought by the American Booksellers Association against several book publishers tend to suggest that unlawful price discrimination is not a thing of the past in the industry.

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[4] *E.g., YKK (U.S.A.) Inc.*, 98 FTC 25 (1981). *See also* the form of notice order the Commission issued with each of the complaints in these six cases: "[R]espondent shall . . . cease and desist from discriminating in price" by selling to two purchasers at different prices.

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Third, the majority expresses dismay that orders against the six book publishers may be ineffective, because the respondents would be free to use the "meeting competition" defense[5] to meet the prices of publishers not subject to Commission order. Of course, the respondents would be free to meet competition. That is what the defense is for. If what the majority means to suggest is that book publishers not under order also are engaging in discriminatory pricing, the solution would appear to be to initiate additional investigations, not to dismiss these complaints. As far as I know, the Commission never before has deemed enforcement of the Robinson-Patman Act fruitless on the ground that a respondent under order could lawfully meet the presumptively lawful prices of its competitors, and it seems a very odd proposition to adopt.

Finally, the majority cites the success that the American Booksellers Association has had in its private Robinson-Patman suits against several publishers. The Association has negotiated settlements with four publishers. The implication is that the Association's success should somehow stand in for the Commission's law enforcement. This is very confusing, when the same majority suggests that a mere six FTC orders would have been ineffective.

The unfortunate choice to dismiss the complaints may indeed save "scarce public resources" from further expenditure in these cases, but it is an imprudent waste of the substantial law enforcement resources that this agency already has expended.

I dissent.

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[5] Section 2(b) of the Robinson-Patman Act, 15 U.S.C. 13(b).

IN THE MATTER OF

RANDOM HOUSE, INC.

Docket 9222. Interlocutory Order, September 10, 1996

ORDER RETURNING MATTERS TO ADJUDICATION AND DISMISSING COMPLAINTS

The complaints in these matters, issued on December 20, 1988, allege that the respondents -- six of the country's largest book publishers -- violated Sections 2(a), 2(d), and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a),(d),(e), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The core of the complaints is that the respondents gave certain national bookstore chains price and promotional concessions that they did not make available to independent bookstores, to the detriment of competition and consumers.

On November 12, 1992, the Secretary issued an order withdrawing these matters from adjudication so that the Commission could evaluate non-public proposed consent agreements signed by complaint counsel and each of the respondents. Since that time, the Commission has considered additional information concerning developments in the industry and what, if any, Commission action is appropriate. Having examined the proposed consent agreements, and having considered significant developments that have occurred in the industry since the complaints were issued -- including the initiation of private litigation addressing many of the same issues -- the Commission has concluded that it is in the public interest to reject the proposed consent agreements and dismiss the complaints.

Although the proposed consent agreements prohibit most of the practices that led to the complaints, the industry has changed appreciably since the consent agreements were signed. For example, the dynamics and structure of the book distribution market have evolved in significant ways, reflecting the growth of "superstores" and warehouse or "club" stores. Moreover, it appears that major book publishers generally have modified pricing and promotional practices. Finally, the respondents generally have replaced the principal forms of alleged price discrimination that prompted the complaints -- unjustified quantity discounts on trade books and secret discounts on

mass market books -- with other pricing strategies. These developments may limit the potential benefits of the proposed consent agreements.

The Commission could attempt to evaluate the economic and legal significance of changes in industry structure and practices, and respond to the effects of these industry changes, by directing the Commission staff to conduct additional investigation and, if appropriate, to negotiate revised consent agreements. Further investigation would be time-consuming and resource-intensive, however, and even more resources would be needed in the event that litigation became necessary. In addition, even if the Commission were to issue litigated or consent orders against these respondents, such orders might not effectively prevent the respondents from adopting, pursuant to the "meeting competition" defense, practices used by other publishers that are not subject to a Commission order. Finally, since the time that the proposed consent agreements were signed, the American Booksellers Association has filed several private actions challenging alleged discrimination in this industry, and has already obtained consent decrees against four publishers. In view of these developments, further investigation, and possibly litigation, by the Commission does not appear to be a necessary or prudent use of scarce public resources.

For these reasons, the Commission has determined to reject the proposed consent agreements, return the matters to adjudication, and dismiss the complaints. Therefore,

It is ordered, That these matters be, and they hereby are, returned to adjudication, and

It is further ordered, That the complaints in these matters be, and they hereby are, dismissed.

Chairman Pitofsky recused and Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

These cases against six book publishers all involve allegations of unlawful price discrimination in connection with the sale of books to resellers. Although all six respondents reached agreement with complaint counsel on proposed settlements several years ago, the Commission inexplicably has failed to act on the proposed consent

orders. Now, almost four years after the matters were removed from adjudication to consider the proposed consent agreements,[1] the Commission has decided to dismiss the complaints. I do not understand and certainly cannot endorse this decision.

The most obvious justification for dismissing the complaints, a conclusion that the respondents did not engage in the unlawful price discrimination alleged in the complaints, is noticeably absent from the Commission's order. The majority instead cites four reasons for its order. The first reason the majority offers is the evolving industry "dynamics and structure . . . reflecting the growth of 'superstores' and warehouse or 'club' stores." It is not at all clear how such changes might mitigate the practice, alleged in the Commission's complaints, of unlawfully discriminating in price among retailers of books. Indeed, one could speculate that the growth of significant discount retailers would result in more rather than less price discrimination against disfavored retailers.[2] This is simply not a valid reason to dismiss the complaints.

Second, the majority suggests that the "principal forms" of discriminatory practices that led to the complaints have been replaced with other pricing strategies that "may limit the potential benefits of the proposed consent agreements." This rationale for dismissal does not suggest a conclusion that the respondents did not violate the law but rather appears to reflect a concern about the remedial effectiveness of the proposed orders.[3] Traditionally, an order of the Commission addressing unlawful price discrimination requires the respondent to cease and desist from such conduct in the future.[4] Such an order is not easily outmoded by changing fashions in discriminatory practices. To the extent that the proposed consent orders were inadequate, the usual options have been available to the Commission to seek appropriate relief. The Commission could have

[1] Proposed consent agreements having been executed by the respondents and complaint counsel, the matters were withdrawn from adjudication by the Secretary pursuant to Section 3.25(c) of the Commission's Rules of Practice on November 12, 1992.

[2] The private Robinson-Patman actions brought by the American Booksellers Association against several book publishers tend to suggest that unlawful price discrimination is not a thing of the past in the industry.

[3] To the extent that the majority may intend to suggest that the specific practices that led to the complaints have been abandoned, it should be noted that abandonment is not a sufficient basis, under well-established precedent, to avoid a Commission order. *See, e.g., Warner Communications, Inc.*, 105 FTC 342 (1985).

[4] *E.g., YKK (U.S.A.) Inc.*, 98 FTC 25 (1981). *See also* the form of notice order the Commission issued with each of the complaints in these six cases: "[R]espondent shall . . . cease and desist from discriminating in price" by selling to two purchasers at different prices.

sought appropriate revisions in the proposed consent orders, or it could have rejected the orders and returned the matters to adjudication.

Third, the majority expresses dismay that orders against the six book publishers may be ineffective, because the respondents would be free to use the "meeting competition" defense[5] to meet the prices of publishers not subject to Commission order. Of course, the respondents would be free to meet competition. That is what the defense is for. If what the majority means to suggest is that book publishers not under order also are engaging in discriminatory pricing, the solution would appear to be to initiate additional investigations, not to dismiss these complaints. As far as I know, the Commission never before has deemed enforcement of the Robinson-Patman Act fruitless on the ground that a respondent under order could lawfully meet the presumptively lawful prices of its competitors, and it seems a very odd proposition to adopt.

Finally, the majority cites the success that the American Booksellers Association has had in its private Robinson-Patman suits against several publishers. The Association has negotiated settlements with four publishers. The implication is that the Association's success should somehow stand in for the Commission's law enforcement. This is very confusing, when the same majority suggests that a mere six FTC orders would have been ineffective.

The unfortunate choice to dismiss the complaints may indeed save "scarce public resources" from further expenditure in these cases, but it is an imprudent waste of the substantial law enforcement resources that this agency already has expended.

I dissent.

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[5] Section 2(b) of the Robinson-Patman Act, 15 U.S.C. 13(b).

IN THE MATTER OF

NEW BALANCE ATHLETIC SHOE, INC.

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

Docket C-3683. Complaint, Sept. 10, 1996--Decision, Sept. 10, 1996

This consent order prohibits, among other things, the Massachussetts-based corporation from fixing, controlling, or maintaining the prices at which retailers advertise, promote or offer for sale any New Balance athletic or casual footwear. The order also prohibits the respondent from coercing or pressuring any retailer to maintain or adopt any resale price and from attempting to secure a retailer's commitment to any resale price. In addition, the order prohibits the respondent, for ten years, from notifying a retailer in advance that the retailer is subject to partial or temporary suspension or termination as a New Balance dealer if it advertises products below New Balance's designated resale price.

Appearances

For the Commission: *Michael J. Bloom* and *Pamela A. Gill.*

For the respondent: *Paul R. Gauron, Goodwin, Procter & Hoar,* Boston, MA.

COMPLAINT

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

PARAGRAPH 1. Respondent New Balance Athletic Shoe, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its principal place of business located at 61 North Beacon Street, Boston, Massachusetts.

PAR. 2. Respondent is now, and for some time has been, engaged in the offering for sale, sale, and distribution of athletic footwear to retail dealers located throughout the United States, including many of the nation's largest retail chains.

PAR. 3. Respondent maintains, and has maintained, a substantial course of business, including the acts or practices alleged in the complaint, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In connection with the sale and distribution of New Balance branded products, respondent, in combination, agreement and understanding with certain of its dealers, has engaged in a course of conduct to fix, establish and maintain the resale prices at which dealers sell its products. Respondent has entered into express or tacit agreements with certain dealers, pursuant to which such dealers have agreed to raise retail prices on respondent's products, or to maintain certain prices or price levels set by respondent, or to refrain from discounting respondent's products for a certain period of time. Respondent has engaged in certain actions with the intent and effect of inducing dealers to enter into such price agreements, including, among other things, the following:

(a) Respondent has made threats to terminate or suspend shipments to discounting retailers and has engaged in other coercive acts, such as surveillance of dealers' prices, demands that dealers raise their prices, and threats that respondent would in the future respond to complaints by other dealers about a dealer's prices, with the intent and effect of inducing dealers to enter into express or tacit price agreements;

(b) Respondent, in order to induce certain dealers to enter into price agreements, has told such dealers that it would act to secure similar price agreements with other dealers or to prevent other dealers from discounting more than a certain fixed percentage below suggested retail prices; and

(c) Respondent has secured price agreements from dealers after warning discounting dealers that continued or subsequent selling of its products at prices below those set by respondent would result in discontinuation of sales to the dealer pursuant to respondent's written policy stating that respondent will give a "one-time warning" to a dealer who sells its products below designated prices, and that in the

event of continued or subsequent violation of its policy respondent will discontinue selling to that dealer.

PAR. 5. The purpose, effect, tendency, or capacity of the acts and practices described in paragraph four is and has been to restrain trade unreasonably and to hinder competition in the sale of athletic footwear in the United States, and to deprive consumers of the benefits of competition in the following ways, among others:

(a) Price competition among retail dealers with respect to the sale of New Balance products has been restricted, and

(b) Prices to consumers of New Balance products have been increased, or have been prevented from falling.

PAR. 6. The aforesaid acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. These acts and practices are continuing and will continue in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

1. Respondent New Balance Athletic Shoe, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts. The mailing address and principal place of business of respondent New Balance Athletic Shoe, Inc. is 61 North Beacon Street, Boston, Massachusetts.

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

ORDER

I.

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

(A) The term *"New Balance"* means New Balance Athletic Shoe, Inc., its predecessors, subsidiaries, divisions, groups, and affiliates controlled by New Balance Athletic Shoe, Inc., and its respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of each.

(B) The term *"respondent"* means New Balance.

(C) The term *"product"* means any athletic or casual footwear item which is manufactured, offered for sale or sold under the brand name of "New Balance" to dealers or consumers located in the United States of America.

(D) The term *"dealer"* means any person, corporation or entity not owned by New Balance, or by any entity owned or controlled by

New Balance, that in the course of its business sells any product in or into the United States of America.

(E) The term *"resale price"* means any price, price floor, minimum price, maximum discount, price range, or any mark-up formula or margin of profit used by any dealer for pricing any product. "Resale price" includes, but is not limited to, any suggested, established, or customary resale price.

II.

It is further ordered, That New Balance, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacturing, offering for sale, sale or distribution of any product in or into the United States of America in or affecting "commerce," as defined by the Federal Trade Commission Act, do forthwith cease and desist from:

(A) Fixing, controlling, or maintaining the resale price at which any dealer may advertise, promote, offer for sale or sell any product.

(B) Requiring, coercing, or otherwise pressuring any dealer to maintain, adopt, or adhere to any resale price.

(C) Securing or attempting to secure any commitment or assurance from any dealer concerning the resale price at which the dealer may advertise, promote, offer for sale or sell any product.

(D) For a period of ten (10) years from the date on which this order becomes final, adopting, maintaining, enforcing or threatening to enforce any policy, practice or plan pursuant to which respondent notifies a dealer in advance that: (1) the dealer is subject to warning or partial or temporary suspension or termination if it sells, offers for sale, promotes or advertises any product below any resale price designated by respondents, and (2) the dealer will be subject to a greater sanction if it continues or renews selling, offering for sale, promoting or advertising any product below any such designated resale price. As used herein, the phrase "partial or temporary suspension or termination" includes but is not limited to any disruption, limitation, or restriction of supply: (1) of some, but not all, products, or (2) to some, but not all, dealer locations or businesses, or (3) for any delimited duration. As used herein, the phrase "greater sanction" includes but is not limited to a partial or

temporary suspension or termination of greater scope or duration than the one previously implemented by respondent, or complete suspension or termination.

Provided that nothing in this order shall prohibit New Balance from establishing and maintaining cooperative advertising programs that include conditions as to the prices at which dealers offer products, so long as such advertising programs are not a part of a resale price maintenance scheme and do not otherwise violate this order.

III.

It is further ordered, That, for a period of five (5) years from the date on which this order becomes final, New Balance shall clearly and conspicuously state the following on any list, advertising, book, catalogue, or promotional material where it has suggested any resale price for any product to any dealer:

ALTHOUGH NEW BALANCE MAY SUGGEST RESALE PRICES FOR PRODUCTS, RETAILERS ARE FREE TO DETERMINE ON THEIR OWN THE PRICES AT WHICH THEY WILL ADVERTISE AND SELL NEW BALANCE PRODUCTS.

IV.

It is further ordered, That, within thirty (30) days after the date on which this order becomes final, New Balance shall mail by first class mail the letter attached as Exhibit A, together with a copy of this order, to all of its directors and officers, and to dealers, distributors, agents, or sales representatives engaged in the sale of any product in or into the United States of America.

V.

It is further ordered, That, for a period of two (2) years after the date on which this order becomes final, New Balance shall mail by first class mail the letter attached as Exhibit A, together with a copy of this order, to each new director, officer, dealer, distributor, agent, and sales representative engaged in the sale of any product in or into

the United States of America, within ninety (90) days of the commencement of such person's employment or affiliation with New Balance.

VI.

It is further ordered, That New Balance shall notify the Commission at least thirty (30) days prior to any proposed changes in New Balance 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 corporations which may affect compliance obligations arising out of the order.

VII.

It is further ordered, That, within sixty (60) days after the date this order becomes final, and at such other times as the Commission or its staff shall request, New Balance shall file with the Commission a verified written report setting forth in detail the manner and form in which New Balance has complied and is complying with this order.

VIII.

It is further ordered, That this order shall terminate on September 10, 2016.

Commissioner Starek dissenting.

EXHIBIT A

[NEW BALANCE LETTERHEAD]

Dear Retailer:

The Federal Trade Commission has conducted an investigation into New Balance's sales policies, and in particular New Balance's "Statement of Policy," which was announced in July 1991 and, with modifications, has remained in effect since then. To expeditiously resolve the investigation and to avoid disruption to the conduct of its business, New Balance has agreed, without admitting any violation of the law, to the entry of a Consent Order by the Federal Trade Commission prohibiting certain practices relating to resale prices. A copy of the order is enclosed. This letter and the accompanying order are being sent to all of our dealers, sales personnel and representatives.

The order spells out our obligations in greater detail, but we want you to know and understand that you can sell and advertise our products at any price you choose. While we may send materials to you which contain suggested retail prices, you remain free to sell and advertise those products at any price you choose.

We look forward to continuing to do business with you in the future.

Sincerely yours,

_____

President
New Balance Athletic Shoe, Inc.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

There is some evidence that New Balance went beyond permissible communications with its dealers and entered the realm of unlawful resale price maintenance. An order is, therefore, appropriate. I write separately to make clear my understanding that the complaint does not challenge the announcement or implementation by a supplier of a structured termination policy. Although I view paragraph 4(c) of the complaint as ambiguous, the essence of the charge is that New Balance secured price agreements from dealers that discounted in return for assurances that New Balance would not impose sanctions on them. New Balance did not implement its structured termination policy, and the complaint and order do not address the lawfulness of that policy.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

As I did in Reebok International, Ltd., Docket No. C-3592, I find reason to believe that the target of the present investigation -- New Balance Athletic Shoe, Inc. ("New Balance") -- has entered into agreements with retailers to restrain retail prices and has thereby violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. However, I dissent from the Commission's decision to issue the final order in this matter because certain provisions of the order are not required to prevent unlawful conduct and may instead unnecessarily restrain procompetitive conduct by New Balance.

As in Reebok International, the fencing-in restrictions in the order relating to resale price advertising (specifically, the minimum

advertised price provisions[1]) and to New Balance's "structured termination policy"[2] are unjustifiably broad and likely to deter efficient conduct. Indeed, the order even goes beyond the provisions I found overinclusive, and therefore unacceptable, in the Reebok order: the current order omits language that appeared in paragraph II of the Reebok order that expressly recognized the respondent's Colgate rights.[3]

In the interests of fairness and efficiency, injunctive relief ordered to address resale price maintenance should be strictly tailored to the *per se* unlawful conduct alleged. Because the order in this case mandates excessive restrictions upon the conduct of New Balance, I respectfully dissent.

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1 The unnecessary provisions relating to price advertising appear in paragraphs II(A), II(B), and III and in Exhibit A to the proposed order.

2 *See* paragraph IV(C) of the proposed complaint and paragraph II(D) of the proposed order.

3 *See United States v. Colgate & Co.*, 250 U.S. 300 (1919).

1377 Dissenting Statement

IN THE MATTER OF

RED APPLE COMPANIES, INC., ET AL.

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

Docket 9266. Consent Order, Feb. 28, 1995--Modifying Order, Sept. 13, 1996

This order reopens a 1995 consent order -- that required the New York-based companies and their officer to divest six supermarkets to a Commission-approved acquirer or acquirers -- and this order modifies the consent order by terminating their obligation to divest a supermarket in the Chelsea area of Manhattan, New York.

ORDER REOPENING AND MODIFYING ORDER

On April 29, 1996, Red Apple Companies, Inc., John A. Catsimatidis, Supermarket Acquisition Corp., and Sloan's Supermarkets, Inc. (formerly Designcraft Industries, Inc.) (collectively, "respondents"), the respondents named in the consent order issued by the Commission on February 28, 1995, in Docket No. 9266, filed their "Motion Requesting Federal Trade Commission to Issue Order Reopening and Modifying Consent Order Issued on February 28, 1995" ("Petition"), seeking to reopen and set aside the order in Docket No. 9266 ("order") that directs respondents to divest six supermarkets in certain areas of New York County, New York by March 6, 1996. On August 23, 1996, respondents withdrew their request for a reopening and modification of the order as to the divestiture requirements in the Upper East Side and Greenwich Village. On September 6, 1996, respondents withdrew their request as to the Upper West Side. Accordingly, the only provision that the respondents continue to seek to modify is paragraph II.A.3, requiring a divestiture in Chelsea. For the reasons stated below, the Commission has determined to grant the Petition.

The order requires respondents to divest six supermarkets, one in each of the four relevant markets consisting of the Upper West Side, the Upper East Side, Greenwich Village and Chelsea, plus two more

in two of three of the relevant markets, by March 6, 1996.[1] Paragraph II.A.3 of the order requires respondents to divest a supermarket located at 188 Ninth Avenue (store no. 441) "or the nearest alternate supermarket owned or operated by any respondent."

On March 5, 1996, the day before the divestiture deadline contained in the order, respondents filed a "Motion Requesting Federal Trade Commission to Issue Order Reopening and Modifying Consent Order Issued on February 28, 1995" ("Original Petition"). Subsequently, in response to a letter from staff detailing specific concerns with the Original Petition and indicating that staff was prepared to recommend denial of the Original Petition unless material that would constitute a sufficient showing was submitted, on April 29, 1996, respondents withdrew the Original Petition and filed the Petition with additional arguments and supporting materials.

I. STANDARD FOR REOPENING AND MODIFYING FINAL ORDERS

Section 5(b) of the Federal Trade Commission Act provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").[2]

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.[3] In such a case, the respondent must demonstrate as a threshold matter

[1] Only one divestiture is required in Chelsea. Respondents may choose in which two of the other three markets they will divest the additional two supermarkets.

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

[3] Hart Letter at 5; 16 CFR 2.51.

some affirmative need to modify the order.[4] For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order."[5] Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification.[6] The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm.[7]

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

II. THE PETITION

Respondents request that the Commission modify the order to eliminate the divestiture requirement in Chelsea. Respondents base their Petition on changed conditions of fact and public interest

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4 Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 ("Damon Letter"), reprinted in [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207.

5 *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983).

6 Damon Letter at 2.

7 Damon Letter at 4.

considerations.[8] The changes of fact alleged by respondents include the entry into the market of Rite Aid under a new format (Rite Aid Food Mart); that other new entry has occurred and will occur in the future; that respondents' market share has declined due to sales of supermarkets; that divestiture in Chelsea will eliminate respondents as a competitor in that market; and that operating losses and declining sales are such that divestiture will further weaken respondents as competitors.[9] Respondents assert that the losses imposed by the requirement to maintain the stores will harm respondents and prevent them from being vigorous competitors, and that this constitutes the affirmative need for the modification under the public interest standard.[10]

Respondents claim that they have "made diligent efforts (Catsimatidis Declaration ¶¶ 3-8) to divest,"[11] to no avail. John Catsimatidis asserts that he has been in contact with numerous persons concerning the divestiture, but no viable purchasers have come forward.[12] The only purchasers who have come forward have not been able to arrange adequate financing to finalize a transaction.[13]

Respondents assert that the competitive environment has substantially changed in ways that were not foreseeable at the time the order was entered.[14] In addition, they assert that a number of strong competing supermarket chains have entered the market or expanded and that this is scheduled to continue;[15] that they could not have known that Rite Aid would enter the market with its Food Mart format; that respondents' market share has declined due to sales of stores; and that store operating losses and declining sales are such that divestiture will further weaken respondents as competitors.[16]

Respondents state that Price/Costco has entered the market with a 116,000 square foot supermarket in Staten Island. Also, Price/Costco plans to open a 120,000 square foot supermarket on 34th Street between Eighth and Ninth Avenues during the summer of

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8 Respondents do not assert that any change of law requires reopening the order.

9 Petition at 19.

10 Petition at 26-27.

11 Petition at 3.

12 Declaration of John A. Catsimatidis, Petition Exhibit A ("Catsimatidis Decl."), at ¶ 6.

13 Catsimatidis Decl. at ¶ 7.

14 Petition at 19.

15 Petition at 4-5.

16 Petition at 23-24.

1997.[17] Respondents assert that "[b]ased on size alone, the inference is overwhelming that this store, like a Macy's, will compete on a citywide basis, *i.e.*, in each of the four areas in issue here."[18] In addition, according to the Petition, the imminent opening of the Chelsea Market will further eliminate the need for relief in that area.[19]

Respondents state in addition that there has been enormous entry of drug stores, some of which allocate 50% of their space to food and supermarket items, and which are lower cost and have a competitive advantage over respondents' operations.[20]

The Petition asserts that "the geographic markets set forth in the order did not foresee or contemplate the developments of the last year."[21]

Respondents also assert that their market share has diminished since the order became final.[22] At the time respondents entered into the consent agreement, they owned three supermarkets in Chelsea. Currently, they own one, having sold two to Rite Aid.[23]

Finally, respondents assert that divestiture would cause further losses and weaken their competitive position.[24] Respondents argue that the divestiture of their only remaining supermarket in Chelsea will cause them to exit the market and will weaken respondents competitively with no corresponding benefit to competition. These losses constitute the affirmative need to modify the order. In addition, the large amount of entry reduces the need for the order as written, and the sale of supermarkets to Rite Aid (which has opened Rite Aid Food Marts at the locations) has in substance accomplished the purposes of the divestiture, thus favoring modification.[25]

As part of the Petition, respondents submitted consumer surveys regarding the Rite Aid Food Marts.[26] Respondents also submitted several declarations, audited and unaudited financial statements, and news articles, among other things.

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17 Petition at 20-21; Declaration of Matt Wanning (June 23, 1996), ("Wanning Decl.").

18 Petition at 21.

19 Petition at 15.

20 Petition at 22-23.

21 Petition at 23.

22 Petition at 23.

23 Petition at 6-7.

24 Petition at 24.

25 Petition at 26.

26 Exhibit 1 to Wanning Decl.

III. IT IS IN THE PUBLIC INTEREST TO GRANT THE PETITION

Respondents assert that the modification of the order is necessary for them to remain effective competitors. Respondents currently only have one supermarket in Chelsea, and divestiture of that supermarket would cause them to exit the market. Respondents assert that it is in the public interest to reopen and modify the order to prevent them from exiting the market. For the reasons discussed below, it is in the public interest to reopen and modify the order as requested by respondents.[27]

Respondents have an affirmative need for the modification because compliance with the order would require them to exit the Chelsea market. Divestiture of respondents' only supermarket in Chelsea will harm respondents in a way not contemplated by the order, by requiring them to exit.

In addition, the reasons in favor of the modification outweigh the reasons to retain the order as written. The purpose of the divestiture requirement, as stated in the order, is to ensure the continuation of the assets to be divested as ongoing, viable enterprises engaged in the supermarket business and to remedy the lessening of competition resulting from the acquisitions as alleged in the Commission's complaint. Divestiture of respondents' sole remaining supermarket will not restore competition in the market. Instead, it will simply replace one competitor with another. In addition, there is no reason to believe that the supermarket will be more viable when operated by another firm than it will be in the hands of respondents. Although respondents themselves, by selling supermarkets for non-supermarket use, have created the situation where divestiture will not improve competition in Chelsea, there is no longer any reason to continue to require divestiture in this market other than to punish respondents.[28] However, to the extent that respondents merit punishment for their conduct, that is a matter best addressed through an action for violation of the order. The Commission expressly reserves the right

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[27] Because the Petition is granted on public interest grounds, the Commission has not reached the question of whether it also meets the standards under change of fact. The Commission notes, however, that the entry discussed by respondents is not within the product and/or geographic markets alleged in the complaint and order. Accordingly, respondents have a heavy burden to demonstrate that conditions have changed so significantly that those markets are no longer appropriate.

[28] There may, of course, be circumstances under which a divestiture would improve competition and accomplish an order's remedial purposes even though that divestiture would result in a respondent's exit from a market.

to pursue such an action with regard to the failure to divest a supermarket in Chelsea, as well as any other violations of the order.[29]

Commissioner Starek concurring in the result only.

[29] Respondents have agreed to pay a civil penalty of $600,000 to settle the Commission's claims for failure to divest a supermarket in Chelsea, as well as failure to divest the other supermarkets as required by the order.

IN THE MATTER OF

JORDAN, McGRATH, CASE & TAYLOR, INC.

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

Docket C-3684. Complaint, Sept. 18, 1996--Decision, Sept. 18, 1996

This consent order requires, among other things, the New York advertising agency for Doan's pills to have competent and reliable scientific evidence, consisting of at least two clinical studies, to support any claim that any over-the-counter analgesic is more effective than any other such drug in relieving any particular kind of pain. In addition, the consent order requires the advertising agency to have scientific evidence to support claims regarding the efficacy, safety, benefits or performance of any over-the-counter internal analgesic.

Appearances

For the Commission: *Loren G. Thompson* and *Shira Modell.*

For the respondent: *Stuart Friedel, David & Gilbert,* New York, N.Y.

COMPLAINT

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

PARAGRAPH 1. Respondent Jordan, McGrath, Case & Taylor, Inc., is a New York corporation with its principal office or place of business at 445 Park Avenue, New York, New York.

PAR. 2. Respondent, at all times relevant to this complaint, was an advertising agency of Ciba-Geigy Corporation or CIBA Self-Medication, Inc., and prepared and disseminated advertisements to promote the sale of Doan's analgesic products. Doan's analgesic products are "drugs" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

PAR. 4. Respondent has disseminated or caused to be disseminated advertisements for Doan's analgesic products, including, but not necessarily limited to, the attached Exhibits A and B. These advertisements contain the following statements and depictions:

1. If nothing seems to help, try Doan's. It relieves back pain no matter where it hurts. Doan's has an ingredient these pain relievers don't have. [Depiction of large package of Doan's in front of smaller packages of Bayer, Aleve, Advil, and Tylenol]. [Superscript: Magnesium Salicylate]. Doan's. The Back Specialist. [Superscript: The Back Specialist] [Exhibit A: "Activity - Pets" 15-Second Television]

2. There are hundreds of muscles in the back. Any one can put you in agony. That's when you need Doan's. [Depiction of box of Doan's superimposed over boxes of Bayer, Tylenol, Aleve and Advil]. Doan's has an ingredient the leading brands don't. It relieves back pain no matter where it hurts. There are hundreds of muscles in the back. Doan's relieves them all. [Superscript: The Back Specialist] [Exhibit B: "Muscles - Male" 15-Second Television]

PAR. 5. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondent has represented, directly or by implication, that Doan's analgesic products are more effective than other analgesics, including Bayer, Advil, Tylenol, and Aleve, for relieving back pain.

PAR. 6. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including, but not necessarily limited to, the advertisements attached as Exhibits A and B, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representation.

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

PAR. 8. Respondent knew or should have known that the representation set forth in paragraph six was, and is, false and misleading.

PAR. 9. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices and the

making of false advertisements in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

1522 Complaint

EXHIBIT A

EXHIBIT B

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 the complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent 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, 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 Jordan, McGrath, Case & Taylor, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its office and principal place of business at 445 Park Avenue, New York, New York.

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

ORDER

For purposes of this order:

1. *"Doan's"* shall mean any over-the-counter internal analgesic drug, as "drug" is defined in the Federal Trade Commission Act, bearing the Doan's brand name, including, but not limited to, Regular Strength Doan's analgesic, Extra Strength Doan's analgesic, and Extra Strength Doan's P.M. analgesic.

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

I.

It is ordered, That respondent Jordan, McGrath, Case & Taylor, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of Doan's or any other over-the-counter analgesic drug, in or affecting commerce, as "drug" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, that such product is more effective than other over-the-counter analgesic drugs for relieving back pain or any other particular kind of pain, unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. For purposes of Part I of this order, "competent and reliable scientific evidence" shall include at least two adequate and well-controlled, double-blinded clinical studies which conform to acceptable designs and protocols and are conducted by different persons, each of whom is qualified by training and experience to conduct such studies, independently of each other.

II.

It is further ordered, That respondent Jordan, McGrath, Case & Taylor, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of Doan's or any other over-the-counter internal analgesic drug, in or affecting commerce, as "drug" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, regarding such product's efficacy, safety, benefits, or performance, unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

Provided, however, that it shall be a defense hereunder that the respondent neither knew nor had reason to know of an inadequacy of substantiation for the representation.

III.

Nothing in this order shall prohibit respondent from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

IV.

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

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

B. All tests, reports, studies, surveys, demonstrations or other evidence in its possession or control that contradict, qualify, or call

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

V.

It is further ordered, That respondent shall:

A. Within thirty (30) days from the date of entry of this order, provide a copy of this order to each of its current principals, officers, directors and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order; and

B. For a period of ten (10) years from the date of entry of this order, provide a copy of this order to each of its future principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order who are associated with them or any subsidiary, successor, or assign, within three (3) days after the person assumes his or her position.

VI.

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

VII.

It is further ordered, That this order will terminate on September 18, 2016, 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 part 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 Part.

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 Part 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.

VIII.

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

IN THE MATTER OF

LOCKHEED MARTIN CORPORATION

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-3685. Complaint, Sept. 19, 1996--Decision, Sept. 19, 1996

This consent order requires Lockheed Martin, a Maryland-based corporation, among other things, to divest an air traffic control system-related contract; limits Lockheed Martin's ownership of Loral Space; prohibits Lockheed Martin from providing certain technical services or information regarding satellites to Loral Space; restricts participation and compensation of persons who serve as directors or officers of both Lockheed Martin and Loral Space; and requires firewalls to limit information flows about competitors' tactical fighter aircraft and unmanned aerial vehicles.

Appearances

For the Commission: *Naomi Licker.*

For the respondent: *Ray Jacobsen, Howrey & Simon,* Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Lockheed Martin Corporation ("Lockheed Martin"), a corporation subject to the jurisdiction of the Commission, has agreed to, among other things, acquire all of the outstanding voting stock of Loral Corporation ("Loral"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and that such an acquisition, if consummated, would violate 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; 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. DEFINITIONS

1. *"SETA services"* means systems engineering, technical assistance services and support services relating to air traffic control systems provided by Lockheed Martin to the Federal Aviation Administration, pursuant to paragraphs C.2.2.1.3., C.2.2.1.5., C.2.2.1.12. and C.2.2.4. of Task Area 2 and paragraphs C.9.1.3., C.9.2.2., C.9.2.3., C.9.2.4., C.9.2.6., C.9.2.7., C.9.2.8. and C.9.2.10. of Task Area 9 of the National Implementation and Support Contract, DTFA01-93-C-00031, that involve the development of technical and other specifications for procurements and programs; the assessment of bid and other proposals; the evaluation, testing or monitoring of any service, equipment or product provided by any company; the modification or change of any performance requirements of any contractor; or the development of financial, cost or budgetary plans, procedures or policies.

2. *"Air traffic control systems"* means any current or future air traffic control equipment, system or service designed, developed, proposed or provided for the Federal Aviation Administration.

3. *"Commercial low earth orbit satellite"* means an unmanned machine that is launched from the earth's surface and designed to orbit approximately 100 miles to 300 miles above the earth's surface in low earth orbit for the purpose of transmitting data back to earth, which is sold to any customer other than the U.S. government.

4. *"Commercial geosynchronous earth orbit satellite"* means an unmanned machine that is launched from the earth's surface and designed to orbit approximately 22,300 miles above the earth's surface in geosynchronous earth orbit for the purpose of transmitting data back to earth, which is sold to any customer other than the U.S. government.

5. *"Military aircraft"* means fixed-wing aircraft manufactured for sale to the United States or foreign governments.

6. *"NITE Hawk systems"* means any airborne forward-looking infrared targeting system researched, developed, designed, manufactured or sold by Loral for use on the F/A-18 series of military aircraft.

7. *"Simulation and training systems"* means the operational and weapons systems trainers designed, developed, manufactured or sold by Loral that simulate military aircraft.

8. *"Electronic countermeasures"* means systems designed, developed, manufactured or sold by Loral, including, but not limited to, the ALR-56A and ALR-56C, that detect, jam and deceive hostile radars and radar and infrared guided weapons for use on military aircraft.

9. *"Mission computers"* means any computer designed, developed, manufactured or sold by Loral, including, but not limited to, the AP1, AAAP1R and CP1075A/B/C, that control, monitor or manage the operations and electronics of any military aircraft.

10. *"Unmanned aerial vehicle"* means any unmanned aircraft used for tactical or strategic reconnaissance missions manufactured for sale to the United States or foreign governments.

11. *"Integrated communications systems"* means systems designed, developed, manufactured or sold by Loral, including, but not limited to, the 367-6000-59-R-012 and the 367-6000-59-R-013, that are capable of both wideband satellite and line-of-sight data link communications and command and control data links for use on unmanned aerial vehicles.

12. *"Merger Agreement"* means the Agreement and Plan of Merger, dated as of January 7, 1996, by and among Loral Corporation, Lockheed Martin Corporation and LAC Acquisition Corporation.

13. *"Restructuring Agreement"* means the Restructuring, Financing and Distribution Agreement, dated as of January 7, 1996, by and among Loral Corporation, Loral Aerospace Holdings, Inc., Loral Aerospace Corp., Loral General Partner, Inc., Loral Globalstar, L.P., Loral Globalstar Limited, Loral Telecommunications Acquisition, Inc. (to be renamed Loral Space & Communications Ltd.) and Lockheed Martin Corporation.

14. *"Lockheed Martin/Loral Space Technical Services Agreement"* means the technical services agreement between Lockheed Martin and Loral Space, as described by Article VI, Section 6.7, paragraph (d), of the Restructuring Agreement.

15. *"Loral Space"* means Loral Space & Communications Ltd., a company organized under the laws of the Islands of Bermuda, with its principal office and place of business located at 600 Third Avenue, New York, New York. Loral Space, through its 33% ownership interest in Space Systems/Loral, is engaged in, among other things, the research, development, manufacture and sale of Commercial Low

Earth Orbit Satellites and Commercial Geosynchronous Earth Orbit Satellites.

16. *"Space Systems/Loral"* means Space Systems/Loral, Inc., a Delaware corporation, with its principal office and place of business located at 3825 Fabian Way, Palo Alto, California. Space Systems/Loral is engaged in, among other things, the research, development, manufacture and sale of commercial low earth orbit satellites and commercial geosynchronous earth orbit satellites.

II. RESPONDENT

17. Respondent Lockheed Martin is a corporation organized and existing under and by virtue of the laws of the state of Maryland, with its office and principal place of business located at 6801 Rockledge Drive, Bethesda, Maryland. Respondent Lockheed Martin is engaged in, among other things, the provision of SETA services and the research, development, manufacture and sale of commercial low earth orbit satellites, commercial geosynchronous earth orbit satellites, military aircraft and unmanned aerial vehicles.

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

III. ACQUIRED COMPANY

19. Loral is a corporation organized and existing under and by virtue of the laws of the state of New York, with its principal office and place of business located at 600 Third Avenue, New York, New York. Loral is engaged in, among other things, the research, development, manufacture and sale of air traffic control systems, NITE Hawk systems, simulation and training systems, electronic countermeasures, mission computers and integrated communications systems. Loral, through its 33% ownership interest in Space Systems/Loral, is also engaged in the research, development, manufacture and sale of commercial low earth orbit satellites and commercial geosynchronous earth orbit satellites.

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

IV. THE ACQUISITION

21. On or about January 7, 1996, Lockheed Martin entered into a Merger Agreement and Restructuring Agreement, whereby Lockheed Martin would engage in a series of related transactions and acts, including, but not limited to: (1) the acquisition of all of the outstanding voting common stock of Loral; (2) the transfer of the space and telecommunications businesses of Loral and its subsidiaries to Loral Space; (3) the acquisition of a 20% convertible preferred stock interest in Loral Space, which in turn owns a 33% interest in Space Systems/Loral; (4) the Lockheed Martin/Loral Space Technical Services Agreement; and (5) the appointment of Mr. Bernard Schwartz, Chairman of the Board of Directors and Chief Executive Officer of Loral Space, to the position of Vice Chairman of the Board of Directors of Lockheed Martin.

V. THE RELEVANT MARKETS

22. For purposes of this complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are:

a. The research, development, manufacture and sale of air traffic control systems;
b. The provision of SETA services;
c. The research, development, manufacture and sale of commercial low earth orbit satellites;
d. The research, development, manufacture and sale of commercial geosynchronous earth orbit satellites;
e. The research, development, manufacture and sale of military aircraft;
f. The research, development, manufacture and sale of NITE Hawk systems;
g. The research, development, manufacture and sale of simulation and training systems;

h. The research, development, manufacture and sale of electronic countermeasures;
i. The research, development, manufacture and sale of mission computers;
j. The research, development, manufacture and sale of unmanned aerial vehicles; and
k. The research, development, manufacture and sale of integrated communications systems.

23. For purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in all the relevant lines of commerce.

VI. STRUCTURE OF THE MARKETS

24. The market for the provision of SETA Services in the United States is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI") or the two-firm and four-firm concentration ratios ("concentration ratios"). Respondent has been the only provider of SETA services since 1993.

25. Respondent, through the Acquisition, would be engaged in both the research, development, manufacture and sale of air traffic control systems and the provision of SETA services.

26. The markets for the research, development, manufacture and sale of commercial low earth orbit satellites and commercial geosynchronous earth orbit satellites in the United States are highly concentrated as measured by the HHI or concentration ratios.

27. Respondent and Loral, through its 33% ownership interest in Space Systems/Loral, are actual significant competitors in the relevant markets for the research, development, manufacture and sale of commercial low earth orbit satellites and commercial geosynchronous earth orbit satellites.

28. Respondent and Loral Space, through its 33% ownership interest in Space Systems/Loral, will be actual significant competitors in the relevant markets for the research, development, manufacture and sale of commercial low earth orbit satellites and commercial geosynchronous earth orbit satellites.

29. The markets for the research, development, manufacture and sale of NITE Hawk systems, simulation and training systems,

electronic countermeasures, mission computers and integrated communications systems in the United States are highly concentrated as measured by the HHI or concentration ratios.

30. Respondent, through the Acquisition, would be engaged in the research, development, manufacture and sale of military aircraft, as well as the research, development, manufacture and sale of NITE Hawk systems, electronic countermeasures and mission computers, all of which are used in military aircraft.

31. Respondent, through the Acquisition, would be engaged in the research, development, manufacture and sale of both military aircraft and simulation and training systems, which are used to simulate military aircraft.

32. Respondent, through the Acquisition, would be engaged in the research, development, manufacture and sale of both unmanned aerial vehicles and integrated communications systems, which are used in unmanned aerial vehicles.

VII. BARRIERS TO ENTRY

33. Entry into the market for the provision of SETA services would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph thirty-six because of, among other things, the time required to develop the experience and expertise necessary to effectively provide these services.

34. Entry into the markets for the research, development, manufacture and sale of commercial low earth orbit satellites and commercial geosynchronous earth orbit satellites is difficult, unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph thirty-six because of, among other things, the time and expense required to establish manufacturing facilities, develop the technology needed to produce these products and establish a reputation for high quality products among customers in these markets.

35. Entry into the markets for the research, development, manufacture and sale of NITE Hawk systems, simulation and training systems, electronic countermeasures, mission computers and integrated communications systems is difficult, unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph thirty-six because of,

among other things, the time and expense required to develop the technology needed to produce these products.

VIII. EFFECTS OF THE ACQUISITION

36. The effects of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant markets set forth above in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

A. Respondent may gain access to competitively sensitive non-public information concerning other air traffic control systems contractors, whereby:

(1) Actual competition between respondent and air traffic control systems contractors would be reduced; and

(2) Advancements in air traffic control systems research, development, innovation and quality would be reduced;

B. Respondent may be in a position to disadvantage or raise the costs of competing air traffic control systems contractors, whereby actual competition between respondent and air traffic control systems contractors would be reduced;

C. By eliminating direct actual competition between respondent and Loral Space in the markets for the research, development, manufacture and sale of commercial low earth orbit satellites and commercial geosynchronous earth orbit satellites;

D. By enhancing the likelihood of collusion or coordinated interaction between or among the firms in the markets for the research, development, manufacture and sale of commercial low earth orbit satellites and commercial geosynchronous earth orbit satellites;

E. By increasing the likelihood that quality and technological innovation in the commercial low earth orbit satellite and commercial geosynchronous earth orbit satellite markets would be reduced;

F. By increasing the likelihood that consumers in the United States would be forced to pay higher prices for commercial low earth orbit satellites and commercial geosynchronous earth orbit satellites;

G. Respondent may gain access to competitively sensitive non-public information concerning other military aircraft manufacturers, whereby:

(1) Actual competition between respondent and military aircraft manufacturers would be reduced; and

(2) Advancements in military aircraft research, development, innovation and quality would be reduced; and

H. Respondent may gain access to competitively sensitive non-public information concerning other unmanned aerial vehicle manufacturers, whereby:

(1) Actual competition between respondent and unmanned aerial vehicle manufacturers would be reduced; and

(2) Advancements in unmanned aerial vehicle research, development, innovation and quality would be reduced.

IX. VIOLATIONS CHARGED

37. The Acquisition described in paragraph twenty-one constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

38. The Acquisition described in paragraph twenty-one, 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 having initiated an investigation of the proposed acquisition by respondent of all of the outstanding voting common stock of Loral Corporation ("Loral"), and the respondent 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 respondent with violations 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

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the

aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent 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 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 Lockheed Martin Corporation ("Lockheed Martin") is a corporation organized, existing and doing business under and by virtue of the laws of the state of Maryland, with its principal place of business located at 6801 Rockledge Drive, Bethesda, Maryland.

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. *"Respondent"* or *"Lockheed Martin"* means Lockheed Martin Corporation, its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Lockheed Martin Corporation, and the respective directors, officers, employees, agents, representatives, successors and assigns of each. Lockheed Martin includes Loral Corporation, which prior to the Acquisition had its principal office and place of business located

at 600 Third Avenue, New York, New York; except that Lockheed Martin does not include any of the foregoing that will be part of Loral Space after the Acquisition.

B. *"Loral"* means Loral Corporation, a New York corporation, with its principal office and place of business located at 600 Third Avenue, New York, New York, its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Loral Corporation, and the respective directors, officers, employees, agents, representatives, successors and assigns of each; except that Loral does not include any of the foregoing that will be part of Loral Space after the Acquisition.

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

D. *"SETA services"* means systems engineering, technical assistance services and support services relating to air traffic control systems provided by Lockheed Martin to the Federal Aviation Administration, pursuant to paragraphs C.2.2.1.3., C.2.2.1.5., C.2.2.1.12. and C.2.2.4. of Task Area 2 and paragraphs C.9.1.3., C.9.2.2., C.9.2.3., C.9.2.4., C.9.2.6., C.9.2.7., C.9.2.8. and C.9.2.10. of Task Area 9 of the National Implementation and Support Contract, DTFA01-93-C-00031, that involve the development of technical and other specifications for procurements and programs; the assessment of bid and other proposals; the evaluation, testing or monitoring of any service, equipment or product provided by any company; the modification or change of any performance requirements of any contractor; or the development of financial, cost or budgetary plans, procedures or policies.

E. *"SETA services operations"* means all assets, properties, business and goodwill, tangible and intangible, held by respondent and used in the provision of SETA services including, without limitation, the following:

1. All rights, obligations and interests in paragraphs C.2.2.1.3., C.2.2.1.5., C.2.2.1.12., C.2.2.4., C.9.1.3., C.9.2.2., C.9.2.3., C.9.2.4., C.9.2.6., C.9.2.7., C.9.2.8. and C.9.2.10. of contract DTFA01-93-C-00031 relating to the provision of SETA services;

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, financial information, technical information, management information and

systems, software, software licenses, inventions, copyrights, trademarks, trade secrets, intellectual property, patents, technology, know-how, specifications, designs, drawings, processes and quality control data;

3. All rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits;

4. All rights, titles and interests in and to the contracts entered into in the ordinary course of business, including, but not limited to, contracts with customers (together with associated bid and performance bonds), suppliers, subcontractors, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

5. All rights under warranties and guarantees, express or implied;

6. All books, records and files;

7. All data developed, prepared, received, stored or maintained; and

8. All items of prepaid expense.

F. *"Non-public air traffic control information"* means any information not in the public domain disclosed by the Federal Aviation Administration or any company to respondent in its capacity as a provider of SETA services.

G. *"Standard terminal automation replacement system"* means any current or future equipment and services designed, developed, proposed or provided by Loral air traffic control to upgrade the traffic control equipment and systems in the Federal Aviation Administration's U.S. air traffic control terminals.

H. *"Traffic flow management system"* means any current or future equipment and services designed, developed, proposed or provided by Loral air traffic control to predict arrival and departure traffic flows at U.S. airports for the Federal Aviation Administration.

I. *"Operational and supportability implementation service"* means any current or future equipment and services designed, developed, proposed or provided by Loral air traffic control to upgrade Federal Aviation Administration flight server stations.

J. *"Air traffic control systems"* means any current or future air traffic control equipment, system or service designed, developed, proposed or provided by Loral air traffic control, including, but not limited to, the standard terminal automation replacement system, the

traffic flow management system and the operational and supportability implementation service, for the Federal Aviation Administration.

K. *"Military aircraft"* means fixed-wing aircraft manufactured for sale to the United States or foreign governments.

L. *"NITE Hawk systems"* means any airborne forward-looking infrared targeting system researched, developed, designed, manufactured or sold by Loral for use on the F/A-18 series of military aircraft.

M. *"Simulation and training systems"* means the operational and weapons systems trainers designed, developed, manufactured or sold by Loral that simulate military aircraft.

N. *"Electronic countermeasures"* means systems designed, developed, manufactured or sold by Loral, including, but not limited to, the ALR-56A and ALR-56C, that detect, jam and deceive hostile radars and radar and infrared guided weapons for use on military aircraft.

O. *"Mission computers"* means any computer designed, developed, manufactured or sold by Loral, including, but not limited to, the AP1, AAAP1R and CP1075A/B/C, that control, monitor or manage the operations and electronics of any military aircraft.

P. *"Unmanned aerial vehicle"* means any unmanned aircraft used for tactical or strategic reconnaissance missions manufactured for sale to the United States or foreign governments.

Q. *"Integrated communications systems"* means systems designed, developed, manufactured or sold by Loral, including, but not limited to, the 367-6000-59-R-012 and the 367-6000-59-R-013, that are capable of both wideband satellite and line-of-sight data link communications and command and control data links for use on unmanned aerial vehicles.

R. *"Loral air traffic control"* means Loral air traffic control, an entity with its principal place of business at 9211 Corporate Blvd., Rockville, Maryland, or any other entity within or controlled by Lockheed Martin that is engaged in, among other things, the research, development, manufacture or sale of air traffic control systems, and its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Loral air traffic control (or such similar entity), and the respective directors,

officers, employees, agents, representatives, successors and assigns of each; except that Loral air traffic control does not include any of the foregoing that will be part of Loral space after the Acquisition.

S. *"Lockheed Martin Military Aircraft Business"* means any entity within or controlled by Lockheed Martin that is engaged in, among other things, the research, development, manufacture or sale of military aircraft or unmanned aerial vehicles, and its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by a Lockheed Martin Military Aircraft Business and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

T. *"Management and data systems"* means Lockheed Martin Management and Data Systems Division, an entity with its principal place of business at 7000 Geerdes Blvd., King of Prussia, Pennsylvania, or any other entity within or controlled by Lockheed Martin that is engaged in, among other things, the provision of SETA services, and its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Lockheed Martin Management and Data Systems Division (or such similar entity), and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

U. *"Non-public military aircraft information (NITE Hawk)"* means (1) any information not in the public domain disclosed by any military aircraft manufacturer, other than Lockheed Martin, to respondent or Loral in its capacity as a provider of NITE Hawk systems and (a) if written information, designated in writing by the military aircraft manufacturer as proprietary information by an appropriate legend, marking, stamp or positive written identification on the face thereof, or (b) if oral, visual or other information, identified as proprietary information in writing by the military aircraft manufacturer prior to the disclosure or within thirty (30) days after such disclosure; or (2) any information not in the public domain disclosed by any military aircraft manufacturer prior to the Acquisition to Loral in its capacity as a provider of NITE Hawk systems. Non-public military aircraft information (NITE Hawk) shall not include: (1) information known or disclosed to respondent, excluding Loral, at the time respondent signed the Agreement

Containing Consent Order in this matter, (2) information that subsequently falls within the public domain through no violation of this order by respondent, (3) information that subsequently becomes known to respondent from a third party not in breach of a confidential disclosure agreement (information obtained from Loral or otherwise obtained as a result of the Acquisition shall not be considered information known to respondent from a third party), or (4) information after six (6) years from the date of disclosure of such non-public military aircraft information (NITE Hawk) to respondent, or such other period as agreed to in writing by respondent and the provider of the information.

V. *"Non-public military aircraft information (simulation and training)"* means (1) any information not in the public domain disclosed by any military aircraft manufacturer, other than Lockheed Martin, to respondent or Loral in its capacity as a provider of simulation and training systems and (a) if written information, designated in writing by the military aircraft manufacturer as proprietary information by an appropriate legend, marking, stamp or positive written identification on the face thereof, or (b) if oral, visual or other information, identified as proprietary information in writing by the military aircraft manufacturer prior to the disclosure or within thirty (30) days after such disclosure; or (2) any information not in the public domain disclosed by any military aircraft manufacturer prior to the Acquisition to Loral in its capacity as a provider of simulation and training systems. Non-public military aircraft information (simulation and training) shall not include: (1) information known or disclosed to respondent, excluding Loral, at the time respondent signed the Agreement Containing Consent Order in this matter, (2) information that subsequently falls within the public domain through no violation of this order by respondent, (3) information that subsequently becomes known to respondent from a third party not in breach of a confidential disclosure agreement (information obtained from Loral or otherwise obtained as a result of the Acquisition shall not be considered information known to respondent from a third party), or (4) information after six (6) years from the date of disclosure of such non-public military aircraft information (simulation and training) to respondent, or such other period as agreed to in writing by respondent and the provider of the information.

W. *"Non-public military aircraft information (electronic countermeasures)"* means (1) any information not in the public domain disclosed by any military aircraft manufacturer, other than Lockheed Martin, to respondent or Loral in its capacity as a provider of electronic countermeasures and (a) if written information, designated in writing by the military aircraft manufacturer as proprietary information by an appropriate legend, marking, stamp or positive written identification on the face thereof, or (b) if oral, visual or other information, identified as proprietary information in writing by the military aircraft manufacturer prior to the disclosure or within thirty (30) days after such disclosure; or (2) any information not in the public domain disclosed by any military aircraft manufacturer prior to the Acquisition to Loral in its capacity as a provider of electronic countermeasures. Non-public military aircraft information (electronic countermeasures) shall not include: (1) information known or disclosed to respondent, excluding Loral, at the time respondent signed the Agreement Containing Consent Order in this matter, (2) information that subsequently falls within the public domain through no violation of this order by respondent, (3) information that subsequently becomes known to respondent from a third party not in breach of a confidential disclosure agreement (information obtained from Loral or otherwise obtained as a result of the Acquisition shall not be considered information known to respondent from a third party), or (4) information after six (6) years from the date of disclosure of such non-public military aircraft information (electronic countermeasures) to respondent, or such other period as agreed to in writing by respondent and the provider of the information.

X. *"Non-public military aircraft information (mission computers)"* means (1) any information not in the public domain disclosed by any military aircraft manufacturer, other than Lockheed Martin, to respondent or Loral in its capacity as a provider of mission computers, and (a) if written information, designated in writing by the military aircraft manufacturer as proprietary information by an appropriate legend, marking, stamp or positive written identification on the face thereof, or (b) if oral, visual or other information, identified as proprietary information in writing by the military aircraft manufacturer prior to the disclosure or within thirty (30) days after such disclosure; or (2) any information not in the public domain disclosed by any military aircraft manufacturer prior to the

Acquisition to Loral in its capacity as a provider of mission computers. Non-public military aircraft information (mission computers) shall not include: (1) information known or disclosed to respondent, excluding Loral, at the time respondent signed the Agreement Containing Consent Order in this matter, (2) information that subsequently falls within the public domain through no violation of this order by respondent, (3) information that subsequently becomes known to respondent from a third party not in breach of a confidential disclosure agreement (information obtained from Loral or otherwise obtained as a result of the Acquisition shall not be considered information known to respondent from a third party), or (4) information after six (6) years from the date of disclosure of such non-public military aircraft information (mission computers) to respondent, or such other period as agreed to in writing by respondent and the provider of the information.

Y. *"Non-public unmanned aerial vehicle information"* means (1) any information not in the public domain disclosed by any unmanned aerial vehicle manufacturer, other than Lockheed Martin, to respondent or Loral in its capacity as a provider of integrated communications systems, and (a) if written information, designated in writing by the unmanned aerial vehicle manufacturer as proprietary information by an appropriate legend, marking, stamp or positive written identification on the face thereof, or (b) if oral, visual or other information, identified as proprietary information in writing by the unmanned aerial vehicle manufacturer prior to the disclosure or within thirty (30) days after such disclosure; or (2) any information not in the public domain disclosed by any unmanned aerial vehicle manufacturer prior to the Acquisition to Loral in its capacity as a provider of integrated communications systems. Non-public unmanned aerial vehicle information shall not include: (1) information known or disclosed to respondent, excluding Loral, at the time respondent signed the Agreement Containing Consent Order in this matter, (2) information that subsequently falls within the public domain through no violation of this order by respondent, (3) information that subsequently becomes known to respondent from a third party not in breach of a confidential disclosure agreement (information obtained from Loral or otherwise obtained as a result of the Acquisition shall not be considered information known to respondent from a third party), or (4) information after six (6) years

from the date of disclosure of such non-public unmanned aerial vehicle information to respondent, or such other period as agreed to in writing by respondent and the provider of the information.

Z. *"Satellite"* means an unmanned machine that is launched from the earth's surface for the purpose of transmitting data back to earth and which is designed either to orbit the earth or travel away from the earth.

AA. *"Restructuring Agreement"* means the Restructuring, Financing and Distribution Agreement, dated as of January 7, 1996, by and among Loral Corporation, Loral Aerospace Holdings, Inc., Loral Aerospace Corp., Loral General Partner, Inc., Loral Globalstar, L.P., Loral Globalstar Limited, Loral Telecommunications Acquisition, Inc. (to be renamed Loral Space & Communications Ltd.) and Lockheed Martin Corporation.

BB. *"Loral Space"* means Loral Space & Communications Ltd., a company organized under the laws of the Islands of Bermuda, with its principal office and place of business located at 600 Third Avenue, New York, New York, as described by the Restructuring Agreement; its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled or managed by Loral Space & Communications Ltd., including, but not limited to, Globalstar, L.P., Space Systems/Loral, Inc. and K&F Industries, Inc., and the respective directors, officers, employees, agents, representatives, successors and assigns of each; except that Loral Space does not include any of the foregoing that will be part of Loral or Lockheed Martin after the Acquisition.

CC. *"Space Systems/Loral"* means Space Systems/Loral, Inc., an entity with its principal place of business at 3825 Fabian Way, Palo Alto, California, or any other entity within or controlled by Loral Space that is engaged in, among other things, the research, development, manufacture or sale of Satellites, and its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Space Systems/Loral, Inc. (or such similar entity), and the respective directors, officers, employees, agents, representatives, successors and assigns of each; except that Space Systems/Loral does not include any of the foregoing that will be part of Loral or Lockheed Martin after the Acquisition and does

not include any entity or line of business, outside of Space Systems/Loral, Inc., within or controlled by Loral Space that is not engaged in the research, development, manufacture or sale of Satellites.

DD. *"Defensive missiles systems"* are the research, development, manufacture or sale of defensive missiles systems and components, including, among other things, the Theater High Altitude Area Defense System, Corps SAM/MEADS, the Advanced Intercept Technology, National Missile Defense, Naval Upper Tier, the Airborne Laser, target programs and other related activities.

EE. *"Fleet Ballistic Missiles"* are the research, development, manufacture, sale or life cycle support including disposal of strategic offensive missiles and associated support equipment, including, among other things, the Trident missile.

FF. *"Missile System Products Center"* is the research, development, manufacture or sale of missile systems, missile components, missile technology, propulsion systems, seekers, electronics, avionics, composites, bombs, rockets and mortars, including, among other things, the Composites Initiative, the Propulsion Initiative, BLU-109 and Precision Guided Mortar Munition.

GG. *"Space & Strategic Missiles"* means Lockheed Martin Space & Strategic Missiles Sector, an entity with its principal place of business at 6801 Rockledge Drive, Bethesda, Maryland, or any other entity within or controlled by Lockheed Martin that is engaged in, among other things, the research, development, manufacture or sale of Satellites; and its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Lockheed Martin Space & Strategic Missiles Sector (or such similar entity), and the respective directors, officers, employees, agents, representatives, successors and assigns of each; except that Space & Strategic Missiles does not include Defensive Missile Systems, Fleet Ballistic Missiles, and Missile System Products Center, and any other entity or line of business, outside of Lockheed Martin Space & Strategic Missiles Sector, within or controlled by Lockheed Martin that is not engaged in the research, development, manufacture or sale of Satellites.

HH. *"Common LM/Loral Space Director"* means any person who is simultaneously a member of the Board of Directors of Lockheed Martin or an officer of Lockheed Martin and a member of the Board of Directors of Loral Space or an officer of Loral Space.

II. *"Non-public space information of Lockheed Martin"* means any information not in the public domain relating to Space & Strategic Missiles.

JJ. *"Non-public space information of Loral Space"* means any information not in the public domain relating to Space Systems/Loral.

KK. *"Lockheed Martin/Loral Space Technical Services Agreement"* means the technical services agreement between Lockheed Martin and Loral Space, as described by Article VI, Section 6.7, paragraph (d), of the Restructuring Agreement.

LL. *"Merger Agreement"* means the Agreement and Plan of Merger, dated as of January 7, 1996, by and among Loral Corporation, Lockheed Martin Corporation and LAC Acquisition Corporation.

MM. *"Stockholders Agreement"* means the Stockholders Agreement referred to in the Restructuring Agreement.

NN. *"Non-Voting Equity Securities"* means any share of stock that does not entitle the shareholder to vote for any member of the Board of Directors.

OO. *"Voting Equity Securities"* means any share of stock that entitles the shareholder to vote for any member of the Board of Directors.

PP. *"Acquisition"* means the transaction described by the Merger Agreement and the Restructuring Agreement, including, but not limited to: (1) the acquisition by respondent of all of the outstanding voting common stock of Loral; (2) the transfer of the space and telecommunications businesses of Loral and its subsidiaries to Loral Space; (3) the acquisition by respondent of a 20% convertible preferred stock interest in Loral Space, which in turn owns a 33% interest in Space Systems/Loral; (4) the Lockheed Martin/Loral Space Technical Services Agreement; and (5) the appointment of Mr. Bernard Schwartz, Chairman of the Board of Directors and Chief Executive Officer of Loral Space, to the position of Vice Chairman of the Board of Directors of Lockheed Martin.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within six (6) months of the date respondent signed the Agreement Containing Consent Order in this matter, the SETA services operations, and shall not charge any costs associated with the divestiture to the Federal Aviation Administration.

B. Respondent shall divest the SETA services operations only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture is to ensure the continued provision of SETA services in the same manner as provided by respondent at the time of the proposed divestiture and to remedy the lessening of competition alleged in the Commission's complaint.

C. Pending divestiture of the SETA services operations, respondent shall take such actions as are necessary to ensure the continued provision of SETA services, to maintain the viability and marketability of the assets used to provide SETA services, to prevent the destruction, removal, wasting, deterioration or impairment of the assets used to provide SETA services, and to prevent the disclosure of non-public air traffic control information to Loral Air Traffic Control.

D. Upon reasonable notice from any acquirer or the Federal Aviation Administration to respondent, respondent shall provide such technical assistance to the acquirer as is reasonably necessary to enable the acquirer to provide SETA services in substantially the same manner and quality as provided by respondent prior to divestiture. Such assistance shall include reasonable consultation with knowledgeable employees and training at the acquirer's facility for a period of time sufficient to satisfy the acquirer's management that its personnel are appropriately trained in the skills necessary to perform the SETA services operations. Respondent shall convey all know-how necessary to perform the SETA services operations in substantially the same manner and quality provided by respondent prior to divestiture, provided, however, that the respondent may retain the right to use the know-how. However, respondent shall not be required to continue providing such assistance for more than one (1) year from the date of the divestiture. Respondent shall charge the

acquirer at a rate no more than its own costs for providing such technical assistance.

E. At the time of the execution of the purchase agreement between respondent and a proposed acquirer of the SETA services operations ("Purchase Agreement"), respondent shall provide the acquirer(s) with a complete list of all full-time, non-clerical, salaried employees of respondent who were engaged in the provision of SETA services on the date of the Acquisition, as well as all current full-time, non-clerical, salaried employees of respondent engaged in the provision of SETA services on the date of the purchase agreement. Such list(s) shall state each such individual's name, position, address, business telephone number, or if no business telephone number exists, a home telephone number, if available and with the consent of the employee, and a description of the duties and work performed by the individual in connection with the SETA services operations.

F. Following the execution of the Purchase Agreement(s) and subject to the consent of the employees, respondent shall provide the proposed acquirer(s) with an opportunity to inspect the personnel files and other documentation relating to the individuals identified in paragraph II.E of this order to the extent permissible under applicable laws. For a period of six (6) months following the divestiture, respondent shall further provide the acquirer(s) with an opportunity to interview such individuals and negotiate employment contracts with them.

G. Respondent shall provide all employees identified in paragraph II.E of this order with reasonable financial incentives, if necessary, to continue in their employment positions pending divestiture of the SETA services operations, and to accept employment with the acquirer(s) at the time of the divestiture. Such incentives shall include continuation of all employee benefits offered by respondent until the date of the divestiture, and vesting of all pension benefits (as permitted by law). In addition, respondent shall not enforce any confidentiality restrictions relating to the SETA services or SETA services operations that apply to any employee identified in paragraph II.E who accepts employment with any proposed acquirer. Respondent also shall not enforce any noncompete restrictions that apply to any employee identified in paragraph II.E who accepts employment with any proposed acquirer.

H. For a period of one (1) year commencing on the date of the individual's employment by any acquirer, respondent shall not re-hire any of the individuals identified in paragraph II.E of this order who accept employment with any acquirer, unless such individual has been separated from employment by the acquirer against that individual's wishes.

I. Prior to divestiture, respondent shall not transfer, without the consent of the Federal Aviation Administration, any of the individuals identified in paragraph II.E of this order whose employment responsibilities involve access to non-public air traffic control information from management and data systems to any other position involving business with the Federal Aviation Administration.

III.

It is further ordered, That:

A. Respondent shall not provide, disclose or otherwise make available to Loral Air Traffic Control any non-public air traffic control information.

B. Respondent shall use any non-public air traffic control information obtained by Management and Data Systems only in respondent's capacity as provider of technical assistance to an acquirer, pursuant to paragraph II.D of this order.

IV.

It is further ordered, That:

A. If respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the SETA services operations within six (6) months of the date respondent signed the Agreement Containing Consent Order in this matter, the Commission may appoint a trustee to divest the SETA services operations. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondent 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 IV 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(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by respondent to comply with this order.

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

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld.

The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has 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 respondent of the identity of any proposed trustee, respondent 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 divest the SETA services operations.

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 the 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 IV.B.3 to accomplish the 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 of divestiture or believes that divestiture can be achieved within a reasonable time, the 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 this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the SETA services operations, or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondent shall extend the time for 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 respondent's absolute and

unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to an acquirer or acquirers as set out in paragraph II 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 selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, 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 respondent, 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 the 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 respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the SETA services operations.

8. Respondent 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 paragraph IV.A of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee

issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee may also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability, viability and competitiveness of the SETA services operations.

12. The trustee shall have no obligation or authority to operate or maintain the SETA services operations.

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

V.

It is further ordered, That within forty-five (45) days after the date this order becomes final and every forty-five (45) days thereafter until respondent has fully complied with paragraphs II through IV of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II through IV of this order. Respondent shall include in its 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 through IV including a description of all substantive contacts or negotiations for the divestiture required by this order, including the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda and all reports and recommendations concerning the divestiture.

VI.

It is further ordered, That:

A. Respondent shall not, absent the prior written consent of the proprietor of non-public military aircraft information (NITE Hawk), provide, disclose or otherwise make available to any Lockheed Martin Military Aircraft Business any non-public military aircraft information (NITE Hawk).

B. Respondent shall use any non-public military aircraft information (NITE Hawk) only in respondent's capacity as a provider of NITE Hawk systems, absent the prior written consent of the proprietor of non-public military aircraft information (NITE Hawk).

VII.

It is further ordered, That:

A. Respondent shall not, absent the prior written consent of the proprietor of non-public military aircraft information (simulation and training), provide, disclose or otherwise make available to any Lockheed Martin Military Aircraft Business any non-public military aircraft information (simulation and training).

B. Respondent shall use any non-public military aircraft information (simulation and training) only in respondent's capacity as a provider of simulation and training systems, absent the prior written consent of the proprietor of non-public military aircraft information (simulation and training).

VIII.

It is further ordered, That:

A. Respondent shall not, absent the prior written consent of the proprietor of non-public military aircraft information (electronic countermeasures), provide, disclose or otherwise make available to any Lockheed Martin Military Aircraft Business any non-public military aircraft information (electronic countermeasures).

B. Respondent shall use any non-public military aircraft information (electronic countermeasures) only in respondent's capacity as a provider of electronic countermeasures, absent the prior written consent of the proprietor of non-public military aircraft information (electronic countermeasures).

IX.

It is further ordered, That:

A. Respondent shall not, absent the prior written consent of the proprietor of non-public military aircraft information (mission computers), provide, disclose or otherwise make available to any Lockheed Martin Military Aircraft Business any non-public military aircraft information (mission computers).

B. Respondent shall use any non-public military aircraft information (mission computers) only in respondent's capacity as a provider of mission computers, absent the prior written consent of the proprietor of non-public military aircraft information (mission computers).

X.

It is further ordered, That respondent shall deliver a copy of this order to any United States military aircraft manufacturer prior to obtaining any information outside the public domain relating to that manufacturer's military aircraft, either from the military aircraft manufacturer or through the Acquisition.

XI.

It is further ordered, That:

A. Respondent shall not, absent the prior written consent of the proprietor of non-public unmanned aerial vehicle information, provide, disclose or otherwise make available to any Lockheed Martin Military Aircraft Business any non-public unmanned aerial vehicle information.

B. Respondent shall use any non-public unmanned aerial vehicle information only in respondent's capacity as a provider of integrated communications systems, absent the prior written consent of the proprietor of non-public unmanned aerial vehicle information.

XII.

It is further ordered, That respondent shall deliver a copy of this order to any United States unmanned aerial vehicle manufacturer prior to obtaining any information outside the public domain relating

to that manufacturer's unmanned aerial vehicle, either from the unmanned aerial vehicle manufacturer or through the Acquisition.

XIII.

It is further ordered, That:

A. Respondent shall not discuss, provide, disclose or otherwise make available, directly or indirectly, to any Common LM/Loral Space Director any non-public space information of Lockheed Martin.

B. Respondent shall require any Common LM/Loral Space Director to refrain from discussing, providing, disclosing or otherwise making available, directly or indirectly, any non-public space information of Loral Space to any member of the Board of Directors of Lockheed Martin, any officer of Lockheed Martin or any employee of Lockheed Martin.

C. Respondent shall conduct all matters relating to Space & Strategic Missiles without the vote, concurrence or other participation of any kind whatsoever of any Common LM/Loral Space Director.

D. Any Common LM/Loral Space Director shall not be counted for purposes of establishing a quorum in connection with any matter relating to Space & Strategic Missiles.

E. Respondent shall not provide any Common LM/Loral Space Director with any type of compensation that is based in whole or in part on the profitability or performance of Space & Strategic Missiles; provided, however, that any Common LM/Loral Space Director may receive as compensation for his or her serving on the Lockheed Martin Board of Directors such stock options or other stock-based compensation as is provided generally to other members of the Lockheed Martin Board of Directors in accordance with respondent's ordinary practice.

XIV.

It is further ordered, That:

A. Respondent shall not provide or otherwise make available, directly or indirectly, any personnel, information, facilities, technical services or support from Space & Strategic Missiles to Space Systems/Loral pursuant to any provision contained in the Lockheed Martin/Loral Space Technical Services Agreement.

B. Respondent shall not disclose or otherwise make available to Space & Strategic Missiles any information received in connection with the Lockheed Martin/Loral Space Technical Services Agreement.

C. Respondent shall not disclose to any Space & Strategic Missile employee any information or technical services provided to Space Systems/Loral by Lockheed Martin pursuant to the Lockheed Martin/Loral Space Technical Services Agreement.

XV.

It is further ordered, That if respondent's ownership of the equity securities of Loral Space increases to more than twenty percent (20%) of the total equity securities (including both Voting Equity Securities and Non-Voting Equity Securities) of Loral Space as the result of repurchases of equity securities by Loral Space or for any other reason, respondent shall, following its obtaining actual knowledge of an event leading to such increase ("Event"), reduce its equity security ownership interest to a level of not more than twenty percent (20%). Those equity securities which must be sold are hereinafter referred to as the "Excess Securities." Respondent shall have a period of 185 days following its obtaining actual knowledge of the Event to sell the Excess Securities (the "Sale Period"); provided, however, that, if within ten (10) business days of respondent's receipt of such knowledge, respondent requests that Loral Space file a registration statement providing for such sale, the Sale Period shall be deemed to begin on the effective date of such registration statement, and shall extend for 150 days thereafter, and provided further that, if respondent elects to sell the Excess Securities in a manner that does not require Loral Space to file a registration statement, and such sales cannot be accomplished within the Sale Period without violating Rule 144 (or any successor provision) under the Securities Act of 1933, then the Sale Period shall be extended by the minimum amount necessary to allow such securities to be sold pursuant to Rule 144 (or any successor provision). Pending the sale of Excess Securities, respondent shall not exercise any voting rights relating to the Excess Securities. Respondent shall amend the Stockholders Agreement to provide respondent the means of complying with the foregoing provisions and shall thereafter not amend the applicable provisions of

the Stockholders Agreement in a fashion so as to impair respondent's ability to comply with this paragraph. The provisions of this paragraph shall terminate ten (10) years from the date this order becomes final.

XVI.

It is further ordered, That respondent shall comply with all terms of the Interim Agreement, attached to this order and made a part hereof as Appendix I. Said Interim Agreement shall continue in effect until the provisions in paragraphs II through XVI of this order are complied with or until such other time as is stated in said Interim Agreement.

XVII.

It is further ordered, That within sixty (60) days of the date this order becomes final and annually for the next ten (10) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraphs VI through XVI of this order. To the extent not prohibited by United States Government national security requirements, respondent shall include in its reports information sufficient to identify all United States military aircraft and unmanned aerial vehicle manufacturers with whom respondent has entered into an agreement for the research, development, manufacture or sale of NITE Hawk systems, simulation and training systems, electronic countermeasures, mission computers or integrated communications systems.

XVIII.

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 sale of any division or any other change in the

corporation in each instance where such change may affect compliance obligations arising out of the order.

XIX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege and applicable United States Government national security requirements, upon written request, and on reasonable notice, respondent shall permit any duly authorized representatives of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and 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 respondent, to interview officers, directors, or employees of respondent, who may have counsel present, regarding any such matters.

XX.

It is further ordered, That this order shall terminate on September 19, 2016, except as otherwise provided in this order.

APPENDIX I

INTERIM AGREEMENT

This Interim Agreement is by and between Lockheed Martin Corporation ("Lockheed Martin"), a corporation organized and existing under the laws of the State of Maryland, and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

PREMISES

Whereas, Lockheed Martin has proposed to acquire all of the outstanding voting common stock of Loral Corporation and engage in a series of related transactions and acts; 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 Agreement Containing Consent Order ("Consent Agreement"), 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 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 understanding is not reached preserving competition 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 and divestiture or other relief resulting from a proceeding challenging the legality of the proposed Acquisition might not be possible, or might be less than an effective remedy; and

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

Whereas, Lockheed Martin 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, Lockheed Martin agrees, upon the understanding that the Commission has not yet determined whether the proposed Acquisition 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. Lockheed Martin agrees to execute and be bound by the terms of the order contained in the Consent Agreement, as if it were final, from the date Lockheed Martin signs the Consent Agreement.

2. Lockheed Martin agrees to deliver, within three (3) days of the date the Consent Agreement is accepted for public comment by the Commission, a copy of the Consent Agreement and a copy of this

Interim Agreement to the United States Department of Defense, the Federal Aviation Administration, McDonnell Douglas Corporation, Northrop Grumman Corporation, The Boeing Company and Teledyne Inc.

3. Lockheed Martin agrees to submit, within thirty (30) days of the date the Consent Agreement is signed by Lockheed Martin, an initial report, pursuant to Section 2.33 of the Commission's Rules, signed by Lockheed Martin setting forth in detail the manner in which Lockheed Martin will comply with paragraphs II through XVI of the Consent Agreement.

4. Lockheed Martin agrees that, from the date Lockheed Martin signs the Consent Agreement until the first of the dates listed in subparagraphs 4.a and 4.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 Commission finally issues its Complaint and its Decision and Order.

5. Lockheed Martin waives all rights to contest the validity of this Interim Agreement.

6. For the purpose of determining or securing compliance with this Interim Agreement, subject to any legally recognized privilege and applicable United States Government national security requirements, and upon written request, and on reasonable notice, to Lockheed Martin made to its principal office, Lockheed Martin shall permit any duly authorized representative or representatives of the Commission:

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

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

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

IN THE MATTER OF

ZYGON INTERNATIONAL, INC., ET AL.

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

Docket C-3686. Complaint, Sept. 24, 1996--Decision, Sept. 24, 1996

This consent order prohibits, among other things, a Washington-based company and its owner, that manufacture and advertise learning accelerating, memory enhancing, weight loss, and vision improving products and devices, from making any claims concerning the performance, benefits, efficacy, or safety of any product or service they market, unless they possess competent and reliable evidence to substantiate such claims, and requires the respondents to pay $195,000 into escrow accounts for consumer redress programs.

Appearances

For the Commission: *Dean C. Forbes* and *Lesley Anne Fair*.

For the respondents: *Margaret Feinstein* and *Peter Kadzik, Dickstein, Shapirro & Morin*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Zygon International, Inc., a corporation, and Dane Spotts, individually and as an officer of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Zygon International, Inc. is a Washington corporation, with its principal office or place of business at 18368 Redmond Way, Redmond, WA.

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

PAR. 2. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed consumer products through

radio and print advertisements, the Zygon International "SuperLife" mail-order catalog, and the Internet's World Wide Web. These products include, but are not limited to the "Learning Machine" and the "SuperMind," devices that purportedly accelerate learning; the "SuperBrain Nutrient Program," pills that purportedly enhance memory, intelligence, attention, and concentration levels; "Fat Burner" pills, which purportedly induce weight loss; and "Day and Night Eyes," purported vision improvement pills.

The Learning Machine, SuperMind, SuperBrain Nutrient Program, Fat Burner pills, and Day and Night Eyes pills are "foods," "drugs," or "devices" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

LEARNING MACHINE

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for the Learning Machine, including, but not necessarily limited to, the attached Exhibits A through E. These advertisements contain the following statements:

A. "Amazing Digital Headset Teaches You Foreign Languages Overnight" [Exhibit A: Zygon's SuperLife catalog]

B. "Knowledge really is power. But learning using traditional study methods is slow and boring. Imagine putting on a digital headset hooked up to an ordinary CD player. When you push play it fires a programmed sequence of light and sound, opening a window into your mind. Then like magic it downloads new information directly onto your brain cells. No, it's not science fiction. High-tech learning is now science fact. It's called the Learning Machine™. A profound breakthrough that will revolutionize how you learn and acquire new skills." [Exhibit A: Zygon's SuperLife catalog]

C. "Plus you can try the Learning Machine risk free for 30 days. During your risk free trial, you'll be able to learn 4 languages, triple your reading speed, boost your vocabulary, improve your memory, and reprogram one or two bad habits." [Exhibit A: Zygon's SuperLife catalog]

D. "Let's say . . . you'd like to quit smoking or lose weight. Pop in an Inner-Mind™ Programming Disc. The sensory stimulation matrix opens a window into your unconscious mind. Then by infusing your 'inner mind' with positive programming, you can rescript negative, self-defeating attitudes." [Exhibit B: USA Today, January 23, 1995]

E. "Let's say you want to learn a foreign language, quadruple your reading speed, or increase your math skills. Or give your children a powerful edge in school, learning 300%-500% faster than their peers. You select a specially programmed Learning Disc™ in the area you want to study. Plug it into any ordinary CD player. Then attach your Learning Machine digital headset into the headphone jack. Push play and a few moments later your mind is launched into a pre-programmed learning session. In a fun, almost effortless way, the Learning Disc lesson plan unfolds its program and transfers the knowledge into your mind." [Exhibit A: Zygon's SuperLife catalog; Exhibit C: US AIR magazine, July 1994; and Exhibit D: Longevity magazine, August 1994]

F. "The Learning Machine goes beyond virtual reality. It's the most advanced accelerated learning tool in the world! Absolutely mind blowing! What if you could flip a switch inside your mind to instantly activate your imagination? Speak foreign languages. Expand your mental skills . . . And pour into your mind the genius of an Einstein or a Socrates. Find out how the Learning Machine boosts mental powers . . . Get a Photographic Mind, Instant Motivation, Speak Foreign Languages, and More!" [Exhibit E: The Learning Machine Home Page, World Wide Web, January 18, 1996]

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A through E, respondents have represented, directly or by implication, that the Learning Machine:

A. Enables users to learn foreign languages overnight.
B. Enables users to quadruple their reading speed.
C. Enables users to improve their math skills.
D. Enables children to learn at a rate of 300% to 500% faster than their peers.
E. Enables users to lose weight.
F. Enables users to quit smoking.
G. Substantially improves users' ability to learn and retain information.
H. Enables users to learn four languages, triple their reading speed, improve their vocabulary, and improve their memory in thirty days.

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A through E, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph

five, respondents possessed and relied upon a reasonable basis that substantiated such representations.

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

SUPERMIND

PAR. 8. Respondents have disseminated or have caused to be disseminated advertisements for the SuperMind, including, but not necessarily limited to, the attached Exhibits F and G. These advertisements contains the following statements:

A. "Based on hard scientific evidence which associates states of consciousness with dominant brainwave activity, this machine coaxes your brain into an Alpha/Theta pattern (brainwaves in the 4-10 Hz range), which is associated with deep meditation and mental imagery. . . . Developed by the Mind Research Laboratory, now anyone can enter profound mental states at the push of a button. . . . I take it with me on business trips to beat stress and jet lag. A 20-minute session gives me the equivalent of 8-hours sleep and helps reset my biological clock.

Boost Brainpower

Listen: Training your brain to generate Theta activity for even a few minutes each day has enormous benefits, including boosting the immune system, enhancing creativity, I.Q., and psychic abilities, along with increasing feelings of psychological well-being.

For a little black box to do all that to your brain in 20 minutes is amazing enough, but it's only part of the story. Because this machine can also be used to accelerate learning and modify negative self-defeating behavior.

Automatic Hypnosis

Let's say you wanted to quit smoking, enhance your self-esteem, lose weight, or play a better game of golf. . . . [B]y plugging into the SuperMind™, you could induce a hypnotic trance in a matter of seconds. Then, while your subconscious is primed for psychological programming, you play prerecorded behavioral mindscripts, and these new success patterns become transferred onto your brain." [Exhibit F: Longevity magazine, July 1993]

B. "Instant Speed Learning

Plus, you can use this machine for speed learning. Tests at the University of California have revealed the effects of Theta frequencies on learning. During their study a group of 20 students learned 1,800 words of Bulgarian in 120 hours while

using Theta stimulation programs. In about 1/3 the normal time they spoke and wrote the new language." [Exhibit F: Longevity magazine, July 1993]

C. "Speak French, Spanish, German, & Italian Overnight

Using the amazing accelerated language learning system, these four Instant Language courses are also bundled with your SuperMind™ computer. Each course works with software built into your SuperMind™ to imprint a super-fast working knowledge of these languages into your memory. Edited to accelerate learning time, words and phrases for speaking in each country are imprinted directly onto your brain cells. No verbs to conjugate or grammar to learn." [Exhibit F: Longevity magazine, July 1993]

E. "Speak four languages almost overnight. Instant French. Instant Spanish. Instant German & Instant Italian use the SuperMind computer to stimulate the optimum brain-state for learning. Each language soundtrack imprints new words and phrases directly onto your brain cells. A second tape included with each course uses a special reinforcement system to lock the language session into permanent memory. There are no verbs to conjugate or grammar to learn." [Exhibit G: Omni magazine, January 1994]

PAR. 9. Through the use of the statements contained in the advertisements referred to in paragraph eight, including but not necessarily limited to the advertisements attached as Exhibits F and G, respondents have represented, directly or by implication, that the SuperMind:

A. Effectively treats users' stress.
B. Effectively treats users' jet lag.
C. Gives users the equivalent of eight hours of sleep after twenty minutes of use.
D. Enables users to lose weight.
E. Enables users to quit smoking.
F. Enabled 20 students to learn 1800 words of Bulgarian in 120 hours in tests at the University of California.
G. Improves the functioning of users' immune system.
H. Increases users' I.Q.
I. When used in conjunction with the Instant Language courses, enables users to learn foreign languages overnight.
J. Substantially improves users' ability to learn and retain information.

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph eight, including but not necessarily limited to the advertisements attached as Exhibits F and G, respondents have represented, directly or by implication, that at the

time they made the representations set forth in paragraph nine, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 11. In truth and in fact, at the time they made the representations set forth in paragraph nine, respondents 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. Through the use of the statements contained in the advertisements referred to in paragraph eight, including but not necessarily limited to the advertisement attached as Exhibit F, respondents have represented, directly or by implication, that the SuperMind has been proven in tests conducted at the University of California to teach users to speak and write foreign languages in about one-third the time of traditional methods of study.

PAR. 13. In truth and in fact, tests conducted at the University of California have not proven that the SuperMind teaches users to speak and write foreign languages in about one-third the time of traditional methods of study. Therefore, the representation set forth in paragraph twelve was, and is, false and misleading.

SUPERBRAIN NUTRIENT PROGRAM

PAR. 14. Respondents have disseminated or have caused to be disseminated advertisements for the SuperBrain Nutrient Program, including, but not necessarily limited to, the attached Exhibit H. This advertisement contains the following statements:

A. "Recently I received a news clipping about a Florida medical doctor who takes a daily dose of 'smart pills' to increase memory, improve intelligence, and energize his brain. The article went on to tell of his incredible claim that these super pills not only made him smarter, but his 4-year-old son was turned into a genius because his wife took the pills when she was pregnant." [Exhibit H: Zygon's SuperLife catalog]

B. "I...started taking them myself. Instantly I was zooming....In other words, my brain was thinking at warp speed.

Smart Pill Breakthrough

So how can a 'pill' enhance cognition? Several ways. By increasing blood supply and oxygen to the brain. Enhancing brain cell metabolism. Inhibiting free radical damage to brain cells. And stimulating neuro-transmitter hormones.

My goal was to design a powerful brain formula made entirely of natural substances.

Waking Up Your Brain

We hired the hottest pharmaceutical research lab in the country. The result is the Brain Cognition Formula. Twenty-six ingredients each tested for maximum purity and potency are loaded into a gelatin capsule.

Look: Popping a few pills won't make you an Einstein, but if your experiences are like mine, you'll notice an improvement in attention, focus, concentration, and mental energy. Because subtle or even major improvements in cognitive functioning often go unnoticed, it's important to have some way of measuring your progress.

So included in your package will be a special report called The Mental Boost that shows you how to measure your mental progress. You'll be instructed how to look for changes in alertness, mental energy, concentration, memorization, productivity, organization and planning, verbal skills, problem solving ability, mood, sexual desire, and overall health." [Exhibit H: Zygon's SuperLife catalog]

PAR. 15. Through the use of the statements contained in the advertisements referred to in paragraph fourteen, including but not necessarily limited to the advertisement attached as Exhibit H, respondents have represented, directly or by implication, that the SuperBrain Nutrient Program:

A. Enables users to improve their memory.

B. Enables users to improve their intelligence.

C. When taken by pregnant women, will cause their children to have enhanced intelligence.

D. Enhances cognition, increases blood supply and oxygen to the brain, enhances brain cell metabolism, inhibits free radical damage to brain cells, and stimulates neuro-transmitter hormones of users.

E. Enables users to improve their cognitive and mental functions, including attention and concentration levels, problem solving abilities, and verbal skills.

PAR. 16. Through the use of the statements contained in the advertisements referred to in paragraph fourteen, including but not necessarily limited to the advertisement attached as Exhibit H, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph fifteen, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 17. In truth and in fact, at the time they made the representations set forth in paragraph fifteen, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph sixteen was, and is, false and misleading.

FAT BURNER PILLS

PAR. 18. Respondents have disseminated or have caused to be disseminated advertisements for Fat Burner pills, including, but not necessarily limited to, the attached Exhibit I. This advertisement contains the following statements:

A. "Fat Burner Pills
Not only is *Fat Burner* the fastest selling product in its class, but it contains an incredible 500 mg of pure L-Carnitine (a special amino acid used in metabolism) per serving. . . . [Y]ou'll be on your way to a trimmer, firmer, leaner body.
Try this supplement with any of the other weight control products in this catalog for a super combined effect that will enhance your weight control program.
A special blend of Lipotropics plus 500 mg of L-Carnitine enhances the body's ability to burn fat." [Exhibit I: Zygon's SuperLife catalog]

PAR. 19. Through the use of the statements contained in the advertisements referred to in paragraph eighteen, including but not necessarily limited to the advertisement attached as Exhibit I, respondents have represented, directly or by implication, that Fat Burner pills:

A. Enhance the body's ability to burn fat.
B. Enable users to have a trimmer, firmer, and leaner body.
C. Enable users to lose weight.

PAR. 20. Through the use of the statements contained in the advertisements referred to in paragraph eighteen, including but not necessarily limited to the advertisement attached as Exhibit I, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph nineteen, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 21. In truth and in fact, at the time they made the representations set forth in paragraph nineteen, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph twenty was, and is, false and misleading.

DAY AND NIGHT EYES PILLS

PAR. 22. Respondents have disseminated or have caused to be disseminated advertisements for Day and Night Eyes pills, including, but not necessarily limited to, the attached Exhibit J. This advertisement contains the following statements:

A. "Focus on Healthy Eyes
Eye Improvement Supplement
If you suffer from night blindness (or want clearer vision during the day), *Day and Night Eyes* may be the remedy for you. This all-natural supplement gives your eyes the essential nutrients that must be present in your diet for proper eyesight function. Ingredients include Beta Carotene, Calcium, Vitamin D, Riboflavin (B-2), Zinc, Eyebright, and Anthocyanocide-rich Blueberry Leaf. Recommended dosage is one tablet every morning and evening." [Exhibit J: Zygon's SuperLife catalog]

PAR. 23. Through the use of the statements contained in the advertisements referred to in paragraph twenty-two, including but not necessarily limited to the advertisement attached as Exhibit J, respondents have represented, directly or by implication, that Day and Night Eyes pills:

A. Improve the night blindness of users.
B. Give users clearer vision during the day.

PAR. 24. Through the use of the statements contained in the advertisements referred to in paragraph twenty-two, including but not necessarily limited to the advertisement attached as Exhibit J, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph twenty-three, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 25. In truth and in fact, at the time they made the representations set forth in paragraph twenty-three, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph twenty-four was, and is, false and misleading.

THIRTY-DAY MONEY-BACK GUARANTEE

PAR. 26. Respondents have disseminated or have caused to be disseminated advertisements for products, including, but not

necessarily limited to, the attached Exhibits B, E, and K. These advertisements contains the following statements:

A. "Try the Learning Machine for 30 days risk free. Take your mind on an incredible journey. If for any reason you're not totally blown away by the experience, send your kit back to me for a full refund." [Exhibit B: USA Today, January 23, 1995]

B. "Try the Learning Machine for 30 days RISK FREE." [Exhibit E: The Learning Machine Home Page, World Wide Web, January 16, 1996]

C. "Our Return Policy We are committed to providing you with products that will improve your life. But if within 30 days you are not completely satisfied with your order, simply call a Customer Service Representative at 1-800-526-2177 to receive return instructions." [Exhibit K: Zygon's SuperLife catalog]

PAR. 27. Through the use of the statements contained in the advertisements referred to in paragraph twenty-six, including but not limited to the advertisements attached as Exhibit B, E, and K, respondents have represented, directly or by implication, that products ordered from respondents carry a thirty-day money-back guarantee, and that consumers who returned the product to respondents within thirty days after receipt would receive a full refund within a reasonable period of time.

PAR. 28. In truth and in fact, in numerous instances, consumers returned products to respondents within thirty days after receipt and did not receive a full refund within a reasonable period of time, or at all. Therefore, the representation set forth in paragraph twenty-seven was, and is, false and misleading.

PAR. 29. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBIT D

EXHIBIT E

EXHIBIT F

EXHIBIT F

EXHIBIT G

EXHIBIT H

EXHIBIT I

EXHIBIT J

EXHIBIT K

DECISION AND ORDER

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

The respondents, their attorney, and counsel for Federal Trade 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 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 received, 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 Zygon International, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its office or principal place of business located at 18368 Redmond Way, Redmond, WA.

Respondent Dane Spotts is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his office or principal place of business is located at the above stated address.

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

ORDER

I.

It is ordered, That respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that the use of such product or program can or will have any effect on the user's:

A. Health or bodily structure or function, including but not limited to sleep; weight, bodyfat content, or body shape or tone; immune system; eyesight or night vision; stress; or jet lag; or

B. Smoking behavior,

unless at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates such representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

II.

It is further ordered, That respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, individually and as an officer of said corporation, and

respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that the use of such product or program can or will have any effect on the user's cognitive or mental functions or skills, including but not limited to reading, vocabulary, learning, foreign language, verbal or math skills; intelligence or I.Q. or that of the user's children; attention or concentration levels; or memory, unless at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

III.

It is further ordered, That respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication:

A. Regarding the performance, benefits, efficacy, or safety of any food, drug, or device, as those terms are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, or dietary supplement, unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates such representation.

B. Regarding the performance, benefits, efficacy or safety of any product or service (other than a product or service covered under Part III.A herein), unless, at the time of making such representation, respondents possess and rely upon competent and reliable evidence,

which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

IV.

It is further ordered, That respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

V.

It is further ordered, That respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Representing, directly or by implication, that consumers can receive a refund, through such terms as "money-back guarantee" or similar terms, unless respondents refund the full purchase price at the consumer's request in accordance with the provisions of Part V.B herein;

B. Failing to refund the full purchase price in accordance with the terms of a guarantee, warranty or refund policy within a reasonable period of time after the consumer complies with the conditions for receiving a refund that are stated clearly and prominently in the

advertisement or solicitation. For purposes of this Part, a "reasonable period of time" shall be:

1. That period of time specified in respondents' advertisement or solicitation if such period is clearly and prominently disclosed in the advertisement or solicitation; or

2. If no period of time is clearly and prominently disclosed in the advertisement or solicitation, a period of thirty (30) days following the date that the consumer complies with the conditions for receiving a refund that are stated clearly and prominently in the advertisement or solicitation.

VI.

It is further ordered, That respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, individually and as an officer of said corporation, are jointly and severally liable for consumer redress as provided herein:

A. Not later that the date this order becomes final, respondents shall deposit into an escrow account to be established by the Commission for the purpose of receiving payments due under the provisions of this order ("first escrow account"), the sum of $150,000. These funds, together with accrued interest, less any amount necessary to pay the costs of administering the first escrow account and redress program herein, shall be used by the Commission or its representative to provide refunds to any consumers:

1. Who, between the dates of October 15, 1995, and the date this order becomes final, have returned or return any product(s) purchased from respondents to respondents for a refund within thirty days of their receipt of the product(s); and

2. Who have not previously received either a full refund or a full credit from a credit card issuer for the purchase of the product(s).

B. Any funds remaining in the first escrow account after refunds have been paid to consumers under Part VI.A herein, in the discretion of the Commission:

1. Shall be used to provide redress to purchasers of the Learning Machine who request a refund not later than sixty (60) days after the date this order becomes final and have not previously received either a refund pursuant to Part VI.A herein, a full refund from respondents, or a full credit from a credit card issuer for the purchase of the product(s);

2. Shall be used to provide redress to purchasers who, prior to October 15, 1995, returned, or contacted respondents for authorization to return, any product(s) purchased from respondents to respondents for a refund within thirty (30) days of their receipt of the product(s); have not previously received either a full refund or a full credit from a credit card issuer for the purchase of the product(s); and whose identities become known to respondents or the Commission within sixty (60) days after the date this order becomes final;

3. Shall be used to pay any attendant costs of administration; and/or

4. Shall be paid to the United States Treasury.

C. At any time after this order becomes final, the Commission may direct the escrow agent to transfer funds from the first escrow account, including accrued interest, to the Commission to be distributed as herein provided. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission, provided that the manner of distribution chosen by the Commission comports with the terms of this Agreement. The Commission, or its representative, shall in its sole discretion select the escrow agent. Costs associated with the administration of the first escrow account and refund program provided herein, if any, shall be paid from funds in the first escrow account.

D. Respondents relinquish all dominion, control and title to the funds paid into the first escrow account, and all legal and equitable title to the funds shall vest in the Treasurer of the United States and in the designated purchasers. Respondents shall make no claim to or demand for the return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of respondents, respondents acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

E. Not later than the date this order becomes final, respondents shall deposit into a second escrow account to be established by the Commission for the purpose of receiving payments due under the provisions of this order ("second escrow account"), the sum of $45,000. These funds, together with accrued interest, less any amount necessary to pay the costs of administering the escrow account and redress program herein, shall be used by the Commission or its representative to provide refunds to consumers if refunds owed to consumers pursuant to Parts VI.A and VI.B herein exceed the amount of money in the first escrow account.

F. At any time after this order becomes final, the Commission may direct the escrow agent to transfer funds from the second escrow account, including accrued interest, to the Commission to be distributed as herein provided. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission, provided that the manner of distribution chosen by the Commission comports with the terms of this Agreement. The Commission, or its representative, shall in its sole discretion select the escrow agent. Costs associated with the administration of the second escrow account and refund program provided herein, if any, shall be paid from funds in the second escrow account. Any funds remaining in the second escrow account after all consumers have received refunds pursuant to Part VI.A, VI.B.1, VI.B.2, and VI.E herein shall be returned to respondents. If no funds from the second escrow account are needed to provide redress to consumers as provided herein, the funds in the second escrow account, together with accrued interest, shall be returned to respondents within seventy-five (75) days after the date this order becomes final. If funds from the second escrow account are needed to provide refunds to consumers as provided herein, the funds remaining in the second escrow account, together with accrued interest, less any amount necessary to pay the costs of administering the escrow account and redress program herein, shall be returned to respondents within one hundred twenty (120) days after the date this order becomes final.

VII.

It is further ordered, That within three (3) days after the date this order becomes final, respondents shall, to the extent available,

provide to the Commission, in computer readable form (standard MS-DOS diskettes or IBM-mainframe compatible tape) and in computer print-out form, a list of:

A. The name and address of all consumers in the United States who purchased the Learning Machine;

B. The name, address, and date of refund of all consumers in the United States who purchased the Learning Machine and received a full refund from respondents;

C. The name, address, and date of credit of all consumers in the United States who purchased the Learning Machine and received a full credit from a credit card issuer for the purchase of the product(s); and

D. The name, address, and date of refund of all consumers in the United States who purchased any product(s) from respondents and received a full refund between October 15, 1993 and October 15, 1995.

VIII.

It is further ordered, That for three (3) years after this order becomes final, respondents, and their successors and assigns, shall maintain and upon request make available to the Commission within three (3) business days:

A. Documents and records demonstrating the manner and form of respondents' compliance with Part VI of this order; and

B. Copies of all correspondence and memorializations of other communications to or from any consumer regarding refunds or requests for refunds for any product(s) purchased from respondents.

IX.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission or its staff 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 their possession or control that contradict, qualify, or call into question such representation, or the basis upon which respondents relied for such representation, including but not limited to, including complaints from consumers, and complaints or inquiries from governmental organizations.

X.

It is further ordered, That respondent Zygon International, Inc., its successors and assigns, shall:

A. Within thirty (30) days after service of this order, provide a copy of this order to each of its current principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order; and

B. For a period of five (5) years from the date of entry of this order, provide a copy of this order to each of its future principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order within three (3) days after the person commences his or her responsibilities.

XI.

It is further ordered, That respondent Zygon International, Inc., its successors and assigns, shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in its corporate structure, including but not limited to dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or affiliates, the planned filing of a bankruptcy petition, or any other change in the corporation that may affect compliance obligations arising out of this order.

XII.

It is further ordered, That respondent Dane Spotts shall, for a period of seven (7) years from the date of entry of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment involving the advertising, offering for sale, sale, or distribution of any consumer product or service. Each notice of affiliation with any new business or employment shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

XIII.

This order will terminate on September 24, 2016, 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 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.

XIV.

It is further ordered, That respondents shall, within sixty (60) days after 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 they have complied with this order.

IN THE MATTER OF

HOME SHOPPING NETWORK, INC., ET AL.

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

Docket 9272. Complaint, March 2, 1995--Decision, Sept. 26, 1996

This consent order requires, among other things, the Florida-based corporation and two of its subsidiaries to possess scientific evidence to support any claims: that a food, food or dietary supplement, or drug cures, treats or prevents any disease or has any effect on the structure or function of the human body; and about the performance or benefits of efficacy of any smoking-cessation program, product or service.

Appearances

For the Commission: *Lisa Kopchik.*

For the respondents: *Basil Mezines, Glenn A. Mitchell* and *David U. Fierst, Stein, Mitchell & Mezines,* Washington D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Home Shopping Network, Inc., Home Shopping Club, Inc., and HSN Lifeway Health Products, Inc., corporations, hereinafter sometimes referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Home Shopping Network, Inc. ("HSN") is a Delaware corporation, with its offices and principal place of business at 11831 30th Court North, St. Petersburg, Florida. HSN is a holding company for numerous subsidiaries, including Home Shopping Club, Inc. and HSN Lifeway Health Products, Inc. HSN, through its subsidiaries, is principally engaged in the marketing of a variety of consumer products by means of live, customer-interactive, televised sales programs and through mail-order brochures and other literature.

Respondent Home Shopping Club, Inc. ("HSC") is a Delaware corporation, with its offices and principal place of business at 11831 30th Court North, St. Petersburg, Florida. HSC is a wholly-owned subsidiary of HSN. HSC produces and disseminates advertising in the form of television programming, including "Spotlight on Ruta Lee," that is disseminated through cable channels, HSN's broadcast stations, and satellite dish receivers. This programming directly markets consumer products to viewers.

Respondent HSN Lifeway Health Products, Inc. ("Lifeway") is a Delaware corporation, with its offices and principal place of business at 11831 30th Court North, St. Petersburg, Florida. Lifeway is a wholly-owned second-tier subsidiary of HSN, and has advertised, offered for sale, and sold vitamins and health-related products ("Lifeway products") through television advertising, including "Spotlight on Ruta Lee."

The aforementioned respondents cooperated and acted together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents have advertised, offered for sale, sold, and distributed spray vitamin products, including Life Way Vitamin C and Zinc Spray, Life Way Antioxidant Spray, and Life Way Vitamin B-12 Spray; and a smoking-cessation aid, Smoke-Less Nutrient Spray. These products are foods and/or drugs, as the terms "food" and "drug" are defined in Sections 12 and 15 of the Federal Trade Commission Act.

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

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for Lifeway products, including but not necessarily limited to the attached Exhibit A, a transcription of a television advertisement entitled "Spotlight on Ruta Lee." This advertisement contains the following statements:

(a) Ruta Lee: "And you know how much of that vitamin pill I am absorbing? If I'm exceedingly lucky, five percent. The rest of that vitamin pill gets squashed through me and gets flushed down the toilet the first time I go piddle. So, 95% of my money is wasted going down the toilet. 95% of my vitamin is not even getting into my body....

....Now, let me tell you about the three different two-packs that we have at $19.95.... Instead of flushing that down the toilet, you are getting it into your body. Now, I think that is remarkable. That just by spraying. [She sprays into her mouth.] There

I am. I've taken my vitamins. . . I've got my vitamins. Now you do this four times a day. And you have a month's supply in every tube." [Exhibit A, page ii-iii]

(b) Ruta Lee: "Vitamin C and Zinc. Just spray directly on your throat. Spray in your mouth. Kills rhinovirus on contact. You can avoid colds forever. . . . So, Vitamin C and Zinc. You can avoid colds for the rest of your life." [Exhibit A, pages iii-iv]

(c) Ruta Lee: "I get calls from dentists who say 'tell everybody that's listening, Ruta, if they have a mouth lesion or something' -- Christie, our makeup lady, just had her big molars pulled back here [pointing to the back of her mouth].
I gave her some Vitamin C and Zinc to spray directly on the lesion, the whole inner mouth. Zinc is a healer, and we forget how good it is.
You get cold sores, spray it directly on. You get cracks in the corners of your mouth, spray it directly on. It's delicious." [Exhibit A, page iv]

(d) Ruta Lee: "But, you know every once in a while--"
Show host: "You need a boost."
Ruta Lee: "Sure. Your butt starts to drag and you say Oh, God, I need a cup of coffee, or, Gee, I think I need a candy bar or I need a coke. You don't need any of that which goes to nothing but stuff on your big, lard butt."
Show host: "Plus you end up with the highs and lows when you're getting your fixes--"
Ruta Lee: "Yeah. A sugar high is a phony high. It raises you up and then it drops you like a ton of bricks."
Show host: "Right, right."
Ruta Lee: "Vitamin B-12. All you do is spray, and honey, it's like two martinis. Hits you, oh -- happy time. Its absolutely phenomenal." [Exhibit A, pages iv-v]

(e) Ruta Lee: "Alcohol, by the way, depletes B-12 just like that [she snaps her fingers]. If you're going to be sipping during the holidays, and we all are, and I'm not saying you should deny yourself a cocktail or a little Christmas grog, take your Vitamin B-12. Great for hangovers on New Year's Eve.
It's the greatest thing for a hangover. It's absolutely fabulous." [Exhibit A, page v]

(f) Ruta Lee: "We've got the magic one of them all. The one you've been hearing about and reading about in every newspaper, in every health periodical, in every beauty periodical. You have been reading about the antioxidants. They are the buzz-words of the 90s when it comes to health and beauty. And believe me, I don't care how much makeup you put on, your beauty starts from inside. The antioxidants are the things that keep your immune system working well. It is firmly believed by most medical authorities, and everybody in research, that Vitamins A, C and E are the key to keeping your immune system working. Why does your immune system have to work? I'll tell you why. Because whether it is a cold or whether it is any of the life-threatening diseases that are all around us -- that's what happens. You pick them up if your immune system isn't working for you. A, C and E are the vitamins that have been shown, and are now widely believed to be the things that keep your immune system working. . . . You want to stay young and gorgeous without 52 facelifts? God promises us in the bible 120 years. Honey, I intend to go into my coffin looking damn good. Why? Because I'm going to spray my fabulous A, C and E. It's going to keep me young. I'm not going to get the lines. I'm going to keep the sparkle in my eyes." [Exhibit A, page vi]
[sic]

(h) Ruta Lee: "Dear ones, let me tell you about this smoke-less spray. The same process works. All you do is open wide, spray. And it satisfies your need for a cigarette. Somehow a message goes from the brain to the body that says 'stop quivering. You've satisfied a need.' And you haven't done it with a drug. You've done it with vitamins, minerals, herbs and spices that tickle your tongue and tickle your fancy. . . . Now, if you're a smoker, you know here in your mind and in your soul that you should quit smoking. And its very hard to do. I promise you this works. You get our money-back guarantee. It works with just the natural vitamin and mineral and herb and spice ingredients." [Exhibit A, page x]

(i) Ruta Lee: "I've had smokers call to tell me they have been smoking for 20, 30, 40 years and that they are able to quit smoking in five days, able to quit cold-turkey. . . . And you can do it. In an easy, simple way. Let's take a call.

. . . .

. . . Hi, Sally. . . . Are you a smoker?"
Caller: "No. I quit three years ago with your sprays."
Ruta Lee: "Oh! Hallelujah, Sally! Well, Sally, you obviously have been with me right since the beginning, haven't you honey?"
Caller: "Yeah --"
Ruta Lee: "Three years --"
Caller: "I know if you sell anything, it's bound to work."
Ruta Lee: "Oh, bless you. You know -- you're bringing up a good point. You prove a point. I am starting my fifth year on the air with my products. The diet sprays, the vitamin sprays, and the smoke-less spray. Sally can attest to this. I wouldn't have lasted for five minutes, five weeks, if it didn't work. Because we guarantee you your money back. Sally, how much did you smoke?"
Caller: "Three packs a day."
Ruta Lee: "Whoo!"
Caller: "For thirty years."
Ruta Lee: "Thirty years, three packs a day. And, I don't remember now, how long did it take you to quit?"
Caller: "A month."
Ruta Lee: "A month. Like I said, thirty days. Make a habit, thirty days to break one. And Sally, it was fairly easy, wasn't it?"
Caller: "Yeah -- very easy."

. . . .

Ruta Lee: "Hallelujah! Are you hearing this, ladies and gentlemen? Sally, who three years ago quit smoking in about a month's time, and she had smoked for thirty years, three packs a day." [Exhibit A, pp. xi-xii]

(j) Ruta Lee: "Because you're [the caller is] a source of inspiration to an awful lot of people out there who are sitting back on their rusty-dusty saying 'Oh, I don't know. I tried to quit smoking, but I gained weight.' I've had so many callers tell me that they don't gain weight when they use this spray. "
Caller: "Oh, I lost weight when I used yours."
Ruta Lee: "Hooray! You lost weight." [Exhibit A, page xiii]

(k) Ruta Lee: "It's guaranteed to work. It doesn't put chemicals into your body. All natural given, vitamins, minerals, herbs and spices. You won't be shaky with anxiety. Just spray every time you want a cigarette. But, most of all, get to the phone. Call now. Think about this as a Christmas gift for somebody that you want

to stop smoking. . . . Don't wait. Don't wait until the doctor says you're gonna die if you don't stop smoking. Use your brains that God gave you. God gave you one body to last you a lifetime. Don't spit in His eye by smoking. Dear ones, what can I do but say hallelujah for this product. It works. But it won't work unless you get up off your duff, get to the telephone, use your finger to dial, and then use your finger to spray before you put that cigarette in your mouth." [Exhibit A, page xiv]

PAR. 5. 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, respondents have represented, directly or by implication, that:

(a) The vitamins in Life Way Spray Vitamins are more fully absorbed by the human body than vitamins taken in pill form;

(b) Life Way Vitamin C and Zinc Spray, sprayed directly in the mouth at the dosages recommended, heals lesions in the mouth, cold sores on the mouth, and cracking of the corners of the lips for users generally;

(c) Life Way Vitamin C and Zinc Spray, sprayed directly in the mouth at the dosages recommended, prevents common colds;

(d) Life Way Vitamin B-12 Spray, at the dosages recommended, effectively treats symptoms related to hangovers;

(e) Life Way B-12 Vitamin Spray, at the dosages recommended, increases energy for users generally;

(f) Life Way Anti-Oxidant Spray, at the dosages recommended, ensures the proper functioning of the immune system;

(g) Life Way Anti-Oxidant Spray, at the dosages recommended, reduces the risk of contracting infectious diseases;

(h) Life Way Anti-Oxidant Spray, at the dosages recommended, prevents facial lines;

(i) Life Way Smoke-Less Nutrient Spray enables smokers, regardless of how long they have smoked or how much they smoke, to stop smoking easily; and

(j) Life Way Smoke-Less Nutrient Spray satisfies the physiological urge to smoke a cigarette and eliminates the quivering, anxiety and weight gain attendant with quitting smoking.

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, respondents have represented, directly or by implication, that at the

time they made the representations set forth in paragraph five, they possessed and relied upon a reasonable basis that substantiated such representations.

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

PAR. 8. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

TRANSCRIPT OF SPOTLIGHT ON RUTA LEE

Show host:	How are you?
Ruta Lee:	Ho Ho Ho!
Show host:	That was so original, wasn't it?
Ruta Lee:	That was so original, and honey, the whole point is that the Christmas season is here. We've already done ourselves in on Halloween by eating everything that the kids brought home.
Show host:	I know.
Ruta Lee:	And now we've got the -- whole Christmas season coming up.
Show host:	And Thanksgiving .
Ruta Lee:	And you know it is such a tension-ridden season.
Show host:	Right, right.
Ruta Lee:	It's suppose to be jolly and warm and wonderful and mellow.
Show host:	Hum hum.
Ruta Lee:	And instead it's ahhh! [shaking both hands in the air] It's because you haven't got it put together.
Show host:	That's right. We all do this too. And you think you've got a year -- but you know, you still, something --
Ruta Lee:	Right. Well, I start shopping. I mean I shop on Home Shopping Network all the time. And when I see the real bargains, I get like twelve of something, or six of something, and then just put them aside, and then whenever a birthday or a holiday comes along, I've got something that I can give.
Show host:	You're prepared that way.
Ruta Lee:	Generic gifts. Not very thoughtful, but smart on the pocketbooks.
Show host:	That's right.
Ruta Lee:	And that's the thing to do here. Now listen. We're talking about stress, dear ones. I live a very stressful life. Lord knows, you live a very stressful life. And you know what, we're not rare.

Everybody out there is in stress. Just getting out of your driveway into the traffic is stressful. I've got the answer to your prayers, dear ones. Stress does one thing beyond anything else. And that is it depletes your body of every vitamin and mineral that you've got in it. And you know what you've got in it? Not very much. Because if you really stop and think about how we live such hectic lives, we depend on convenience foods, we depend a lot on fast foods. Even if we're good homemakers, you know that the grains are stored in silos in preservatives so that they shouldn't rot. Then they put them in the grounds that are also filled with chemicals. The little vegetable sticks its little plant root up out of the ground and ssshhh, you hit it with spray to get the bugs off of it. Right? Then you take it to the marketplace, you put it in a preservative. You keep it on a shelf in a preservative and then you get it home and you zap it in the microwave over, right? What kind of minerals and vitamins are we getting. Absolutely nothing. So, I know a lot of us are smart enough to take our vitamin pills. And if you are taking some that are great, more power to you. I can't swallow pills. I don't know about you, but --

Show host: No, I can't either.

Ruta Lee: I think you're very sensitive about swallowing. And if I get it down, it sort of chokes half way down. And then it gunks and I'm coughing and gagging. If it finally makes it down to my stomach, then it sits there and it stews for a while. And I'm burping that awful taste.

Show host: Right, right.

Ruta Lee: And it repeats on me all day long. It feels like its burning a hole in my stomach. And you know how much of that vitamin pill I am absorbing? If I'm exceedingly lucky, five percent. The rest of that vitamin pill gets squashed through me and gets flushed down the toilet the first time I go piddle. So, 95% of my money is wasted going down the toilet. 95% of my vitamin is not even getting into my body. Sweeties, I've got the greatest vitamin product this world has ever seen. Regis Philbin says it's the only civilized way to take vitamins. Look, all I do is open wide. [She sprays vitamins into her mouth from a tube.] That's it. I've taken my vitamins. Now you're probably thinking, oh, that must taste pukey. Its fabulous. It's mouth-refreshing. It's pleasant. And look what's happened. I've got my vitamins. Now you do this four times a day. And you have a month's supply in every tube. We're bringing them to you in two-packs because that's the way you asked for them. And they're $18.95 which really throws me because they used to me $19.95.

Show host: Exactly.

Ruta Lee: I think we're being very nice because it's the holiday season coming up or something.

Show host: Right.

Ruta Lee: Grab them while you can. This is my last visit for this month. Please, dear ones, think about these for your children and for yourself. Now, let me tell you about the three different two-packs that we have at $19.95. And just think, instead of flushing $19.00 -- well, let's see. What would 95% of $19.95 be? Ahh -- $17.00 or something or other. Instead of flushing that down the toilet, you are getting it into your body. Now, I think that is remarkable. That just by spraying. [She sprays into her mouth.] There I am. I've taken my vitamins. Four times a day. You've got a month's supply in every tube. Let me tell you first about the Vitamin C and Zinc. As you're probably noticing, I am a little nasal. I've got a sinus condition. That could very easily develop into a nasty throat infection.

Show host: Right, the draining. Ah -- it's such a horrible feeling.

Ruta Lee: You know. When you're dripping the stuff down your throat. The drainage camps there. It creates a beautiful bed of mucous for all the bacteria to sit in. Vitamin C and Zinc. Just spray directly on your throat. Spray in your mouth. Kills rhinovirus on contact. You can avoid colds forever. If you feel one coming on, you'd have to take two bottles of Vitamin C and Zinc and it would burn a hole in your stomach. Especially if have a sensitive stomach. And if you're on any other medication, you don't want to swallow more stuff. This way, it doesn't interfere with any other medication you're taking. So, Vitamin C and Zinc. You can avoid colds for the rest of your life. I get calls from dentists who say "tell everybody that's listening, Ruta, if they have a mouth lesion or something" -- Christie, our makeup lady, just had her big molars pulled back here [pointing to the back of her mouth] --

Show host: Right, yes.

Ruta Lee: I gave her some Vitamin C and Zinc to spray directly on the lesion, the whole inner mouth. Zinc is a healer, and we forget how good it is.

Show host: A healer, right. That is so important.

Ruta Lee: You get cold sores, spray it directly on. You get cracks in the corners of your mouth, spray it directly on. It's delicious.

Show host: And immediately it dissolves. It's different from some of the product creams.

Ruta Lee: That's it. That's it. Its right there and its doing its magic. So, that is enough about Vitamin C and Zinc except that we live in closed-in environments. You know? You can't open a hotel room window. Through the office, you can't open a window. If anybody's got a cold, it gets passed around through the ventilation system.

Show host: Right.

Ruta Lee: Have this on hand all the time. [Holding up a tube of Vitamin C and Zinc.] Carry it with you and spray.

Ruta Lee: Now, Vitamin B-12. That, to me, is my mother's milk. Its the source of life for me. I'm a high-energy lady. This sweet lady, Bobbi, is even more energetic than I am, if that is possible.

Show host: No, no, no, no.

Ruta Lee: But, you know every once in a while --

Show host: You need a boost.

Ruta Lee: Sure. Your butt starts to drag and you say Oh, God, I need a cup of coffee, or, Gee, I think I need a candy bar or I need a coke. You don't need any of that which goes to nothing but stuff on your big, lard butt.

Show host: Plus you end up with the highs and lows when you're getting your fixes --

Ruta Lee: Yeah. A sugar high is a phony high. It raises you up and then it drops you like a ton of bricks.

Show host: Right, right.

Ruta Lee: Vitamin B-12. All you do is spray, and honey, it's like two martinis. Hits you, oh -- happy time. Its absolutely phenomenal. And you're not doing yourself in with alcohol and sugars and the sat-fat that are phoney and bad for you. Alcohol, by the way, depletes B-12 just like that [she snaps her fingers]. If you're going to be sipping during the holidays, and we all are, and I'm not saying you should deny yourself a cocktail or a little Christmas grog, take your Vitamin B-12. Great for hangovers on New Year's Eve.

Show host: I never thought of that.

Ruta Lee: It's the greatest thing for a hangover. It's absolutely fabulous. Now look, this is also a great way to get vitamins into your kids. Our -- Terri Toner, our --

Show host: Jonelle loves them too.

Ruta Lee: You know, I know she does. Terri Toner's pediatrician said this is the greatest thing that came down the pike for kids because we are a pill-popping society. We take pills for vitamins. We have a headache, we take a pill. We're feeling blue, we take a pill. We're feeling too up and we can't sleep, we take a pill. And we get our kids so used to taking pills, especially with vitamins, that when someone comes along in the school yard and says 'Hey, kid. You want a blue? Hey, kid. You want a yellow?' He says that this is a great way to get vitamins into your kids and get them out of the pill-popping mode.

Show host: Away from the pills. Exactly. A terrific way.

Ruta Lee: Exactly. Now, last but not least, and girls you can listen while you are on the phone. We are going to be running out of time so shortly. It's my last visit until next month. Do not kick yourself in your behind for the rest of the month saying 'why didn't I listen? Why didn't I do it?' We've got the magic one of them all. The one you've been hearing about and reading about in every newspaper, in every health periodical, in every beauty periodical. You have been reading about the antioxidants. They are the

buzz-words of the 90s when it comes to health and beauty. And believe me, I don't care how much makeup you put on, your beauty starts from inside. The antioxidants are the things that keep your immune system working well. It is firmly believed by most medical authorities, and everybody in research, that Vitamins A, C and E are the key to keeping your immune system working. Why does your immune system have to work? I'll tell you why. Because whether it is a cold or whether it is any of the life-threatening diseases that are all around us -- that's what happens. You pick them up if your immune system isn't working for you. A, C and E are the vitamins that have been shown, and are now widely believed to be the things that keep your immune system working. What happens with oxidants is that they attack the oxygen-free radicals that our own bodies create because of the air we breath, because of the pollutants we take in, like tobacco and alcohol and etc. They naturally metabolize and they are nasty little things like termites that romp through your body randomly and attack healthy, live cells that keep you young and keep you healthy. And when they bite into one cell, it attacks another one like a domino theory. The oxygen-free radicals are put out of your body by the oxygenators. The A, C and E are just like a fire hose coming in and putting out the fire. Its a miracle. You want to stay young and gorgeous without 52 facelifts? God promises us in the bible 120 years. Honey, I intend to go into my coffin looking damn good. Why? Because I'm going to spray my fabulous A, C and E. It's going to keep me young. I'm not going to get the lines. I'm going to keep the sparkle in my eyes. Let's take a call.

Show host: Get to the phone calls, ladies and gentlemen. We have only a very short period of time. Hi, you're on the air with Ruta. And what is your name please?

Caller: Sally.

Ruta Lee: Valerie, did you say?

Caller: Sally.

Show host: Sally.

Ruta Lee: Oh, Sally. I'm sorry. I've got to turn up my speaker back here. I'm reaching back here. I'm not scratching. I'm turning you up. Sally, where are you calling from?

Caller: I'm calling from Noridge, New York. I used the Vitamin C last year, and I worked all winter long and I didn't have a cold.

Ruta Lee: Whoo! [clapping loudly] You hear that? Isn't it a miracle? You know, I think our body tells us when we are starting to feel a little puny. And if we will just pay attention to it and give it what it needs. And a blast of Vitamin C and Zinc can surely prevent a lot of troubles. And you used it all winter?

Caller: Yes. And I didn't have any colds at all. I've started using it again this winter.

Ruta Lee: Good for you, sweetheart. I hope you're trying these marvelous antioxidants as well.

Caller: Yeah. I have them too.

Ruta Lee: Now, I want you to tell everybody how these vitamins taste?

Caller: Tastes almost like mint.

Ruta Lee: They are nice, aren't they?

Caller: Very nice.

Ruta Lee: 'Cause I'm sure people think, 'Ooh'. I know how nasty vitamins taste when you swallow them, and how they repeat on you. And these are like a mouth freshener, aren't they?

Caller: Um hum.

Ruta Lee: Well, Sally, honey, I'm so glad that you're going into this cold and flu season taking good care of yourself.

Caller: Yes, and that's another thing. My doctor knows that I have an awful reaction to the flu shots.

Ruta Lee: Oh, yes.

Caller: And she lets me use Vitamin C and Zinc all winter instead.

Ruta Lee: That's fabulous. So, you showed this to your doctor and she said 'spray away,' didn't she?

Caller: Yeah.

Ruta Lee: You know, that's another thing you brought up, Sally, that I want to mention. You can't overdose. We suggest -- the label says spray four times for the daily requirements. I think that sometimes our bodies need more than the daily requirement, so I spray more. Now, I don't want this to get into my throat, so I'm spraying all the time directly onto my throat. And, it's going to do the job. Thank you for calling, sweetheart. Have a wonderful Thanksgiving.

Caller: You too.

Ruta Lee: And I urge everybody out there to listen to our darling sister Sally. Get on the phone. Order now. If you're a new buyer, hang on. Don't get discouraged because you have to hold on. The lines are so busy. This is the time. Now look, I also want to mention something else. I have gotten calls from the nursing staff and professions and the people who work in the medical service industry. And the nurses in the nursing homes for the aged say 'Ruta, you don't know what a boom this is for our senior citizens. Because as they get older, they seem to lose their appetite. Nothing tastes as good, and if they are not feeling well or if they are on medication of some kind, all I do is say 'Open wide' and spray this. It tastes good and it gives them a pickup. It puts a sparkle back in their life. The nurses down at HMS Anderson that take care of the little babies who have leukemia and who are on radiation and chemotherapy called to say 'you don't know how -- when you are on radiation and chemotherapy' -- and we have so many people out there who are, thank God, getting rid of cancer. But they have to go through the process. You get nauseous and pukey and puny and you don't want to eat. But you

have got to keep your strength up. This is the way to do it. Just spray this in. Get it into your system and not flush 95% of it down the toilet.

Show host: So, please. Just stay on the phone lines, ladies and gentlemen. We are going to continue to take the calls coming through on the vitamins. But, we have to offer you the chance to have, yes, your holder. But more important than that, as we talk about the impact of the holidays, a lot of people are going to be grabbing the cigarette and smoking more than they normally do due to stress. So, for people out there -- and this is Ruta's last day here. I mean this is the time to make the call. If you were with us yesterday, or the day before and you've heard about it, make the call today. Let's take a look right now, in a two-pack, which allows you the chance to either have two for yourself or use one for a friend, the smoke-less spray. Two packs today at only $18.95. And the holder. I can't believe we have any left. A few hundred left of this incredible holder.

Ruta Lee: Very --

Show host: A constant reminder of the importance of using these products.

Ruta Lee: And you know its also such a beautiful gift.

Show host: That's a great idea.

Ruta Lee: You know it comes in this wonderful, little velvet pouch. And, come over here so I can show you. Can you see -- oops -- here is -- there it is --

Show host: There you go.

Ruta Lee: It comes in a beautiful little drawstring velvet pouch. The point is, don't keep it in the pouch. Put it around your neck like this. And one of the girls called me -- I've got to share this with you. She said 'Ruta, you've changed my life. Not only am I happy and healthy. But I was spraying my vitamins as I was going down in the elevator one day because my butt was dragging and I thought, gee, I'm tired. I need some of my vitamins.' And she said a cute guy was standing next to me and he said 'what are you doing?' And she said, 'well, I'm spraying my vitamins.' And they got to talking and, to cut a long story short, he took her out for drinks and they are now married. So you see, it's a great conversation-starter as well. Dear ones, let me tell you about this smoke-less spray. The same process works. All you do is open wide, spray. And it satisfies your need for a cigarette. Somehow a message goes from the brain to the body that says 'stop quivering. You've satisfied a need.' And you haven't done it with a drug. You've done it with vitamins, minerals, herbs and spices that tickle your tongue and tickle your fancy. Now, I promise you, these things used to be available in a fancy catalogue for about $28.00, $29.00 a piece. I'm not talking about the holder. I'm talking about just the spray itself. We bring you two of them, because I made a pledge that I would never bring you anything that I didn't believe it, down to the tips of my toes and what is the best

available at the very lowest price. Sweeties, there they are. Two for $18.95 and the holder for $14.95. What a treat. Either for yourself or maybe a smoker in your family. Now, listen to me. You know you've got to quit smoking. But this is a very stressful season and you're going to be reaching for a cigarette all the time. Somehow smoking and drinking seem to go together. Its cocktail time. Its Christmas party time. Its celebration time. And they seem to go together. It would be quite wonderful if you could carry this with you the way I do with this beautiful piece of jewelry and spray every time you think you want a cigarette. Now, if you're a smoker, you know here in your mind and in your soul that you should quit smoking. And its very hard to do. I promise you this works. You get our money-back guarantee. It works with just the natural vitamin and mineral and herb and spice ingredients. Money-back guarantee. Does any other product promise you a money-back guarantee? Does the patch, which just feeds you more nicotine? Does the nicorette gum, which feeds just more nicotine? Do you know that all of the products out there on the marketplace that you might go to out of panic all say if you are on heart medication, do not use. If you are pregnant, do not use. If you are on high blood pressure medicine, do not use. If you overdose, go to your nearest poison center. I don't want you to put that crap in your body. I want you to spray natural, God-given vitamins and minerals. And you know what happens? A message goes to your body that says quit shaking. You can make it for another ten minutes without a cigarette. You can make it for another 1/2 hour without a cigarette. I've had smokers call to tell me they have been smoking for 20, 30, 40 years and that they are able to quit smoking in five days, able to quit cold-turkey. I always say it takes a month to make a habit, it takes a month to break one. So, think about doing this as a Christmas gift to your family. Open this up in front of your family and say 'Family, as a Christmas gift to all of you because you love me, I 'm going to quit smoking. I promise you.' And you can do it. In an easy, simple way. Let's take a call.

Show host: Hi, you're on the air with Ruta. And what is your name, please?

Caller: Sally.

Ruta Lee: Sally?

Caller: Yes. She just talked to me.

Ruta Lee: Yes. Hi, Sally. Are you back again? Are you a smoker?

Caller: No. I quit three years ago with your sprays.

Ruta Lee: Oh! Hallelujah, Sally! Well, Sally, you obviously have been with me right since the beginning, haven't you honey?

Caller: Yeah --

Ruta Lee: Three years --

Caller: I know if you sell anything, it's bound to work.

Ruta Lee: Oh, bless you. You know -- you're bringing up a good point. You prove a point. I am starting my fifth year on the air with my products. The diet sprays, the vitamin sprays, and the smoke-less spray. Sally can attest to this. I wouldn't have lasted for five minutes, five weeks, if it didn't work. Because we guarantee you your money back. Sally, how much did you smoke?

Caller: Three packs a day.

Ruta Lee: Whoo!

Caller: For thirty years.

Ruta Lee: Thirty years, three packs a day. And, I don't remember now, how long did it take you to quit?

Caller: A month.

Ruta Lee: A month. Like I said, thirty days. Make a habit, thirty days to break one. And Sally, it was fairly easy, wasn't it?

Caller: Yeah -- very easy.

Ruta Lee: It didn't kill you.

Caller: Yeah. You just had to put that with your cigarettes. And instead of using your cigarettes, you --

Ruta Lee: When you got it, we didn't even have the holder then. You know how easy it is now to have this thing because every time it hits you between your boobies, it reminds you. But I always say if you don't get the holder, it doesn't matter. Take the spray, put it in your car -- pack of cigarettes, wrap a rubber band around it, and then just before you reach for a cigarette, spray. Course, I like having a holder because then I can say, put your cigarettes upstairs, and when you're downstairs you don't want to run up the stairs. And, Sally, you know better than anybody that $18.95 is about what a carton of cigarettes cost. And --

Caller: I don't know what they are now.

Ruta Lee: Well now with Mr. Clinton's sin tax --

Caller: I just go by the counter and look down at them and say 'I'm so glad I don't have to buy them.'

Ruta Lee: Hallelujah! Are you hearing this, ladies and gentlemen? Sally, who three years ago quit smoking in about a month's time, and she had smoked for thirty years, three packs a day. Do you know, Sally, that in thirty years -- how much money did you burn up? I mean, we're talking probably about $50,000. That you burned up. And now, you are saving -- if -- if two pack a day is -- what is it honey, we figured it out. Three packs a day. You've got to do it. Two packs is $150.00 a month. Three packs would be about $2 --a little more -- $225.00 a month. That you're saving.

Caller: Yeah.

Ruta Lee: Think about that. And not only are you saving that. But, you know what? You're not gonna have to spend money on a fancy funeral because you're gonna outlive everybody.

Caller: But I feel a lot better than I have in years.

Ruta Lee: God bless you for being my friend, Sally. I once again wish you a very, very, happy, happy Thanksgiving Day. A very blessed Christmas. Call me during the Christmas holidays. You know? When I get back here in the middle of December, and let me know how you're doing, okay?

Caller: Okay.

Ruta Lee: Because you're a source of inspiration to an awful lot of people out there who are sitting back on their rusty-dusty saying 'Oh, I don't know. I tried to quit smoking, but I gained weight.' I've had so many callers tell me that they don't gain weight when they use this spray.

Caller: Oh, I lost weight when I used yours.

Ruta Lee: Hooray! You lost weight.

Caller: And I got my girlfriend started on it this summer, so I'm hoping she's stopped. She's in Florida, so I haven't heard yet.

Ruta Lee: Well, God love you. And let me know what she says, okay?

Caller: Okay.

Ruta Lee: A great big hug and kiss, Sally. Bye, bye, angel.

Caller: Bye, bye.

Show host: Now, we have only one minute and 42 seconds left. This is the time to make the call. As Ruta has said, this is her last time here --

Ruta Lee: That's right.

Show host: And the next time will be after Thanksgiving.

Ruta Lee: Now look. This is for you. If you're not a smoker, isn't there somebody in your life that you love dearly who smokes? And if you are the smoker, remember this, that you're not just killing yourself. You're killing everybody around you with your secondary smoke. You're killing your children, your grandchildren. You're killing your pets, dear ones. It makes me crazy when I see young families out in restaurants. And the mother and father are smoking and they're saying 'eat your broccoli, dear, it's good for you. Eat your carrots, dear, it's good for you.' Children, you're killing your children. Not only are you killing them, you smell like a compost heap on fire. You know the grand kids come in and say 'I don't want to kiss grandma. She stinks.' It's guaranteed to work. It doesn't put chemicals into your body. All natural given, vitamins, minerals, herbs and spices. You won't be shaky with anxiety. Just spray every time you want a cigarette. But, most of all, get to the phone. Call now. Think about this as a Christmas gift for somebody that you want to stop smoking. Maybe young college people. Maybe someone that has suddenly starting smoking because they think it is chic. I got a call from a lady last month. And she said 'Ruta,' and she had called me a year or two ago and she said 'Ruta, we worked so hard, my husband and I, to save our money, put our kids through school. We thought we would go into our golden retirement years travelling and enjoying the money that we

earned.' Do you know what she said? 'Do you know where I'm travelling? To the nursing home where my husband is strapped to a machine that does his breathing for him.' She called me last month to say 'Darling Ruta. I wish this had been around five years ago and ten years ago when it would have made a difference in his lungs. My husband died.' She said 'Thank God, I have stopped. But, I could have had a lovely, long life with my husband thanks to your product. If it had just been around a few years before.' Don't wait. Don't wait until the doctor says you're gonna die if you don't stop smoking. Use your brains that God gave you. God gave you one body to last you a lifetime. Don't spit in His eye by smoking. Dear ones, what can I do but say hallelujah for this product. It works. But it won't work unless you get up off your duff, get to the telephone, use your finger to dial, and then use your finger to spray before you put that cigarette in your mouth. Just promise me that you'll do it. Try it. You have nothing to lose but a rotten, crappy habit that is not just killing you, but everybody around you. And, if you're not the smoker, get it for somebody you love who does smoke.

Show host: Ruta, thank you so much for being here.

Ruta Lee: You're an angel.

Show host: It's always great. Wonderful health.

Ruta Lee: Thank you for sharing your time.

Ruta Lee: Dear ones, hang on the phone. We'll take the call, but hang on the phone. Get in there and do it now.

Show host: So, do not hang up. Stay there. We'll continue to take all the calls coming through.

DECISION AND ORDER

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

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents of facts, other than jurisdictional facts, or of violations of law as alleged in the complaint issued by the Commission.

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

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

1. Respondent Home Shopping Network, Inc. is a Delaware corporation, with its principal office or place of business at 11831 30th Court North, St. Petersburg, Florida.

2. Respondent Home Shopping Club, Inc. is a Delaware corporation, with its principal office or place of business at 11831 30th Court North, St. Petersburg, Florida. Home Shopping Club, Inc. is a wholly-owned subsidiary of Home Shopping Network, Inc.

3. Respondent HSN Lifeway Health Products, Inc. is a Delaware corporation, with its principal office or place of business at 11831 30th Court North, St. Petersburg, Florida. HSN Lifeway Health Products, Inc. is a wholly-owned second-tier subsidiary of Home Shopping Network, Inc.

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

ORDER

DEFINITIONS

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

I.

It is ordered, That respondents Home Shopping Network, Inc., Home Shopping Club, Inc., and HSN Lifeway Health Products, Inc., corporations, their successors and assigns, by and through their officers, agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale or distribution of Life Way Vitamin C and Zinc Spray, Life Way Antioxidant Spray, Life Way Vitamin B-12 Spray, or any other food, food or dietary supplement, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication:

A. That such product:

1. Is more fully absorbed by the human body than any other product;
2. Heals lesions in the mouth, cold sores on the mouth, or cracking of the corners of the lips;
3. Prevents common colds;
4. Effectively treats symptoms related to hangovers;
5. Increases energy;
6. Ensures the proper functioning of the immune system;
7. Reduces the risk of contracting infectious diseases;
8. Prevents facial lines; or

B. That use of the product can or will cure, treat, or prevent any disease, or have any effect on the structure or function of the human body,

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondents Home Shopping Network, Inc., Home Shopping Club, Inc., and HSN Lifeway Health Products,

Inc., corporations, their successors and assigns, by and through their officers, agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale or distribution of Life Way Smoke-Less Nutrient Spray or any other smoking cessation product, program, or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication:

A. That such product, program, or service enables smokers, regardless of how long they have smoked or how much they smoke, to stop smoking easily;

B. That such product, program, or service satisfies the physiological urge to smoke a cigarette, or eliminates the quivering, anxiety and weight gain attendant with quitting smoking; or

C. Regarding the performance, benefits or efficacy of any such product, program, or service,

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

IV.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for any such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

V.

It is further ordered, That, for three (3) years after the last date of dissemination of any representation covered by this order, respondents Home Shopping Network, Inc., Home Shopping Club, Inc., and HSN Lifeway Health Products, Inc., corporations, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying copies of all advertisements which contain any such representation, including videotape recordings of all such broadcast advertisements.

VI.

It is further ordered, That, for five (5) years after the last date of dissemination of any representation covered by this order, respondents Home Shopping Network, Inc., Home Shopping Club, Inc., and HSN Lifeway Health Products, Inc., corporations, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

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

VII.

It is further ordered, That respondents Home Shopping Network, Inc., Home Shopping Club, Inc., and HSN Lifeway Health Products, Inc., corporations, shall, within thirty (30) days after service of this order, provide a copy of this order to each of respondents' current principals, officers, directors and managers, and to all personnel, agents and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order.

VIII.

It is further ordered, That the respondents Home Shopping Network, Inc., Home Shopping Club, Inc., and HSN Lifeway Health Products, Inc., their successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporations 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 the 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 the respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as 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.

IX.

It is further ordered, That respondents Home Shopping Network, Inc., Home Shopping Club, Inc., and HSN Lifeway Health Products, Inc., corporations, shall, within sixty (60) days after 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 they have complied with this order.

X.

This order will terminate on September 26, 2016, 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 Part 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 Part.

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 Part as though the complaint had never been 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

KONINKLIJKE AHOLD NV, 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-3687. Complaint, Sept. 30, 1996--Decision, Sept. 30, 1996

This consent order requires, among other things, a Georgia-based supermarket chain to divest a total of 30 supermarkets or supermarket properties, within 30 days, to Commission-approved acquirers. If the transactions are not completed as required, the Commission may appoint a trustee to divest the properties.

Appearances

For the Commission: *Marimichael Skubel*, *Ronald Rowe* and *William Baer*.

For the respondents: *Robert Paul* and *Mark Gidley*, *White & Case*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondent Koninklijke Ahold nv, and respondent Ahold USA, Inc. (collectively referred to as "Ahold"), corporations subject to the jurisdiction of the Commission, have acquired certain voting securities of The Stop & Shop Companies, Inc. ("Stop & Shop") 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, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

DEFINITIONS

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

"Supermarket" means a full-line retail grocery store with annual sales of at least two million dollars that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including non-food items such as soaps, detergents, paper goods, and other household products.

KONINKLIJKE AHOLD NV

2. Respondent Koninklijke Ahold nv ("Royal Ahold") is a corporation organized, existing and doing business under and by virtue of the laws of The Netherlands, with its executive offices located at Albert Heijnweg 1, 1507 EH Zaandam, The Netherlands.

3. Respondent Royal Ahold owns and operates five regional supermarket chains in the United States. Royal Ahold owns a chain of supermarkets that operate under the trade name "Edwards" in Connecticut, Rhode Island, and Massachusetts.

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

AHOLD USA, INC.

5. Respondent Ahold USA, Inc. ("Ahold USA"), a wholly-owned subsidiary of Royal Ahold, is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its executive offices at One Atlanta Plaza, 950 East Paces Ferry Road, Suite 2575, Atlanta, GA.

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

in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

ACQUISITION

7. On or about March 27, 1996, Ahold and Stop & Shop entered into an agreement whereby Ahold agreed to purchase the voting stock of Stop & Shop.

TRADE AND COMMERCE

8. The relevant line of commerce in which to analyze the effects of the acquisition described herein is the retail sale of food and grocery products in supermarkets.

9. The relevant sections of the country in which to analyze the acquisition described herein are the areas in and around the following incorporated cities and towns:

a) New Milford, Connecticut;

b) Windham and Mansfield, Connecticut;

c) Wallingford and Meriden, Connecticut;

d) Waterbury, Watertown, and Naugatuck, Connecticut;

e) "The greater Hartford, Connecticut, area," which includes Hartford, New Britain, Newington, Wethersfield, Farmington, West Hartford, Bloomfield, Windsor, South Windsor, East Hartford, Manchester, Glastonbury, and Vernon, Connecticut;

f) Avon and Simsbury, Connecticut;

g) Enfield, Somers, East Windsor, Suffield, and Windsor Locks, Connecticut;

h) Southington and Plainville, Connecticut;

i) Milford, Orange, West Haven, and New Haven, Connecticut;

j) East Haven, Branford, Guilford, Madison, Clinton, and Old Saybrook, Connecticut;

k) Fairfield, Stratford, Bridgeport, Trumbull, and Shelton, Connecticut;

l) South Kingstown and Narragansett, Rhode Island;

m) "The greater Providence, Rhode Island, area," which includes East Providence, Providence, Pawtucket, Warwick, Cranston, Central Falls, Lincoln, Smithfield, Barrington, Bristol, Cumberland, North

Providence, Johnston, West Warwick, East Greenwich, and Coventry, Rhode Island; and Attleboro and Seekonk, Massachusetts; and

n) Chicopee, Massachusetts

MARKET STRUCTURE

10. The retail sale of food and grocery products in supermarkets in the relevant sections of the country is concentrated, whether measured by the Herfindahl-Hirschmann Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios.

ENTRY CONDITIONS

11. Entry into the retail sale of food and grocery products in supermarkets in the relevant sections of the country is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant sections of the country.

ACTUAL COMPETITION

11. Prior to the acquisition described herein, Ahold and Stop & Shop were actual competitors in the relevant line of commerce in the relevant sections of the country.

EFFECTS

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

a. By eliminating direct competition between supermarkets owned or controlled by Ahold and supermarkets owned or controlled by Stop & Shop,

b. By increasing the likelihood that Ahold will unilaterally exercise market power, or

c. By increasing the likelihood of, or facilitating, collusion or coordinated interaction,

each of which increases the likelihood that the prices of food, groceries, or services will increase, and the quality and selection of

food, groceries, or services will decrease, in the relevant sections of the country.

VIOLATIONS CHARGED

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

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

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by Koninklijke Ahold nv and Ahold USA, Inc. (hereinafter collectively "respondents") of the voting securities of The Stop & Shop Companies, Inc. ("Stop & Shop"), and respondents having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of the Clayton Act and Federal Trade Commission Act; and respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Koninklijke Ahold nv ("Royal Ahold") is a corporation organized, existing and doing business under and by virtue of the laws of The Netherlands, with its executive offices located at Albert Heijnweg 1, 1507 EH Zaandam, The Netherlands.

2. Respondent Ahold USA, Inc. ("Ahold USA"), a wholly-owned subsidiary of Royal Ahold, is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its executive offices at One Atlanta Plaza, 950 East Paces Ferry Road, Suite 2575, Atlanta, GA.

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

ORDER

I.

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

A. *"Royal Ahold"* means Koninklijke Ahold nv, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Koninklijke Ahold nv, their successors and assigns, and their directors, officers, employees, agents, and representatives.

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

C. *"Respondents"* means Royal Ahold and Ahold USA.

D. *"Assets to be Divested"* means the supermarkets identified in paragraph II.A of this order as well as the supermarket business operated, and all assets, leases, properties, business and goodwill, tangible and intangible, utilized in the supermarket operations at those locations, but need not include the "Stop & Shop" or "Edwards" trade names, trade dress, trade marks, service marks, and such other intangible assets that respondents also utilize in their business at locations other than those identified in paragraph II.A of this order.

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

F. *"Acquisition"* means Royal Ahold's proposed purchase of all the voting stock of Stop & Shop pursuant to an agreement dated on or about March 27, 1996.

G. *"Supermarket"* means a full-line retail grocery store with annual sales of at least two million dollars that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including non-food items such as soaps, detergents, paper goods, and other household products.

H. *"Overlap Areas"* means the following incorporated towns and cities:

a) New Milford, Connecticut;

b) Windham and Mansfield, Connecticut;

c) Wallingford and Meriden, Connecticut;

d) Waterbury, Watertown, and Naugatuck, Connecticut;

e) "The greater Hartford, Connecticut, area," which includes Hartford, New Britain, Newington, Wethersfield, Farmington, West Hartford, Bloomfield, Windsor, South Windsor, East Hartford, Manchester, Glastonbury, and Vernon, Connecticut;

f) Avon and Simsbury, Connecticut;

g) Enfield, Somers, East Windsor, Suffield, and Windsor Locks, Connecticut;

h) Southington and Plainville, Connecticut;

i) Milford, Orange, West Haven, and New Haven, Connecticut;

j) East Haven, Branford, Guilford, Madison, Clinton, and Old Saybrook, Connecticut;

k) Fairfield, Stratford, Bridgeport, Trumbull, and Shelton, Connecticut;

l) South Kingstown and Narragansett, Rhode Island;

m) "The greater Providence, Rhode Island, area," which includes East Providence, Providence, Pawtucket, Warwick, Cranston, Central Falls, Lincoln, Smithfield, Barrington, Bristol, Cumberland, North Providence, Johnston, West Warwick, East Greenwich, and Coventry, Rhode Island; and Attleboro and Seekonk, Massachusetts; and

n) "the greater Springfield, Massachusetts, area," which includes Springfield, West Springfield, South Hadley, Chicopee, Westfield, Holyoke, Agawam, Southwick, Longmeadow, and East Longmeadow, Massachusetts.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, within thirty (30) days from the date this order becomes final:

1) To Star Markets Company in a manner approved by the Commission:

a) Edwards supermarket number 821 located at 295 Armistice Boulevard, Pawtucket, RI;
b) Edwards supermarket number 751 located at 200 Niantic Avenue, Providence, RI;
c) Edwards supermarket number 815 located at 1810 Plainfield Pike, Cranston, RI;
d) Edwards supermarket number 817 located at 418 Kingstown Road, Wakefield, RI;
e) Edwards supermarket number 779 located at 1401 Bald Hill Road, Warwick, RI;
f) Edwards supermarket number 820 located at 1000 Division Street, East Greenwich, RI; and
g) Stop & Shop supermarket number 458 located at Route 6 & 1 Commercial Way, Seekonk, MA.

2) To Bozzuto's Inc. in a manner approved by the Commission:

a) Edwards supermarket number 295 located at 207 Hartford Turnpike, Vernon, CT;
b) Edwards supermarket number 362 located at Newbrite Plaza, 60 East Main Street, New Britain, CT;
c) Edwards supermarket number 748 located at 333 North Main Street, West Hartford, CT; and
d) Edwards supermarket number 768 located at 750 Queen Street, Southington, CT.

3) To Shaw's Supermarkets, Inc., pursuant to a purchase and sale agreement dated September 20, 1996:

a) Edwards supermarket number 725 located at 40 Hazard Avenue, Enfield, CT;

b) Edwards supermarket number 742 located at 953 Wolcott Road, Waterbury, CT;

c) Edwards supermarket number 758 located at 538 Boston Post Road, Orange, CT;

d) Edwards supermarket number 773 located at 875 Bridgeport Avenue, Shelton, CT;

e) Stop & Shop supermarket number 665 located at 55 Welles Street, Glastonbury, CT;

f) Edwards lease agreement for premises located in the former Rich's Department Store, Wakefield Mall, Tower Hill Road, South Kingstown, RI;

g) Edwards supermarket number 312 located at 1100 Barnum Avenue, Stratford, CT;

h) Edwards lease agreement for the former Grand Union store site located at 800 Barnum Avenue, Stratford, CT;

i) Edwards supermarket number 200 located at 1975 Black Rock Turnpike, Fairfield, CT;

j) Edwards supermarket number 299 located at 1167 Main Street, Watertown, CT;

k) Edwards supermarket number 823 located at 266 East Main Street, Clinton, CT;

l) Edwards supermarket number 749 located at 60 Cantor Drive, Willimantic, CT;

m) Edwards supermarket number 783 located at 245 Kane Street, West Hartford, CT; and

n) Edwards supermarket number 317 located at 976 North Colony Road, Wallingford, CT.

4) To Big Y Foods, Inc., pursuant to a purchase and sale agreement dated September 26, 1996:

a) Edwards supermarket number 728 located at 830 Boston Post Road, Guilford, CT;

b) Edwards supermarket number 722 located at 650 Memorial Drive, Chicopee, MA;

c) Edwards supermarket number 704 located at West Main Route 44, Avon, CT;

d) Edwards supermarket number 368 located at 3 Kent Road, New Milford, CT; and

e) Edwards supermarket number 329 located at 265 Ellington Road, East Hartford, CT.

B. If respondents have not divested the Assets to be Divested pursuant to paragraph II.A, respondents shall divest the Assets to be Divested within thirty (30) days from the date this order becomes final to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

C. The purpose of the divestiture of the Assets to be Divested is to ensure the continuation of the Assets to be Divested as ongoing viable enterprises engaged in the Supermarket business 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 have not divested absolutely and in good faith the Assets to be Divested pursuant to paragraph II of this order, the Commission may appoint a trustee to divest the Assets to be Divested. In the event that the Commission brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), 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 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.

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

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written 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 divest the Assets to be Divested.

3. Within ten (10) days after appointment of the trustee, respondents 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 the 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.B.3 to accomplish the 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 of divestiture or believes that divestiture can be achieved within a reasonable time, the 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 this period only two (2) times for up to six (6) months each time.

5. The trustee shall have full and complete access to the Assets to be Divested and to the personnel, books, records and facilities related to the Assets to be Divested or to any other relevant information, as the trustee may reasonably request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondents shall extend the time for divestiture under this paragraph 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 divest at no minimum price. The divestitures shall be made to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. In the event that the trustee receives *bona fide* offers from more than one acquiring entity, the trustee shall submit all such bids to the Commission, and if the Commission determines to approve more than one such acquiring entity for the Assets to be Divested, the trustee shall divest to the acquiring entity or entities selected by respondents from among those approved by the Commission.

7. In the event the trustee determines that he or she is unable to divest the Assets to be Divested as described in paragraph II in a manner consistent with the terms of this order, the trustee may on his or her own initiative, or at the direction of the Commission, divest any additional or substitute supermarkets of the respondents located in the respective overlap areas and effect such arrangements as are necessary to satisfy the requirements of this order.

8. 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 the 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 divesting the Assets to be Divested, and may include an incentive arrangement relating to price.

9. 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, 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.

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

11. 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 the divestiture required by this order.

12. The trustee shall have no obligation or authority to operate or maintain the Assets to be Divested.

13. The trustee shall report in writing to respondents and the Commission every forty-five (45) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That:

A. Pending divestiture of the Assets to be Divested, respondents shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the Assets to be Divested consistent with paragraphs II and III of this order and to prevent the destruction, removal, wasting, deterioration, or impairment of the Assets to be Divested except in the ordinary course of business and except for ordinary wear and tear.

B. Respondents shall comply with all the 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 Assets to be Divested have been divested as required by this order.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any ownership or leasehold interest in any facility that has operated as a supermarket within six (6) months of the date of such proposed acquisition in the Overlap Areas; or

B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any supermarket or owned any interest in or operated any supermarket within six (6) months of such proposed acquisition in the Overlap Areas.

Provided, however, that advance written notification shall not apply to the construction of new facilities by respondents or the acquisition of or leasing of a facility that has not operated as a supermarket within six (6) months of respondents' offer to purchase or lease.

Said notification 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 and transmitted in accordance with the requirements of that part, except that no filing fee will be required for the Notification. The Notification shall be filed with the Secretary of the Commission and need not be made to the United States Department of Justice. The Notification is required only of respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty days prior to acquiring any such interest (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, respondents shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that 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.

VI.

It is further ordered, That respondents shall be bound by the terms and obligations of the Consent Order issued by the Commission in The Stop & Shop Companies, Inc., et al., Docket No. C-3649.

VII.

It is further ordered, That:

A. Within forty-five (45) days after the date this order becomes final and every forty-five (45) days thereafter until respondents have fully complied with the provisions of paragraphs II or III of this order, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II and III 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 proposals for divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties concerning divestiture.

B. One year (1) from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondents shall file verified written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this order.

VIII.

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

IX.

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. Upon five days' written notice to respondents, 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' written notice to respondents and without restraint or interference from respondents, to interview respondents or officers, directors, or employees of respondents in the presence of counsel.

APPENDIX I

ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement ("Agreement") is by and between Koninklijke Ahold nv ("Royal Ahold"), a corporation organized, existing, and doing business under and by virtue of the laws of The Netherlands, with its office and principal place of business located at Albert Heijnweg 1, 1507 EH Zaandam, The Netherlands; Ahold USA, Inc. ("Ahold USA"), a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at One Atlanta Plaza, 950 East Paces Ferry Road, Suite 2575, Atlanta, GA; 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, Royal Ahold and Ahold USA, pursuant to an agreement dated on or about March 27, 1996, agreed to acquire the voting stock of The Stop & Shop Companies, Inc. ("the Acquisition"); and

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

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

Whereas, the Commission is concerned that if an agreement is not reached preserving the *status quo ante* of the Assets to be Divested as described in the attached Agreement Containing Consent Order ("Assets") during the period prior to their divestitures, 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 divestiture to the acquirer or acquirers, 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 or acquirers approved by the Federal Trade Commission under the terms of the order, in order to remedy any anticompetitive effects of the Acquisition; and

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

Whereas, Royal Ahold and Ahold USA 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, unless the Commission determines to reject the Consent Order, it will not seek further relief from the parties with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order annexed hereto and made a part thereof, the Parties agree as follows:

TERMS OF AGREEMENT

1. Royal Ahold and Ahold USA 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. Unless the Commission brings an action to seek to enjoin the proposed Acquisition pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), and obtains a temporary restraining order or preliminary injunction blocking the proposed Acquisition, Royal Ahold and Ahold USA will be free of close the Acquisition after July 15, 1996.

3. Royal Ahold and Ahold USA agree that from the date this Agreement is singed until the earlier of the dates listed in subparagraphs 3.a - 3.b, they will comply with the provisions of this Agreement:

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

b. On the day the divestitures set out in the Consent Order have been completed.

4. From the time Royal Ahold and Ahold USA acquire The Stop & Shop Companies, Inc., until the divestiture set out in the Consent Order has been completed, Royal Ahold and Ahold USA 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.

5. From the time Royal Ahold and Ahold USA acquire The Stop & Shop Companies, Inc., until the divestiture set out in the Consent Order has been completed, Royal Ahold and Ahold USA shall maintain the competitiveness of the Assets. This includes but is not limited to the maintaining of promotions and discount policies (*e.g.*, double and triple coupon policies and store coupon promotional as well as the continuation of specific store services (*e.g.*, hours of operation and operation of specific departments).

6. Should the Commission seek in any proceeding to compel Royal Ahold and Ahold USA to divest themselves of the Assets or to seek any other injunctive or equitable relief, Royal Ahold and Ahold USA 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

Acquisition. Royal Ahold and Ahold USA also waive all rights to contest the validity of this Agreement.

7. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to Royal Ahold or Ahold USA and to their principal offices, Royal Ahold and Ahold USA shall permit any duly authorized representative or representatives of the Commission:

a. Upon three (3) days' notice to Royal Ahold or Ahold USA, access during the office hours of Royal Ahold or Ahold USA, 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 Royal Ahold or Ahold USA relating to compliance with this Agreement; and

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

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

IN THE MATTER OF

PENDLETON WOOLEN MILLS, INC.

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

Docket C-2985. Consent Order, July 31, 1979--Modifying Order, Sept. 30, 1996

This order reopens a 1979 consent order -- that prohibited the Oregon manufacturer from fixing, maintaining or enforcing resale prices for its products -- and this order modifies the consent order by permitting Pendleton to institute lawful price restrictive cooperative programs that are not a part of a resale price maintenance scheme.

ORDER GRANTING IN PART REQUEST TO REOPEN AND MODIFY ORDER ISSUED JULY 31, 1979

On April 1, 1996, Pendleton Woolen Mills, Inc. ("Pendleton"), filed its "Request To Reopen" ("Petition") in Docket No. C-2985, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51 ("Rules"). Pendleton asks the Commission to reopen and modify the consent order issued by the Commission on July 31, 1979 ("order"), in *Pendleton Woolen Mills, Inc.*, 94 FTC 229 (1979).

In its Petition, Pendleton asks the Commission to reopen the order and modify provisions that limit Pendleton's ability to restrict the prices advertised by its dealers for Pendleton apparel and unilaterally to terminate a dealer for failure to adhere to previously announced resale prices. In support of its Petition, Pendleton maintains that reopening and modification is warranted by changed conditions of fact and the public interest. Pendleton's Petition was placed on the public record for thirty days; no comments were received.

I. STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and

shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *see* Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").[1]

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

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if

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

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

II. REOPENING IS IN THE PUBLIC INTEREST

Pendleton asserts in its Petition that its inability under the order to establish and maintain price-restrictive cooperative advertising programs and unilaterally to terminate resellers that decline to adhere to previously announced resale prices and sale periods has impeded its ability to compete. Because of restrictions in the order, Pendleton maintains, it is unable to choose freely those with whom it will deal and unable to terminate business relationships with retailers that advertise and price Pendleton products in a matter inconsistent with Pendleton's image and quality and with Pendleton's marketing strategies. In addition, Pendleton claims that it is unable under the order unilaterally to impose restrictions on cooperative advertising or to specify sales break dates.

According to Pendleton, "both the retail and manufacturing side of the apparel industry have undergone tremendous changes over the last 15 years." Petition at 3.[2] The changes identified by Pendleton include increased competition from imports,[3] unprecedented restructuring in the retail industry, including a proliferation of discount, warehouse and factory outlets, and increased retail discounting.[4] Petition at 3-4. According to Pendleton, the growth of discount, warehouse and factory outlets has eroded the market share of Pendleton's customers, traditional department stores and specialty

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[2] Because the Commission has determined that the order should be reopened and modified in the public interest, it need not and does not consider whether Pendleton has shown changed conditions that would require reopening the order.

[3] More than 60 percent of all apparel sold in the United States is now manufactured abroad, according to the Petition at 4.

[4] Similar changes in retailing were cited in Levi Strauss & Co., Docket No. 9081, Order Reopening and Modifying Order Issued on July 12, 1978 (December 20, 1994) (apparel manufacturers integrating into retailing to showcase their products, market their complete lines and demonstrate to their retailer-customers the benefits of promoting the manufacturer's products). *See also* Interco Incorporated, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995) at 5 ("discount advertising is harming London Fog's quality image and affecting its ability to market its product through certain retailers.").

stores,[5] which "have faced serious financial problems in the last decade."[6] Petition at 4. Pendleton claims that the increased discounting and its inability under the order to respond unilaterally to the discounting have resulted in decreased sales by Pendleton to its traditional department store and specialty store customers and decreased promotion and emphasis on Pendleton products by those retailers.[7]

Pendleton states that the order has put it "at a substantial disadvantage in competing with foreign and other domestic clothing manufacturers." Petition at 5. Unlike its competitors, Pendleton cannot unilaterally impose "marketing controls"[8] and is reluctant to suggest that its customers refrain from "excessive or inappropriate promotion of its products" that "ultimately results in decreased profitability" for its customers. Petition at 7. Pendleton believes that the use of these marketing controls would increase its sales and increase the profitability of the line for its customers. Poth Affidavit ¶¶ 12-15; Stine Affidavit ¶¶ 6-7 & 9. The ability to use price restrictive cooperative advertising programs and unilaterally to terminate a retailer for failure to adhere to previously announced resale prices would encourage service-oriented stores to compete with the discount stores with respect to these brands, according to Pendleton. Finally, Pendleton asserts that the requested modifications would enable it to compete more effectively for sales to retailers that stress quality over price and that provide a high level of service to consumers.[9] Pendleton has found that such retailers do best with Pendleton merchandise. Petition at 6.

Pendleton has shown that the public interest warrants reopening the order to consider whether it should be modified. Pendleton has shown that the order prohibits conduct that by itself may not be unlawful and that the prohibition inhibits its ability to compete with

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[5] Pendleton does not offer its products to discount or warehouse operations. *See* Affidavit of Dick Poth, President of Pendleton Woolen Mills, Inc. (August 14, 1995) ¶ 7 ("Poth Affidavit").

[6] Pendleton reports that from 1988 through 1994, it lost more than 100 accounts because of bankruptcy or other financial problems, approximately 640 accounts because of store closures or going out of business and approximately 40 accounts for other reasons. Poth Affidavit ¶ 11.

[7] Poth Affidavit ¶ 13; Affidavit of Jon Stine (June 26, 1995), ¶ 6 ("Stine Affidavit").

[8] Petition at 7. Specifically, Pendleton claims that the order prevents it from choosing its customers, from restricting cooperative advertising or specifying sale breakdates, and from choosing to stop selling to a retailer because of that retailer's pricing, practices that Pendleton claims are available to its competitors. Poth Affidavit ¶¶ 12-13. *See also* Stine Affidavit ¶¶ 2-5; Affidavits of Lauren Bensen (June 6, 1995), ¶¶ 1-4; and Karen Decasperis (May 31, 1995), ¶¶ 1-2.

[9] Pendleton traditionally has sold its products through retailers that have a "quality image and who provide a high level of service to the consumer." Poth Affidavit ¶ 2.

firms that are free to and do engage in price-restrictive cooperative advertising and promotional programs and that are free to choose those with whom they will deal.

III. THE ORDER SHOULD BE MODIFIED

Pendleton requests that the order be modified to permit Pendleton to implement price restrictive cooperative advertising programs and unilaterally to terminate a reseller that refuses to sell Pendleton products at Pendleton's previously announced resale prices. For these purposes, Pendleton has requested that the following proviso be added to paragraph I of the order:

Provided that nothing in this order shall be construed to prohibit the implementation of a lawful, price restrictive, cooperative advertising program or the unilateral termination of a reseller for failure to adhere to previously announced resale prices or sale periods.

The Commission previously has modified orders to permit implementation of price restrictive cooperative advertising programs. Price restrictive cooperative advertising is not *per se* unlawful and does not prevent a dealer from selling at discount prices or from advertising discount prices at the retailer's own expense. *See Advertising Checking Bureau, Inc.*, 109 FTC 146, 147 (1987).[10] The Commission has said that "[t]he fact that a distributional restraint may have an incidental effect on resale price is not by itself enough to condemn the practice as *per se* unlawful." *Id.* The Commission also has said that price restrictive cooperative advertising programs likely are procompetitive or competitively neutral in most cases "by, for example, . . . channeling the retailer's advertising efforts in directions that the manufacturer believes consumers will find more compelling and beneficial. This, in turn, may stimulate dealer promotion and

[10] *See also* Interco Incorporated, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995); Clinique Laboratories, Inc., Docket No. C-3027 (Feb. 8, 1993), reprinted in [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,330; U.S. Pioneer Electronics Corp., Docket No. C-2755 (April 8, 1992), reprinted in [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,172; *The Magnavox Co.*, 113 FTC 255 (1990).

investment and, thus, benefit interbrand competition." 109 FTC at 147.[11]

Modification of the order to permit Pendleton to institute lawful price restrictive cooperative advertising programs is consistent with Commission policy and cases. Such restrictions may not necessarily be part of an illegal RPM scheme and have been recognized as reasonable in many circumstances.[12] Pendleton's use of price restrictive cooperative advertising programs, absent further agreement on price or price levels to be charged by the retailers, is not likely to restrict interbrand competition or to reduce output. Of course, any cooperative advertising program implemented by Pendleton as part of a scheme to fix resale prices would be *per se* unlawful and would violate paragraph I.1 of the order. In addition, the proviso's limitation to a "lawful price restrictive cooperative advertising program" will retain the order's prohibition against such programs if they are part of a plan to implement resale price maintenance.

The new proviso to paragraph I also would permit Pendleton unilaterally to terminate a reseller for failure to adhere to previously announced prices. This conduct is lawful under *United States v. Colgate Co.*, 250 U.S. 300, 307 (1919), which permits a supplier to "announce its resale prices in advance and refuse to deal with those who do not comply." Accordingly, the Commission has determined to add the proviso quoted above to paragraph I of the order. The modification would permit Pendleton to engage in conduct that is lawful if not a part of a resale price maintenance scheme.

IV. ADDITIONAL MODIFICATION OF THE ORDER

Pendleton has requested additional modifications of the order to remove language that Pendleton maintains is inconsistent with the new proviso to paragraph I of the order. Each of these requests is considered below.

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[11] In Advertising Checking Bureau, the Commission announced rescission of its 1980 Policy Statement Regarding Price Restrictions In Cooperative Advertising Programs (viewing such programs as *per se* unlawful). 109 FTC at 146 n.1; *see* Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs – Rescission, 6 Trade Reg. Rep. (CCH) ¶ 39,057 (May 21, 1987).

[12] *See* In re Nissan Antitrust Litigation, 577 F.2d 910 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) (price restrictive cooperative advertising not *per se* unlawful); *see also Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717 (1988).

Paragraph I.1. -- According to Pendleton, the words "advertise, promote" in paragraph I.1 of the order[13] would be confusing as to Pendleton's ability to "take any lawful steps vis-a-vis its accounts' pricing practices." Petition at 9. Pendleton requests that the Commission delete these words from paragraph I.1 of the order.

The language of the proviso added to paragraph I of the order is sufficient to permit Pendleton to implement lawful price restrictive cooperative advertising programs. Deleting the words "advertise, promote" from paragraph I.1, however, could be construed to allow agreements on advertised prices that go beyond such lawful cooperative advertising programs. Pendleton has not requested or shown that it should be permitted to enter such agreements outside lawful cooperative advertising programs. Accordingly, the request to delete the words "advertise, promote," from paragraph I.1 of the order is denied.

Paragraph I.4. -- Pendleton has requested that the words "or terminating" be deleted from paragraph I.4 of the order.[14] According to Pendleton, these words directly contradict the proviso added to paragraph I of the order and would cause confusion as to Pendleton's right, for example, unilaterally to terminate a retailer after receiving complaints from other retailers about the first retailer's pricing. The words "or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating any dealer" should be deleted from paragraph I.4 of the order.[15] Deleting these words is consistent with the decision of the Commission in *Lenox, Inc.*, 111 FTC 612, 617-18 & 620 (1989). In Lenox, the Commission modified the order by deleting the words "or acting on reports so obtained by refusing or threatening to refuse sales to the dealers so reported" from a provision barring Lenox from requesting its dealers to report any retailer that did not observe the resale prices suggested by Lenox. The conduct prohibited by the deleted words in Lenox included

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[13] Paragraph I.1 prohibits Pendleton from:
Fixing, establishing, controlling or maintaining, directly or indirectly, the resale price at which any dealer may advertise, promote, offer for sale or sell any product.

[14] Paragraph I.4 prohibits Pendleton from:
Requiring, requesting, or soliciting any dealer to report the identity of any other dealer, because of the price at which such dealer is advertising, offering to sell or selling any product; or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating any dealer.

[15] *See Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-764 (1984) (*per se* unlawful agreement could not be inferred from nothing more than a dealer termination following competitors' complaints); *see also Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) (vertical agreement to terminate a price-cutting dealer is not *per se* unlawful unless there is also an agreement on price or price levels).

termination of a dealer. As the Supreme Court explained in Monsanto, dealers "are an important source of information for manufacturers," dealer complaints about price cutters "arise in the normal course of business and do not indicate illegal concerted action" and a manufacturer's termination of a dealer following complaints from other dealers would not, by itself, support an inference of concerted action. 465 U.S. at 763-64. To the extent that this portion of paragraph I.4 may inhibit Pendleton from legitimate unilateral conduct, it may cause competitive injury. Any conduct that would be unlawful under this part of paragraph I.4 would be prohibited by other provisions of the order.

Paragraph I.5. -- Pendleton asks the Commission to delete the words "advertising" and "or advertised" from paragraph I.5 of the order.[16] Pendleton claims that inclusion of these words in paragraph I.5, notwithstanding the paragraph I proviso, may interfere with its ability to address legitimate concerns about the advertising and marketing of its products. The words should be deleted from paragraph I.5. The references to "advertising" in paragraph I.5 of the order could hinder Pendleton's ability to institute a lawful, price restrictive cooperative advertising program. Deleting these words makes clear that Pendleton can impose price restrictions on its dealers in connection with a lawful cooperative advertising program, consistent with the Commission's conclusion that price restrictions in cooperative advertising programs, standing alone, are not *per se* unlawful. *See* Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs -- Rescission, 6 Trade Reg. Rep. (CCH) ¶ 39,057 (May 21, 1987).

Paragraph I.6. -- Pendleton has asked the Commission to delete paragraph I.6 in its entirety, or, in the alternative, delete the words "Terminating or" from paragraph I.6 of the order.[17] Pendleton believes that this provision, but especially the word "Terminating," prohibits Pendleton from unilaterally terminating "a dealer because of the

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[16] Paragraph I.5 prohibits Pendleton from:
Conducting any surveillance program to determine whether any dealer is advertising, offering for sale or selling any product at a resale price other than that which respondent has established or suggested, where such surveillance program is conducted to fix, maintain, control or enforce the retail price at which any product is sold or advertised.

[17] Paragraph I.6 prohibits Pendleton from:
Terminating or taking any other action to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product.

dealer's pricing practices . . . ." Petition at 12. According to Pendleton, such conduct is "clearly . . . lawful action." *Id*.

The prohibition in paragraph I.6 against "terminating . . . any dealer" restricts Pendleton from unilaterally terminating such a dealer even if the termination is consistent with the Colgate doctrine. Deleting the word "terminating" from paragraph I.6 will make the order consistent with the proviso language that restores Pendleton's Colgate rights. Unilateral termination of a dealer for discounting is not in itself unlawful. *See* Interco Incorporated, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995) at 10. The request to delete the word "terminating" from paragraph I.6 of the order is granted.[18] For clarity, the words "(other than termination)" should be added to the paragraph following the word "action."

Paragraph II -- Pendleton requests that the Commission delete paragraph II from the order.[19] Pendleton states that "if [Pendleton] remains subject to paragraph II, it will be reluctant to take lawful action which might be construed as contrary to representations required by that provision." Petition at 12.

Paragraph II relates to Pendleton's use of suggested retail prices. Under the order, Pendleton could not suggest retail prices for a period that expired in 1982. The remaining provisions of paragraph II restrict the use of suggested retail prices. Specifically, Pendleton must "[c]learly and conspicuously state on any material on which such suggested price is stated that such price is suggested only," order ¶ II.a, and notify its customers that they are not obligated to adhere to suggested retail prices and that "such suggested retail price is advisory only." Order ¶ II.b. The Commission considered

[18] Paragraph I.6, as modified, would bar Pendleton from threatening to terminate dealers for failure to adhere to resale prices. Threats to obtain dealer acquiescence in resale prices are "plainly relevant and persuasive to a meeting of the minds" that could result in an unlawful agreement to fix resale prices. Pendleton may, consistent with the order, as modified, announce in advance its intention to terminate any dealer who fails to adhere to its previously announced resale prices and it may terminate any such dealer, but "it may not threaten a dealer to coerce compliance with or agreement to suggested retail prices." *See* Interco Incorporated, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995), at 10.

[19] Paragraph II of the order prohibits:

Publishing, disseminating, circulating, providing or communicating, orally or in writing or by any other means, any suggested retail price from the date of service of this order until April 20, 1982; provided, however, that if, after April 20, 1982, respondent suggests any retail price, respondent shall:

a. Clearly and conspicuously state on any material on which such suggested price is stated that such price is suggested only.

b. Mail to all dealers a letter stating that no dealer is obligated to adhere to any suggested retail price and that such suggested retail price is advisory only.

modification of a similar provision in Clinique[20] and set the provision aside in the public interest. The Commission concluded that the provision in the Clinique order addressed conduct (suggested prices) that by itself may not be unlawful and was no longer necessary to ensure compliance with the law. Consistent with Clinique, paragraph II should be set aside.

V. CONCLUSION

Pendleton has shown that reopening the order is in the public interest and that the order should be modified as described above. The order as modified bars Pendleton from engaging in resale price maintenance and permits Pendleton to engage in otherwise lawful conduct.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened and that the Commission's order in Docket No. C-2985 be, and it hereby is, modified, as of the effective date of this order, as follows:

(a) Paragraph I is modified by adding the following proviso:

Provided that nothing in this order shall be construed to prohibit the implementation of a lawful, price restrictive, cooperative advertising program or the unilateral termination of a reseller for failure to adhere to previously announced resale prices or sale periods.

(b) Paragraph I.4 is modified by deleting the words "or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating any dealer," as follows:

Requiring, requesting, or soliciting any dealer to report the identity of any other dealer, because of the price at which such dealer is advertising, offering to sell or selling any product.

(c) Paragraph I.5 is modified to delete the words "advertising" and "or advertised," as follows:

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[20] Clinique Laboratories, Inc., Docket No. C-3027 (Feb. 8, 1993), reprinted in [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,330.

Conducting any surveillance program to determine whether any dealer is offering for sale or selling any product at a resale price other than that which respondent has established or suggested, where such surveillance program is conducted to fix, maintain, control or enforce the retail price at which any product is sold.

(d) Paragraph I.6 is modified by deleting the words "Terminating or" and "other" and adding "(other than termination)," as follows:

Taking any action (other than termination) to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product.

(e) Paragraph II is set aside.

(f) Pendleton's request to modify paragraph I.1 to delete the words "advertise, promote" is denied.

Commissioner Starek concurring in the result only.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III CONCURRING IN THE RESULT

I concur in the Commission's decision to reopen and modify the order in this matter. Respondent Pendleton Woolen Mills, Inc. has shown that the order prohibits conduct that by itself may not be unlawful, and that the prohibition inhibits its ability to compete with firms that are free to (and do) engage in price-restrictive advertising programs and can freely choose with whom they will deal.

As I have stated elsewhere, however, I cannot concur fully in the reasoning expressed in today's order because I do not share in the view that respondent "must demonstrate as a threshold matter some affirmative need to modify the order" when a petition to reopen is judged under the public interest standard. Order Granting in Part Request to Reopen and Modify Order, Docket No. C-2985, at 2. Neither the statute[1] nor the Commission rule[2] governing our consideration of petitions to reopen provides for an "affirmative need" requirement that a petitioner must meet. I would therefore prefer that

[1] Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b).

[2] Rule 2.51(b) of the Commission's Rules of Practice, 16 CFR 2.51(b).

such language be deleted from this and future Commission rulings granting or denying petitions to reopen existing orders.

2788 Modifying Order

IN THE MATTER OF

HOME OXYGEN & MEDICAL EQUIPMENT CO., ET AL.

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

Docket C-3530. Consent Order, Sept. 14, 1994--Modifying Order, Oct. 4, 1996

This order reopens a 1994 consent order -- that prohibited, among other things, the California suppliers of oxygen systems from acquiring or granting an ownership interest in a firm that sells or leases oxygen systems in the relevant geographic market -- and this order modifies the consent order by relieving John E. Sailer, M.D. of all obligations under the consent order as it applies to him, since he is now retired.

ORDER REOPENING AND MODIFYING ORDER

On April 16, 1996, Dr. John E. Sailer, one of the respondents named in the consent order issued by the Commission on September 14, 1994, in Docket No. C-3530 ("order"), filed his first annual report of compliance with that order in which he explained that he had retired from the practice of medicine and believed, therefore, that he no longer was subject to the order's annual reporting obligation. On June 17, 1996, Dr. Sailer filed a verified statement confirming that he is retired and that he has neither acquired nor intends to acquire any interest proscribed by the order. In addition to the annual reporting requirement of paragraph V.B, as a respondent, Dr. Sailer continues to be subject to paragraphs II and III of the order. Paragraph II prohibits each respondent from specified grants or acquisitions of interests in oxygen systems in the relevant geographic market if, after such a grant or acquisition, more than twenty-five percent of the pulmonologists who practice in the relevant geographic market would be affiliated with the entity. Paragraph III requires each respondent to notify the Commission within thirty days of making certain specified acquisitions.

Dr. Sailer's letter and verified statement together have been treated as a Petition To Reopen and Modify Consent Order ("Petition") in this matter. Dr. Sailer requests that the Commission reopen and modify the order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, to set

aside the order as it applies to him. The thirty-day public comment period on Dr. Sailer's Petition ended on August 11, 1996. No comments were received. For the reasons discussed below, the Commission has determined to grant Dr. Sailer's Petition.

Section 5(b) of the FTC Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" require such modification. A satisfactory showing sufficient to require such reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986) at 4.[1]

The Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. *Id.* Therefore, Section 2.51 of the Commission's Rules of Practice invites respondents in petitions to reopen to show how the public interest warrants the modification. In the case of a request for modification based on public interest grounds, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. *See* Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983) at 2. If the showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Id.* The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm.

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of Section 5(b) plainly anticipates that the petitioner must make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the burden of showing, other than by conclusory statements, why an order

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[1] *Cf. United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992), where the court noted that "[a] decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification." *Id.*

should be modified.[2] If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in repose and the finality of Commission orders.[3]

As required by Section 2.51(b), Dr. Sailer has submitted an affidavit affirming that he is permanently retired from the practice of medicine and that he neither now or in the future plans to acquire any interest in any medically related venture including durable medical goods. The complaint in this matter alleged that Dr. Sailer, in partnership with the other named respondent pulmonologists, through their partnership interest in respondent Home Oxygen & Medical Equipment Company, violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The alleged anticompetitive effects resulted from the respondents, as a significant percentage of pulmonary doctors practicing in the relevant market, referring patients to their pulmonary equipment company. Dr. Sailer no longer has patients to refer to a medically related company and no longer owns an interest in any such company. Moreover, even a subsequent acquisition of such an interest either currently proscribed by the order or for which the order requires notice would lack competitive significance because Dr. Sailer is retired and, consequently, has no patients to refer to such a company.

Dr. Sailer has, therefore, made a satisfactory showing that conditions of fact have changed. Having determined to reopen the order, the Commission next considers whether the order should be modified and, if so, how. In this matter, Dr. Sailer's retirement is an exit from the market and is a sufficient changed circumstance to support setting aside the entire order as to him. The respondent in Union Carbide Corporation, Order Reopening and Modifying Consent Order Issued on September 28, 1977, 108 FTC 184 (1986)

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[2] The Commission may properly decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979). *See also* Rule 2.51(b), which requires affidavits in support of petitions to reopen and modify.

[3] *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

requested that the Commission reopen and modify that order to delete welding products and gas welding apparatus as covered products because it sold all such assets and intended to stay out of the welding business.[4] The Commission modified the Union Carbide order because respondent had clearly exited a business covered by the order and had demonstrated that it had no intention of re-entering the business. So in this instance, Dr. Sailer has submitted an affidavit stating that he is permanently retired from the practice of medicine and that he neither now nor in the future plans to acquire any interest in any medically related venture, including durable medical goods. Dr. Sailer has clearly exited a business covered by the order and has demonstrated that he has no intention of re-entering the business, either through the practice of pulmonary medicine or through acquisitions covered by order paragraphs II and III. These changed circumstances, therefore, warrant relieving him from being subjected to the proscriptions of these paragraphs and from the annual reporting requirement of paragraph V.B. As these three paragraphs are the only remaining operative paragraphs of the order, the order as to Dr. Sailer should be set aside.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and that the Commission's order issued on September 14, 1994, be, and it hereby is, set aside as to Dr. John E. Sailer as of the effective date of this order.

SEPARATE STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

Because I have consistently questioned the Commission's basis for even issuing the consent orders in this matter as well as in Certain Home Oxygen Pulmonologists, Docket No. C-3531, and Homecare Oxygen and Medical Equipment Co., Docket No. C-3532,[1] I would have preferred to view Dr. Sailer's petition as an occasion for reexamining all three orders and, ideally, for determining that they should be vacated. The Commission, however, has chosen to confine its scrutiny to Dr. Sailer's situation under the Home Oxygen order. I agree that the order should be set aside as to him in light of his retirement from medical practice. Nevertheless, given that Dr. Sailer's retirement constitutes a change of fact and that the Commission has

[4] 108 FTC at 188. *Cf.* National Tea Company, Order Reopening and Setting Aside Order Issued on July 23, 1980, 111 FTC 109 (1988).

[1] Statement of Commissioner Roscoe B. Starek, III, in Home Oxygen and Medical Equipment Co., Docket No. C-3530; Certain Home Oxygen Pulmonologists, Docket No. C-3531; Homecare Oxygen and Medical Equipment Co., Docket No. C-3532.

relied entirely on this changed circumstance in reaching its decision, I see no reason for the Commission's order to include the boilerplate paragraph on page 3 that sets forth the separate "public interest" standard for reopening and modifying orders.

IN THE MATTER OF

SYNCRONYS SOFTCORP, ET AL.

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

Docket C-3688. Complaint, Oct. 7, 1996--Decision, Oct. 7, 1996

This consent order prohibits, among other things, the California-based computer software manufacturer and three of its officers from making performance claims regarding their software programs or any substantially similar product unless the claims are true and substantiated. The consent order also prohibits the respondents from making any claims that a product intended to improve computer performance is licensed, endorsed, authorized, or certified by any person or organization, unless those claims are true.

Appearances

For the Commission: *Robin Eichen, Douglas Goglia* and *Julie Gearty.*

For the respondents: *Harvey Saferstein, Chadbourne & Parke,* New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Syncronys Softcorp, a corporation, and Rainer Poertner, Daniel G. Taylor, and Wendell Brown, individually and as officers of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Syncronys Softcorp is a Nevada corporation with its principal office or place of business at 3958 Ince Boulevard, Culver City, California.

2. Respondent Rainer Poertner is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Syncronys Softcorp.

3. Respondent Daniel G. Taylor is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Syncronys Softcorp.

4. Respondent Wendell Brown is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Syncronys Softcorp.

5. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed to the public software products intended to improve the performance of personal computers, including "SoftRAM" and "SoftRAM^{95}."

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

BACKGROUND

7. For a computer to work, it must "load" its own operating instructions, the applications programs being used (such as word processing, spreadsheet, and database programs), and the data being worked on into its "random access memory," often referred to as "RAM." As computers' operating instructions and applications programs have become more powerful, they generally have become more "memory intensive," *i.e,* they have needed more RAM to load and run properly. This has been true of the "Windows" operating systems manufactured by Microsoft, Inc. -- the predominant operating systems in personal computers -- and for applications programs sold for use with them.

8. When a computer has inadequate RAM for a user's demands, the computer may operate sluggishly, refuse to run large or multiple programs, or "crash," in effect shutting down catastrophically with resultant loss of data. Additional RAM, however, generally can be purchased and installed in a computer in order to mitigate or remedy these problems. RAM is measured in "megabytes," often abbreviated as "MB," and is purchased in the form of memory chips that are inserted into the computer's processor. Additional RAM is relatively expensive, and personal computer users often spend several hundred

dollars to purchase and install additional RAM adequate to their needs.

9. In or about May 1995, respondents began marketing a software product called "SoftRAM." As is more fully described subsequently, respondents promoted SoftRAM to users of the Windows 3.0, 3.1, and 3.11 operating systems (collectively "Windows 3.x") as a substantially less expensive, but functionally identical, alternative to the purchase and installation of additional RAM. To date, respondents have sold approximately 100,000 copies of SoftRAM for that purpose.

10. In or about August 1995, Microsoft, Inc. introduced "Windows 95," a much publicized and awaited operating system said to embody numerous and substantial improvements over Windows 3.x. At the time of its release, it was expected that there would be an unparalleled demand for Windows 95, both as installed in new computers and as "upgrades" to computers using Windows 3.x. Both before and after the introduction of Windows 95, considerable notice was taken by prospective purchasers of the fact that Windows 95 and applications sold for use with it would be particularly "memory hungry," requiring at least eight megabytes of RAM and preferably sixteen. The great number of computer users with only four or eight megabytes of RAM in their computers were frequently cautioned that they could upgrade effectively to Windows 95 only by acquiring additional RAM.

11. As is more fully described subsequently, in or about August 1995, respondents began the promotion and sale of "SoftRAM^{95}," bearing Microsoft's logo "Designed for Windows 95," to prospective and actual Windows 95 users as a substantially less expensive, but functionally identical, alternative to the purchase and installation of additional RAM. To date, respondents have sold approximately 600,000 copies of SoftRAM^{95} for that purpose.

SOFTRAM

12. Since at least May 1995, respondents have disseminated or have caused to be disseminated advertisements and product packaging that make a variety of effectiveness claims for SoftRAM. Respondents' advertisements and product packaging include, but are not necessarily limited to, the attached Exhibit 1. These

advertisements and product packages contain the following statements:

A. "Double Your Memory seamlessly with SoftRAM. Eliminate the expense and hassle of opening your PC to install hard RAM." (Emphasis in original; Exhibit 1).

B. "Imagine: 4MB becomes 8, 8 becomes 16 . . . You become doubly productive. Open more applications simultaneously and say good-bye to [computer screen messages indicating error due to insufficient memory]." (Emphasis in original; Exhibit 1).

C. "SoftRAM's Patented Technologies take your Windows memory and effectively double it. And SoftRAM's unique RAM Analyst . . . pre-calculates the most efficient compression method for each RAM page of memory." (Emphasis in original; Exhibit 1).

13. Through the means described in paragraph twelve, respondents have represented, expressly or by implication, that:

A. SoftRAM uses compression technology to double the RAM available to a computer using Windows 3.x;

B. SoftRAM produces the effect of doubling RAM in a computer using Windows 3.x, such that a computer with 4MB of RAM will behave as though it had 8MB of RAM and a computer with 8MB of RAM will behave as though it had 16MB of RAM;

C. Use of SoftRAM will permit a Windows 3.x user to open more applications simultaneously on a computer as though the amount of RAM in that computer had been doubled; and

D. Use of SoftRAM in a computer using Windows 3.x will substantially reduce or eliminate the occurrence of computer screen messages that indicate that the computer has insufficient memory to run the user's application(s).

14. Through the means described in paragraph twelve, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph thirteen, at the time the representations were made.

15. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph thirteen, at the time the representations were made.

Therefore, the representation set forth in paragraph fourteen was, and is, false or misleading.

SOFTRAM[95]

16. Since at least August 1995, respondents have disseminated or caused to be disseminated advertisements and product packaging that make a variety of effectiveness claims for SoftRAM[95]. Respondents' advertisements and product packaging include, but are not necessarily limited to, the attached Exhibits 2, 3, and 4. These advertisements and product packages contain the following statements and depictions:

A. "ANNOUNCING THE ONLY DISK THAT DOUBLES YOUR MEMORY FOR WINDOWS 95." (Emphasis in original; Exhibit 2).

B. "Why risk the technical nightmare and expense of adding hard RAM? Just click on SoftRAM[95], the only software to instantly speed up Windows 95 and Windows 3.0 and higher." (Exhibit 2).

C. "Doubling RAM doesn't have to be hard. Install SoftRAM[95] and instantly speed up Windows 95 and Windows 3.0 and higher. Run multimedia and RAM hungry applications. Open more applications simultaneously." (Emphasis in original; Exhibit 3).

D. "4MB becomes at least 8MB. 8MB becomes at least 16MB. . . . (In fact, you can get up to 5 times more memory.)" (Exhibit 3).

E. "Designed for Microsoft Windows 95 [depicting the Microsoft logo]." (Exhibit 4).

F. "Double Your Memory and expand your System Resources seamlessly with SoftRAM[95]. Eliminate the expense and hassle of opening your PC to install HardRAM chips." (Emphasis in original; Exhibit 4).

G. "Imagine: 4MB becomes 8MB, 8MB becomes 16MB . . . You become doubly productive." (Emphasis in original; Exhibit 4).

H. "Say good-bye to 'Out-of-Memory' messages." (Exhibit 4).

I. "SoftRAM[95]'s Patent Pending RAM compression technology takes your Windows memory and at least doubles it. In fact, SoftRAM[95] now achieves RAM compression ratios of up to 5x and higher." (Emphasis in original; Exhibit 4).

17. Through the means described in paragraph sixteen, respondents have represented, expressly or by implication, that:

A. SoftRAM[95] increases RAM in a computer using Windows 95 to a greater extent than other software products;

B. SoftRAM[95] uses compression technology to at least double the RAM available to a computer using Windows 3.x or Windows 95, and achieves RAM compression ratios of up to five times and higher in such a computer;

C. SoftRAM[95] produces the effect of at least doubling RAM in a computer using Windows 3.x or Windows 95, such that a computer with 4MB of RAM will behave as though it had 8MB of RAM and

a computer with 8MB of RAM will behave as though it had 16MB of RAM;

D. Use of SoftRAM[95] in a computer will speed up Windows 3.x or Windows 95 as though the amount of RAM in that computer had been at least doubled;

E. Use of SoftRAM[95] will permit a Windows 3.x or Windows 95 user to run larger applications on a computer, and to open more applications simultaneously, as though the amount of RAM in that computer had been at least doubled;

F. Use of SoftRAM[95] with Windows 3.x or Windows 95 will result in expanded systems resources on a computer and will substantially reduce or eliminate the occurrence of computer screen messages that indicate that the computer has insufficient memory to run the user's application(s); and

G. Microsoft, Inc. has licensed, endorsed, or otherwise approved SoftRAM[95] for use with Windows 95.

18. In truth and in fact,

A. SoftRAM[95] does not increase RAM in a computer using Windows 95 to a greater extent than other software products;

B. SoftRAM[95] does not use compression technology or at least double the RAM available to a computer using Windows 95, nor does it achieve RAM compression ratios of up to five times and higher in a computer using Windows 95; in fact, SoftRAM[95] does not increase the RAM available to a computer using Windows 95;

C. SoftRAM[95] does not produce the effect of at least doubling RAM in a computer using Windows 95, such that a computer with 4MB of RAM will behave as though it had 8MB of RAM and a computer with 8MB of RAM will behave as though it had 16MB of RAM; in fact, SoftRAM[95] does not produce the effect of increasing RAM in a computer using Windows 95;

D. Use of SoftRAM[95] in a computer will not speed up Windows 95 as though the amount of RAM in that computer had been at least doubled; in fact, use of SoftRAM[95] will not speed up Windows 95;

E. Use of SoftRAM[95] will not permit a Windows 95 user to run larger applications on a computer, or to open more applications simultaneously, as though the amount of RAM in that computer had been at least doubled; in fact, use of SoftRAM[95] will not permit a

Windows 95 user to run larger applications or to open more applications simultaneously;

F. Use of SoftRAM[95] with Windows 95 will not result in expanded systems resources on a computer and will not substantially reduce or eliminate the occurrence of computer screen messages that indicate that the computer has insufficient memory to run the user's application(s); and

G. Microsoft, Inc. has not licensed, endorsed, or otherwise approved SoftRAM[95] for use with Windows 95.

Therefore, the representations set forth in paragraph seventeen, to the extent applicable to Windows 95, were, and are, false or misleading.

19. Through the means described in paragraph sixteen, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph seventeen, subparagraphs A through F, at the time the representations were made.

20. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph seventeen, subparagraphs A through F, at the time the representations were made. Therefore, the representation set forth in paragraph nineteen was, and is, false or misleading.

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

EXHIBIT 1

EXHIBIT 1

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EXHIBIT 1

EXHIBIT 2

EXHIBIT 3

EXHIBIT 4

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EXHIBIT 4

DECISION AND ORDER

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

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft 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 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, 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 Syncronys Softcorp is a Nevada corporation with its principal office or place of business located at 3958 Ince Boulevard, Culver City, California.

Respondent Rainer Poertner is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in the complaint. His principal office or place of business is the same as that of Syncronys Softcorp.

Respondent Daniel G. Taylor is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation,

including the acts or practices alleged in the complaint. His principal office or place of business is the same as that of Syncronys Softcorp.

Respondent Wendell Brown is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in the complaint. His principal office or place of business is the same as that of Syncronys Softcorp.

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

ORDER

DEFINITIONS

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

1. *"Random access memory ("RAM")"* is the primary working memory in a computer. The instructions provided by a computer program and the data being worked on are stored in RAM while the program is running. Additional RAM, measured in megabytes ("MBs"), can be purchased in the form of microchips that are physically inserted into a computer.

2. *"Compression technology"* is a process which allows more information to reside in RAM. Compression technology eliminates redundant data by utilizing various recipes for analyzing and transforming it.

3. *"Windows 95"* refers to the Windows 95 software operating system manufactured by Microsoft, Inc.

4. *"Substantially similar product"* shall mean any software product that uses or purports to use compression technology and that is intended or purports to increase the amount of RAM in a computer or to accomplish any effect similar to one that would be caused by increasing the amount of RAM in a computer. These effects include, but are not limited to, increase in speed of computer operations, increase in size or number of applications that can be run simultaneously, and expansion of systems resources or reduction or elimination of "insufficient memory" errors or messages.

5. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise

of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

6. Unless otherwise specified, *"respondents"* shall mean Syncronys Softcorp, a corporation, its successors and assigns and its officers; Rainer Poertner, Daniel G. Taylor, and Wendell Brown, individually and as officers of the corporation; and each of the above's agents, representatives, and employees.

7. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondents, 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 SoftRAM[95] or any substantially similar product in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, that:

A. Such product increases RAM in a computer using Windows 95 to a greater extent than other software products;

B. Such product uses compression technology to increase the RAM available to a computer using Windows 95 or achieves RAM compression ratios of up to five times or higher in a computer using Windows 95;

C. Such product produces the effect of increasing the RAM available to a computer using Windows 95;

D. Use of such product in a computer will speed up Windows 95;

E. Use of such product will permit a Windows 95 user to run larger applications on a computer or to open more applications simultaneously;

F. Use of such product with Windows 95 will result in expanded systems resources on a computer and will substantially reduce or eliminate the occurrence of computer screen messages that indicate that the computer has insufficient memory to run the user's application(s); or

G. Microsoft, Inc. has licensed, endorsed, or otherwise approved such product for use with Windows 95.

II.

It is further ordered, That respondents, 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 SoftRAM, SoftRAM^{95}, or any substantially similar product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the relative or absolute performance, attributes, benefits, or effectiveness of such product, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

III.

It is further ordered, That respondents, 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 product intended to improve the performance of any computer in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that such product has been authorized, certified, licensed, endorsed, or otherwise approved by any person or organization, unless such representation is true.

IV.

It is further ordered, That respondents, 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 product intended to improve the performance of any computer in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the relative or absolute performance, attributes, benefits, or effectiveness of such product, unless, at the time it is made, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

V.

It is further ordered, That respondents shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and, within ten (10) business days of their receipt of a written request, make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

It is further ordered, That respondent Syncronys Softcorp and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent Syncronys Softcorp and its successors and assigns shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

It is further ordered, That respondent Syncronys Softcorp and its successors and assigns shall notify the Commission at least thirty (30) days prior to any 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 respondents learn less than thirty (30) days prior to the date such action is to take place, respondents 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.

VIII.

It is further ordered, That respondents Rainer Poertner, Daniel G. Taylor, and Wendell Brown, for a period of five (5) years after the date of issuance of this order, shall each notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any company engaged in the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product intended to improve the performance of any computer in or affecting commerce. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. 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.

IX.

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

X.

This order will terminate on October 7, 2016, 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 Part 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 Part.

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 Part as though the complaint had never been 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

FRESENIUS AG, 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-3689. Complaint, Oct. 15, 1996--Decision, Oct. 15, 1996

This consent order requires, among other things, the California-based subsidiary of Fresenius AG to divest its Lewisberry, Pennsylvania hemodialysis concentrate production facility to Di-Chem, Inc., of Maple Grove, Minnesota, or to another Commission-approved acquirer, if the Di-Chem deal falls through.

Appearances

For the Commission: *Howard Morse, Steven Wilensky* and *William Baer.*

For the respondents: *David Beddow* and *Richard Parker, O'Melveny & Myers,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Fresenius AG, the parent company of Fresenius USA, Inc. (collectively "Fresenius"), has entered into an Agreement and Plan of Reorganization with W.R. Grace & Co. ("Grace") whereby Fresenius will acquire from Grace the businesses comprising National Medical Care, Inc. ("NMC"), and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and having reason to believe that Fresenius has entered into such agreement in restraint of trade in violation of Section 5 of the Federal Trade Commission Act, 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 RESPONDENTS

1. Respondent Fresenius AG is a corporation organized, existing and doing business under and by virtue of the laws of Germany with its office and principal place of business located at Borkenberg 14, 61440 Oberursel/Ts, Bad Homburg, Germany.

2. Respondent Fresenius USA, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Massachusetts with its principal place of business located at 2637 Shadelands Drive, Walnut Creek, California.

3. At all times relevant herein, the respondents (collectively "Fresenius") have been, and are 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), and are corporations whose business is in or affecting commerce as defined in Section 4 of the Federal Trade Commission Act (15 U.S.C. 44).

II. THE PROPOSED ACQUISITION

4. On or about February 24, 1996, Fresenius and Grace executed an Agreement and Plan of Reorganization in which Fresenius would acquire the assets and businesses comprising Grace's NMC subsidiary.

5. Fresenius and NMC are substantial direct competitors in the United States market for hemodialysis concentrate.

III. THE RELEVANT LINE OF COMMERCE

6. One relevant line of commerce within which to analyze the effects of the acquisition is the United States market for hemodialysis concentrate. Hemodialysis concentrate is a bicarbonate solution used in hemodialysis treatment of End Stage Renal Disease to carry waste materials from the patient's blood during the treatment.

7. Hemodialysis concentrate is a necessary product for hemodialysis treatment with no available substitute. The cost of the hemodialysis concentrate accounts for a small portion of the cost of hemodialysis treatment.

8. Imports of hemodialysis concentrate into the United States are rare. The potential for significant imports is constrained by the fact

that most concentrate is shipped in an aqueous solution, making shipping costs very high relative to the value of the product.

9. Total sales of hemodialysis concentrate in the United States are approximately $50 million.

IV. MARKET CONCENTRATION

10. Fresenius and NMC are two of a small number of producers of hemodialysis concentrate in the United States. NMC is the leading producer. The other producers include CGH Medical, Minn-Tech Corporation, Rockwell Medical and Dana Laboratories. After the acquisition, Fresenius would have a market share of hemodialysis concentrate sales of over 50 percent in the United States.

11. The United States market for hemodialysis concentrate is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI"). On the basis of capacity, the proposed acquisition would increase concentration, as measured by the HHI, by over 1250 points, to over 3100. On the basis of sales, the proposed acquisition would increase concentration, as measured by the HHI, by over 950 points, to over 3000.

V. CONDITIONS OF ENTRY

12. Entry into the hemodialysis concentrate market would not be likely to deter or offset reductions in competition resulting from the acquisition.

13. In addition to obtaining FDA approval, a new entrant would need to obtain a relatively high volume of sales in order to have cost-competitive production, and to support the costs of product testing. The need to capture a large market share makes the success of new entry less likely, and acts as a deterrent to entry. Most of the investment in production would likely be sunk in the event that entry were unsuccessful.

14. The likelihood of new entry is also reduced by the fact that a significant proportion of the dialysis clinics that use hemodialysis concentrate, including NMC, also produce the concentrate, and therefore are unlikely to purchase from a new entrant. Vertically integrated firms account for approximately a third of patients receiving hemodialysis treatment.

15. Moreover, a new entrant into hemodialysis concentrate would need to have an effective distribution system. However, there are only a few large full-line distributors of hemodialysis products, the largest of which (Fresenius, NMC, and CGH Medical) already produce hemodialysis concentrate.

VI. EFFECTS OF THE ACQUISITION

16. The acquisition of NMC by Fresenius may substantially lessen competition in the United States market for hemodialysis concentrate because, among other things:

a. It will eliminate substantial head-to-head competition between NMC and Fresenius;

b. It will increase concentration substantially in a highly concentrated market;

c. It will increase the likelihood of coordinated interaction among producers of hemodialysis concentrate;

d. Company documents project that the increased "consolidation" of suppliers will likely lead to "price stabilization;" and

e. It will likely result in increased prices for hemodialysis concentrate.

VII. VIOLATIONS CHARGED

17. The acquisition agreement between Fresenius and NMC described in paragraph four violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

18. The proposed acquisition of NMC by Fresenius would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Starek dissenting.

DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the proposed acquisition by Fresenius AG, the parent company of Fresenius USA, Inc. (collectively

"Fresenius" or "respondents"), of National Medical Care, Inc. from W.R. Grace & Co., which acquisition is more fully described at paragraph I.D. below, and Fresenius having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration and which, if issued by the Commission, would charge Fresenius with violations of the Clayton Act and the Federal Trade Commission Act; and

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

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

1. Respondent Fresenius AG is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Borkenberg 14, 61440 Oberursel/Ts, Bad Homburg, Germany.

2. Respondent Fresenius USA, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Massachusetts with its principal place of business located at 2637 Shadelands Drive, Walnut Creek, California.

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. *"Respondents"* or *"Fresenius"* means Fresenius AG and Fresenius USA, Inc., their directors, officers, employees, agents and representatives, their predecessors, successors, and assigns; their subsidiaries, divisions, and groups and affiliates controlled by Fresenius, and the respective directors, officers, employees, agents, representatives, successors and assigns of each; their domestic and foreign parents, and the subsidiaries, divisions, and groups and affiliates controlled by any other domestic or foreign parent, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. *"NMC"* means National Medical Care, Inc., its directors, officers, employees, agents and representatives, its predecessors, successors, and assigns; its subsidiaries, divisions, and groups and affiliates controlled by NMC, and the respective directors, officers, employees, agents, representatives, successors and assigns of each; its domestic and foreign parents, including W.R. Grace & Co., and the subsidiaries, divisions, and groups and affiliates controlled by any other domestic or foreign parent, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

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

D. *"NMC acquisition"* means the acquisition by Fresenius AG of NMC that is the subject of an Agreement and Plan of Reorganization entered into on or about February 4, 1996.

E. *"Hemodialysis concentrate"* means the acid portion of the dialysate solution used in hemodialysis treatment of End Stage Renal Disease to carry waste materials from the patient's blood during the treatment.

F. *"Assets and businesses"* means assets, properties, businesses, and goodwill, tangible and intangible, including, without limitation, the following:

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

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical

information, dedicated management information systems, information contained in management information systems, rights to software, trademarks, patents and patent rights, inventions, trade secrets, technology, know-how, ongoing research and development, specifications, designs, drawings, processes and quality control data;

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

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

5. All right, title, and interest in and to the contracts entered into in the ordinary course of business with customers (other than contracts in which hemodialysis concentrate is sold as part of a package of products), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

6. All rights under warranties and guarantees, express or implied;

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

8. All items of prepaid expense.

G. *"Hemodialysis business to be divested"* means the Fresenius Lewisberry, Pennsylvania Hemodialysis Manufacturing Facility, and any additional Fresenius hemodialysis concentrate assets and businesses (as defined) as are necessary to assure the viability and competitiveness of the hemodialysis business to be divested in the manufacture, marketing or distribution of hemodialysis concentrate.

H. *"Viability and competitiveness"* means that the hemodialysis concentrate business to be divested is capable of functioning independently and competitively in the hemodialysis concentrate business in substantially the same manner achieved by Fresenius prior to the divestiture.

II.

It is further ordered, That:

A. Respondents shall, absolutely and in good faith, divest the hemodialysis business to be divested to Di-Chem, Inc. ("Di-Chem"), within 10 business days of either (i) the date this order is made final, or (ii) the closing of the NMC Acquisition, whichever is later,

pursuant to and in accordance with the May 17, 1996 agreement between Fresenius USA, Inc. and Di-Chem ("Divestiture Agreement"). If the terms of such Divestiture Agreement are changed or supplemented in any way, notice of such changes or supplementations must be provided to the Commission, and any material changes or supplementations may be made only with the prior approval of the Commission. In the event that the Divestiture Agreement is terminated through no fault of respondents, respondents shall divest the hemodialysis business to be divested within four (4) months of either (i) the date this order is made final, or (ii) the closing of the NMC Acquisition, whichever is later, and respondents shall also effect such additional arrangements so as to assure the viability and competitiveness of the hemodialysis business to be divested. Respondents shall divest the hemodialysis business 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. The purpose of the divestiture is to enable the acquirer to compete in the manufacture and sale of hemodialysis concentrate in the United States and to remedy the lessening of competition resulting from the NMC Acquisition as alleged in the Commission's complaint.

B. Pending divestiture of the hemodialysis business to be divested, respondents shall take such actions as are necessary to maintain the marketability, viability and competitiveness of the hemodialysis business to be divested, including, but not limited to, taking necessary steps to ensure that the Lewisberry plant is capable of, and has been approved for, commercial production, and to prevent destruction, removal, wasting, deterioration or impairment of the hemodialysis business to be divested, other than ordinary wear and tear.

III.

It is further ordered, That:

A. If respondents have not divested the hemodialysis business to be divested within four (4) months of either (i) the date this order becomes final, or (ii) the closing of the NMC Acquisition, whichever is later, the Commission may appoint a trustee to divest the hemodialysis business to be divested pursuant to paragraph II of this order. In the event that the Commission or the Attorney General

brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), 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(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondents to comply with this order. The Commission shall select the trustee under this paragraph, 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, divestitures, and licensing. 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.

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

1. Subject to the prior approval of the Commission and consistent with the provisions of paragraph II of this order, the trustee shall have the exclusive power and authority to divest the hemodialysis business to be divested.

2. Within ten (10) days after the appointment of the trustee, respondents 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 the divestiture required by this order.

3. The trustee shall have twelve (12) months from the date the trust agreement described in this paragraph III.B is approved by the Commission to accomplish the divestiture of the hemodialysis business to be divested, which shall be subject to the prior approval of the Commission. If, however, at the end of this twelve (12) month period, the trustee has submitted a plan of divestiture or believes that

divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court.

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

5. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to an acquirer as set out in paragraph II 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.

6. The trustee shall serve without bond or other security at the cost and expense of respondents, and 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, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the 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 divesting the hemodialysis business to be divested.

7. 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 duties of the trustee, 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.

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

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

10. The trustee shall have no obligation or authority to operate or maintain the hemodialysis business to be divested.

11. The trustee shall report in writing to respondents and the Commission every thirty (30) days concerning efforts to accomplish the divestiture.

IV.

It is further ordered, That:

A. Within twenty (20) 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 a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with 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 paragraph II of the order, including a description of all substantive contacts or negotiations for the 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 divestiture.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall cease and desist from acquiring, without Prior Notification to the Commission (as defined below), directly or indirectly, through subsidiaries or otherwise, any assets for manufacturing hemodialysis concentrate or any hemodialysis concentrate manufacturing facility, that have been employed in hemodialysis concentrate manufacturing in the United States within one (1) year of the date of an offer by Fresenius to purchase the assets, or any interest in a hemodialysis concentrate manufacturing facility in the United States, or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates a hemodialysis concentrate manufacturing facility in the United States. Provided, however, that this paragraph V shall not be deemed to require Prior Notification to the Commission for (i) the construction of new facilities by Fresenius, (ii) the acquisition of new or used equipment in the ordinary course of business from a person other than the acquirer of the hemodialysis business to be divested, or any other present producer of hemodialysis concentrate; or (iii) the purchase or lease by Fresenius of a facility that has not been operated as a hemodialysis concentrate manufacturing facility at any time during the year immediately prior to the purchase or lease by Fresenius.

"Prior Notification to the Commission" required by paragraph V 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 Form"), and shall be prepared and transmitted 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, notification need not be made to the United States Department of Justice, and notification is required only of Fresenius and not of any other party to the transaction. Fresenius shall provide the Notification Form to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period,

representatives of the Commission make a written request for additional information, Fresenius shall not consummate the transaction until twenty (20) days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, Fresenius shall not be required to provide Prior Notification to the Commission pursuant to this order 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.

VI.

It is further ordered, That until the obligations set forth in paragraphs II, III and V are met, 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 corporations that may affect compliance obligations arising out of the order.

VII.

It is further ordered, That respondents, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on five days notice to respondents, shall permit any duly authorized representative(s) 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. Without restraint or interference from respondents, to interview respondents' officers, directors, or employees, who may have counsel present, regarding such matters.

Commissioner Starek dissenting.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

There were no public comments on the consent agreement in this matter, and I am not aware of any other information that has come to the Commission's attention since its acceptance of that agreement that would persuade me to join in its decision to issue the complaint and final order in this matter. The evidence accumulated in the investigation was not sufficient to give rise to reason to believe that respondents' acquisition of National Medical Care, Inc. ("NMC") from W.R. Grace & Co. is likely to lessen competition substantially in a United States market for hemodialysis concentrate ("HD concentrate").

HD concentrate consists of various salts (sodium chloride, magnesium chloride, calcium chloride, and potassium chloride) and dextrose in purified water, with sodium bicarbonate (*i.e.*, baking soda) added at a later stage. Because this easily formulated mixture does not enter the body and therefore is not a "drug" for purposes of Food and Drug Administration ("FDA") regulation, the FDA applies to HD concentrate the somewhat more lenient regulations applicable to medical devices. Regulatory delay thus does not significantly constrain entry by new firms or expansion by incumbents.

The investigation revealed that various producers of HD concentrate -- including Fresenius itself -- entered quickly and easily into the manufacture of the product, and some stated that they could inexpensively increase their capacity to make HD concentrate by as much as 60 percent within 30 days, without substantial investment or the need for additional FDA approval.[1] These indicia of cheap and simple entry and expansion may explain why the delivered price of HD concentrate has fallen continuously since the product first became available.[2]

Thus, any assessment of this acquisition's potential to increase concentration in the market for HD concentrate -- and in turn make likelier an exercise of market power -- must take into account several

[1] Given the contrast between the time required for entry in the United States and that required in Germany, it is perhaps unsurprising that the latter nation's Bundeskartellamt concluded that Fresenius' acquisition of a competitor in HD concentrate would have anticompetitive effects. Entry into the German HD concentrate business apparently takes three to five years. In the United States, entry requires around nine months.

[2] It is difficult to accept the proposition that "[m]ost of the investment in production would likely be sunk in the event that entry were unsuccessful" (complaint, ¶ 13). The equipment used in the manufacture of HD concentrate appears to be adaptable to alternate uses, and indeed the investigation in this case turned up evidence of firms planning to convert some HD concentrate facilities to other purposes.

strongly mitigating factors, including approximately 40 percent current excess capacity, the aforementioned ability of manufacturers to expand capacity speedily and at minimal cost, and the evident ability of customers (hemodialysis clinics) to integrate into the manufacture of HD concentrate in the event concentrate producers behave anticompetitively. Certain customers that speculated that the acquisition might lead to higher prices for HD concentrate appear to have been unaware of current plans for significant entry or capacity expansion by firms other than Fresenius and NMC. Moreover, other customer complaints seem to have been motivated by a fear that the vertical integration of Fresenius (a manufacturer of kidney dialysis products) and NMC (an operator of hemodialysis treatment centers, among its other businesses) could make the merged firm a stronger competitor in dialysis treatment.

As I said several months ago, it is always tempting to accept the "bird in the hand" represented by a consent agreement proffered in the early stages of an investigation, such as the one entered into (apparently without significant resistance) by Fresenius. Nevertheless, when the evidence on entry, expansion, and the absence of anticompetitive effects is as clear as in this case, the issuance of a consent order is unwarranted.

I therefore dissent.

IN THE MATTER OF

ONKYO U.S.A. CORPORATION

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

Docket C-3092. Consent Order, July 2, 1982--Modifying Order, Oct. 24, 1996

This order reopens a 1982 consent order -- that prohibited the New Jersey manufacturer from attempting to fix the resale prices for its products, and from restricting the lawful use of its trademarks and brand names -- and this order modifies the consent order by permitting Onkyo to impose lawful price restrictive cooperative advertising programs and to unilaterally terminate a dealer for failing to adhere to previously announced resale prices.

ORDER GRANTING IN PART AND DENYING IN PART REQUEST TO REOPEN AND MODIFY ORDER ISSUED JULY 2, 1982

On April 23, 1996, Onkyo U.S.A. Corporation ("Onkyo"), filed its "Petition to Reopen Proceedings and Modify Consent Order" ("Petition") in Docket No. C-3092, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51 ("Rules"). Onkyo asks the Commission to reopen and modify the consent order issued by the Commission on July 2, 1982, in *Onkyo U.S.A. Corporation*, 100 FTC 59 (1982) ("order").

Among other things, Onkyo asks the Commission to modify the order by adding provisions stating that the order will not be construed to prohibit Onkyo (1) from implementing lawful price restrictive cooperative advertising programs; and (2) from announcing resale prices in advance and unilaterally refusing to deal with or terminating dealers who fail to adhere to such resale prices. Onkyo also asks the Commission to eliminate or modify several order provisions. These provisions either limit Onkyo's ability to impose restrictions on its dealers' advertised prices in connection with the sale of its home audio products or limit its ability unilaterally to terminate a dealer for failure to adhere to previously announced resale prices. In addition, Onkyo requests the Commission to set aside the requirement that it furnish a copy of the order to certain employees and that the Commission terminate the order twenty years after the date it was

issued.[1] Onkyo maintains that reopening and modification is warranted by changes in the law and is in the public interest. Onkyo's Petition was placed on the public record for thirty days. No comments were received.

Onkyo has shown that it is in the public interest to reopen and modify the order. Onkyo's inability to condition advertising allowances on advertised price and unilaterally to announce pricing restrictions to its dealers has harmed its ability to market its products consistent with a marketing strategy that emphasizes knowledgeable sales personnel, attractive showrooms and "quality over price."[2] Consequently, Onkyo cannot operate its business as effectively as its competitors and is thus competitively disadvantaged in a manner that was not contemplated when the order was issued by the Commission. Onkyo has demonstrated that the modifications the Commission has determined to implement would enable it to use what Onkyo considers the most efficient and cost effective marketing strategy with respect to its products and would put Onkyo on an equal basis with its competitors.[3] Permitting Onkyo unilaterally to terminate a dealer for failure to adhere to previously announced resale prices is also consistent with prior order modifications and would permit Onkyo to engage in conduct that is lawful under the Colgate doctrine and would give Onkyo greater control over its dealer network. *See United States v. Colgate Co.*, 250 U.S. 300 (1919). The order, as modified, will continue to prohibit unlawful resale price maintenance.

In light of the recent civil penalty action and settlement against Onkyo arising out of several alleged order violations, the Commission has determined, as discussed below, to deny Onkyo's requests (1) that the Commission set aside the provision requiring Onkyo to furnish a copy of the order to certain of its employees and (2) that the

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1 On July 25, 1995, the Commission filed a civil penalty action and settlement against Onkyo arising out of several alleged order violations. Consequently, the Onkyo order would now remain in effect for twenty years from the date the complaint alleging Onkyo's order violations was filed, pursuant to Section 3.72(b)(3)(ii) of the Rules. In its Petition, Onkyo requests that the Commission exercise its discretion to provide for termination of the order consistent with Section 3.72(b)(3)(i) of the Rules, which provides that existing orders would automatically terminate twenty years from the date that the order was issued.

2 Petition at 3.

3 The Commission recently reopened and made similar modifications to orders in Interco Incorporated, et al., Docket No. C-2929 (March 27, 1995), and Pendleton Woolen Mills, Inc., Docket No. C-2985 (September 30, 1996). Likewise, the Commission modified the orders in U.S. Pioneer Electronics Corp., Docket No. C-2755 (April 8, 1992) and The Magnavox Co., Docket No. 8822 (March 12, 1990).

Commission allow the order to sunset after twenty years pursuant to Section 3.72(b)(3)(i) of the Rules.

I. STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *see Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").[4]

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

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other

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

than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie,* 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

II. REOPENING IS IN THE PUBLIC INTEREST

In support of its Petition, Onkyo states that the relief it seeks is required by changed conditions of law and the public interest. Because the Commission has determined that the order should be reopened and modified in the public interest, it need not and does not consider whether Onkyo has shown changed conditions of law that would require reopening the order.

Onkyo has demonstrated that the order prevents Onkyo, but not its competitors, from freely choosing with whom it will deal.[5] The order, according to Onkyo, also prevents Onkyo from unilaterally imposing price-related restrictions on cooperative advertising, a practice "freely engaged in by [Onkyo's] competitors."[6] In addition, Onkyo, unlike its competitors, is unable to seek and obtain pricing information from its dealers with respect to its own and competing products,[7] nor may it announce in advance suggested resale prices,

[5] For example, some authorized Onkyo dealers discount Onkyo products by "cutting back on display, service and ambience, and by trading on the display and promotion which other dealers provide." Affidavit of Theodore W. Green, Vice President, Sales and Marketing, Onkyo U.S.A. Corporation (April 18, 1996) ("Green Aff.") ¶ 9.

[6] Green Aff. ¶ 14.

[7] According to Onkyo, "consumers, dealers, and manufacturers are constantly focused on the price of their [consumer electronics] products relative to the competition." Green Aff. ¶ 6. Onkyo characterizes the relevant market as highly price competitive and cites, as an example, the rapid decline

and unilaterally choose to cease dealing with a dealer because of its pricing practices.[8] As a result, Onkyo is a less effective competitor because it cannot structure its distribution system to meet the demands of the marketplace with respect to its products.[9] Onkyo has thus shown that it is in the public interest to reopen and modify the order. Onkyo claims that it is a less effective competitor because it cannot structure its distribution system to meet the demands of the marketplace in lawful ways that are available to its competitors.

III. THE ORDER SHOULD BE MODIFIED

Onkyo requests that the order be modified to permit Onkyo to implement price restrictive cooperative advertising programs and unilaterally to terminate a reseller that refuses to sell Onkyo products at Onkyo's previously announced resale prices. For these purposes, Onkyo has requested that the following paragraphs be added to the order:

It is further ordered, That nothing in this order shall be construed to prohibit respondent from offering, establishing or maintaining cooperative advertising programs under which respondent will pay for certain dealer advertising of its products on conditions established by respondent, including conditions as to the prices at which respondent's products are offered in such dealer advertising.

It is further ordered, That nothing in this order shall prohibit respondent from announcing any resale prices for any products in advance and unilaterally refusing to deal with or terminating any dealer who fails to advertise, offer for sale or sell such products at the announced prices.

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in prices for new products. For example, when first introduced, mini-stereo systems sold for approximately $1,000. Within months of their introduction, such systems became available for $400 or less. *Id*.

Onkyo states that because of such rapid price changes, "it is vital to [Onkyo's and its dealers'] success" that Onkyo maintain "regular and effective communication about the competitiveness of our pricing and that of our competitors." *Id.* ¶ 7. Onkyo also needs "accurate feedback on market prices in order to plan the design and introduction of new products." *Id*.

[8] For example, Onkyo cannot "readily refuse to deal with discounting retailers and thereby support its full-service dealers who educate potential consumers about the features of its products, but who frequently lose the ultimate sale to the 'free-riding' retailer who offers the same product at a discounted price." Petition at 21.

[9] For example, unlike many of its competitors, Onkyo is unable to offer its dealers cooperative advertising programs that establish minimum advertised price restriction ("MAP") because the order may be construed to prohibit such programs. Consequently, Onkyo has been unable to expand its dealer base because dealers "are less inclined to carry the Onkyo line because [Onkyo] does not have a MAP program." Green Aff. ¶ 28.

The addition of these provisions would permit Onkyo to impose price restrictions on its dealers in connection with its cooperative advertising programs and would restore Onkyo's Colgate doctrine rights allowing it unilaterally to terminate a dealer who refuses to advertise and sell products at previously published resale prices. Modifying the order in this respect is consistent with the Commission's actions in *The Advertising Checking Bureau, Inc.*, 109 FTC 146 (1987); *The Magnavox Co.*, 113 FTC 255 (1990); U.S. Pioneer Elec. Corp., Trade Reg. Rep. (CCH) ¶ 23,172 (1992); Clinique Laboratories, Inc., Trade Reg. Rep. (CCH) ¶ 23,330 (1993); Interco Incorporated, et al., Docket No. C-2929, Order Granting in Part and Denying in Part Request to Reopen and Modify Order Issued September 26, 1978 (March 27, 1995); and Pendleton Woolen Mills, Inc., Docket No. C-2985, Order Granting in Part Request to Reopen and Modify Order Issued July 31, 1979 (September 30, 1996).

The approach followed by the Commission in adopting its new cooperative advertising policy by setting aside the order in The Advertising Checking Bureau and in the subsequent modifications, applies to Onkyo's request for a paragraph regarding price restrictive cooperative advertising. Without this provision, the order prohibits price restrictions that Onkyo might want to impose on its dealers in connection with cooperative advertising programs it may wish to implement. Such restrictions may not necessarily be part of an illegal RPM scheme and have now been recognized as reasonable in many circumstances.[10] Of course, any cooperative advertising program implemented by Onkyo as part of an RPM scheme would be *per se* unlawful and would violate the order even if Onkyo's requested modification is granted.

The proposed second paragraph would permit Onkyo unilaterally to terminate a reseller for failure to adhere to previously announced prices. This type of conduct is lawful under the Colgate doctrine and would allow Onkyo greater control over its retailer network. Under the Colgate doctrine, a supplier can "announce its resale prices in advance and refuse to deal with those who do not comply."[11] The requested modification should enable Onkyo to afford some

[10] *See, e.g., Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717 (1988) (a vertical restraint of trade is not *per se* illegal unless it includes some arrangement on price or price levels); In re Nissan Antitrust Litigation, 577 F.2d 910 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) (agreements that withhold cooperative advertising allowances from dealers who advertise discounted prices are analyzed under the rule of reason).

[11] *United States v. Colgate Co.*, 250 U.S. 300, 307 (1919).

protection to Onkyo dealers who invest in significant pre-sale services and promotion and thereby have greater success in attracting and retaining these retailers within its distribution network. Such control would assist Onkyo in implementing its overall marketing plans.

The remaining order modifications requested by Onkyo are aimed at removing language that is in direct conflict with the proposed cooperative advertising and "Colgate rights" provisions. Some of these changes, as discussed below, are appropriate to make the order consistent with the two paragraphs the Commission has determined to add to the order:

1. Onkyo's request to delete the words "directly or indirectly" from the order's preamble and from subparagraphs I.1, I.2, and I.3.

In support of this proposed modification, Onkyo states that the use of the modifier "indirectly" unnecessarily inhibits Onkyo from lawful, competitive behavior, "which has had a chilling effect on interbrand competition."[12] Onkyo asserts that the prohibition of acts that "indirectly" have an unlawful result constitute mere "fencing-in" relief that, "[a]fter more than thirteen years, is no longer necessary or appropriate".[13]

Onkyo's request to delete the phrase "directly or indirectly" from the order's preamble is denied. This standard language appears in virtually all of the Commission's orders, and serves to assure that a respondent is not able to do by indirect means what the order prohibits it from doing directly. Moreover, this phrase in the preamble prevents Onkyo from engaging in conduct that, although lawful, could lead to or facilitate an unlawful RPM scheme; for example, a threat to terminate dealers for failure to adhere to resale prices. Threats to obtain dealer acquiescence in resale prices are "plainly relevant and persuasive to a meeting of the minds" that could result in an unlawful agreement to fix resale prices.[14] Onkyo may, consistent with the order as modified, announce in advance its intention to terminate any dealer who fails to adhere to its previously announced resale prices, and it may terminate any such dealer, but "it may not threaten a dealer to coerce compliance with or agreement to suggested

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12 *Id.* at 10.

13 *Id.* at 12.

14 *See Monsanto v. Spray-Rite Service Corporation,* 465 U.S. 752, 765 and n.10 (1984); *see also Lenox, Inc.,* 111 FTC 612, 617 (1989).

retail prices."[15] Thus, retaining the "directly or indirectly" language in the order's preamble will ensure that Onkyo will not be able to engage in lawful conduct that could lead to or facilitate unlawful conduct.

Onkyo's request to delete the phrase "directly or indirectly" from subparagraphs I.1, I.2, and I.3 of the order is granted. The preamble covers Onkyo's conduct under the order's specific substantive provisions and inclusion of the phrase "directly or indirectly" in the preamble extends to Onkyo's conduct under those provisions. It is, therefore, not necessary to repeat the phrase "directly or indirectly" in the order's provisions prohibiting specific conduct.

2. Onkyo's request to delete the words "advertise, promote," from subparagraph I.1 of the order.[16]

Onkyo requests that the words "advertise, promote," be deleted from subparagraph I.1 of the order to enable Onkyo to implement minimum advertised price programs as part of cooperative advertising arrangements.[17] Although Onkyo's Petition does not expressly discuss the reasons Onkyo believes these words should be deleted from the order,[18] presumably, Onkyo is concerned that even with the added cooperative advertising provision, the reference to advertising in subparagraph I.1 of the order could be confusing and, consequently, could exert a chilling effect on Onkyo's ability to implement price-restrictive cooperative advertising and promotional programs.

The language of the cooperative advertising proviso added to the order is sufficient to permit Onkyo to implement lawful price restrictive cooperative advertising programs. Deleting the words "advertise, promote" from subparagraph I.1, however, could be construed to allow agreements on advertised prices that go beyond such lawful cooperative advertising programs. Onkyo has not requested or shown that it should be permitted to enter such agreements outside lawful cooperative advertising programs. Accordingly, the request to delete the words "advertise, promote," from subparagraph I.1 of the order is denied.

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15 *See* In re Interco Incorporated, et al., Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995) at 10.

16 Petition at 13, 25. Subparagraph I.1 prohibits Onkyo from: "Fixing, establishing, controlling or maintaining, directly or indirectly, the resale price at which any dealer may advertise, promote, offer for sale or sell any product."

17 *Id.* at 13, 25.

18 Onkyo requests that the words "advertise, promote," be deleted in the context of its discussion of why the Commission should add the cooperative advertising provision to the order.

3. Onkyo's request to delete the word "Requesting" from subparagraph I.2 and delete subparagraph I.4 in its entirety.[19]

Onkyo states that the prohibition on "requests" is inconsistent with Commission's removal of the prohibition on the use of suggested resale prices that was part of the order as originally proposed.[20] It also argues that deletion of "Requesting" and subparagraph I.4 in its entirety would be consistent with the recent Interco modification. In Interco, the Commission deleted a restriction on "suggesting" that a reseller refrain from advertising products at a certain resale price.[21]

Onkyo's request to delete the word "Requesting" from subparagraph I.2 and to delete subparagraph I.4 in its entirety, or, in the alternative, to delete the words "requesting, or" from subparagraph I.4 of the order is denied. Allowing Onkyo to suggest resale prices to its dealers does not mean that Onkyo can enter into vertical agreements to fix resale prices with its dealers. Such agreements are *per se* unlawful. In Interco, the Commission modified the order to permit the respondent only to suggest prices at which a reseller may wish to advertise a product without permitting the respondent to require a reseller to advertise products at a specified price.[22] Subparagraphs I.2 and I.4 of the order, which, among other things, bar Onkyo from requesting dealers to adhere to resale prices and from requesting dealers to discontinue selling or advertising any product at any resale price, in essence prohibits Onkyo from directly or indirectly "inviting" its dealers to participate in a resale price maintenance scheme.[23] Requests, or any similar cooperative means of accomplishing the maintenance of resale prices fixed by Onkyo, in the context of its business relationship with its dealers, are analogous

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[19] Subparagraph I.2 prohibits Onkyo from: "Requesting, requiring or coercing, directly or indirectly, any dealer to maintain, adopt or adhere to any resale price."

Subparagraph I.4 prohibits Onkyo from: "Requesting or requiring that any dealer refrain from or discontinue selling or advertising any product at any resale price."

In the alternative, Onkyo requests that the words "requesting, or" be deleted from subparagraph I.4 of the order and that the words "where such requirement is imposed to fix, maintain, control or enforce the resale price at which any product is sold" be added to subparagraph I.4. Petition at 13.

[20] The Commission stated in this regard that:
"In prohibiting Onkyo from restricting its dealers' prices, the Commission intends to prohibit only those actions that are aimed at maintaining specific resale prices . . . . However, the order does not preclude Onkyo from initially selecting its dealers and establishing performance criteria that are otherwise reasonable under the antitrust laws." 100 FTC at 61.

[21] *See* Interco, 5 Trade Reg. Rep. (CCH) ¶ 23,791 at 23,541-42.

[22] *Id.*

[23] In Lenox, the Commission denied a request to delete a provision that barred the respondent from requesting dealers to report any person who did not observe suggested resale prices. *See Lenox, Inc.*, 111 FTC 612 (1989).

to threats to obtain dealer acquiescence in resale prices and thus are "plainly relevant and persuasive to a meeting of the minds."[24] Although cooperation and coordination between Onkyo and its dealers "to assure that their product will reach the consumer persuasively and efficiently" is not unlawful,[25] cooperation (*i.e.*: a request by Onkyo and acquiescence by the dealer) to maintain resale prices clearly is unlawful. The language of the new paragraphs is sufficient to permit Onkyo to implement lawful price restrictive cooperative advertising programs and makes it clear that Onkyo can take any lawful steps with respect to its customers' pricing practices, but leaves in place the core prohibitions prohibiting price fixing.

4. Onkyo's request to delete subparagraph I.3.[26]

The first part of subparagraph I.3 of the order is consistent with Monsanto and Sharp in which the Court said that vertical agreements to fix price are *per se* unlawful. The first part of subparagraph I.3, which bars Onkyo from "requesting or requiring, directly or indirectly, any dealer to report the identity of any other dealer who deviates from any resale price,"[27] prohibits Onkyo from inviting its dealers to participate in a resale price maintenance scheme.[28] This provision does not bar dealers from complaining to Onkyo about price cutters. Instead, it bars Onkyo from seeking the dealers' participation in policing and maintaining resale prices.

The second part of subparagraph I.3 prohibits Onkyo from "acting on any reports or information so obtained by threatening, intimidating, coercing or terminating said dealer."[29] As written, this provision applies only when Onkyo solicits and obtains the cooperation of its dealers in enforcing compliance with resale prices and acts on the information so obtained.

In addition, termination of a price cutting dealer is not lawful in all circumstances. For example, a manufacturer's threat to refuse to

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24 Monsanto, 465 U.S. at 765 and n.10.

25 *Id.* at 763-64.

26 This provision prohibits Onkyo from: "Requesting or requiring, directly or indirectly, any dealer to report the identity of any other dealer who deviates from any resale price; or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating said dealer." 100 FTC at 63.

In the alternative, Onkyo requests that the Commission modify this provision to read as follows: "Requiring any dealer to report the identity of any other dealer who deviates from any resale price, where such requirement is imposed to fix, maintain, control or enforce the resale price at which any product is sold." Petition, Exhibit C.

27 100 FTC at 63.

28 *See* Monsanto, 465 U.S. at 764 n.9 and 765.

29 100 FTC at 63.

deal to obtain compliance with resale prices can evidence an invitation to an unlawful agreement on price.[30] Nevertheless, as the Court explained in Monsanto, dealers "are an important source of information for manufacturers," dealer complaints about price cutters "arise in the normal course of business and do not indicate illegal concerted action" and a manufacturer's termination of a dealer following complaints from other dealers would not, by itself, support an inference of concerted action.[31] To the extent that this second part of subparagraph I.3 may inhibit Onkyo from legitimate unilateral conduct it may cause competitive injury. Because any conduct that would be unlawful under this part of subparagraph I.3 would be prohibited by core provisions of the order, the reasons to set aside the second part of subparagraph I.3 outweigh any reasons to retain it.[32]

5. Onkyo's request to delete subparagraphs I.5, I.4 and I.6 in their entirety or, in the alternative, delete the words "advertising" and "or advertised" from subparagraphs I.5, I.4 and I.6.[33]

With the addition of the cooperative advertising proviso to the order, the references to "advertising" in subparagraphs I.5, I.4 and I.6 of the order are confusing and could, therefore, hinder Onkyo's ability to institute a lawful, price-restrictive cooperative advertising program. Deleting these words makes clear that Onkyo can impose price restrictions on its dealers in connection with any lawful cooperative advertising program. Price restrictions in cooperative advertising programs, standing alone, are not *per se* unlawful. *See* Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs -- Rescission, 6 Trade Reg. Rep. (CCH) ¶ 39,057 (May 21, 1987). The request to delete the words "advertising" and "or advertised" from subparagraphs I.5, I.4 and I.6 of the order is granted.

Onkyo's request to delete subparagraph I.5 in its entirety is denied. The prohibition against Onkyo's conducting surveillance programs to determine dealers' resale prices for the purpose of fixing such prices should remain in place for the duration of the order. Threats to obtain dealer acquiescence in resale prices are "plainly relevant and

30 Monsanto, 465 U.S. at 765.

31 *Id.* at 763-64.

32 This recommendation is consistent with the Commission's determination to set aside a similar order provision in 1989. *See Lenox, Inc.*, 111 FTC 612, 617-18 (1989).

33 Subparagraphs I.4 and I.6 are discussed elsewhere. Subparagraph I.5 prohibits Onkyo from: "Conducting any surveillance program to determine whether any dealer is advertising, offering for sale or selling any product at any resale price, where such surveillance program is conducted to fix, maintain, control or enforce the resale price at which any product is sold or advertised." 100 FTC at 63.

persuasive to a meeting of the minds" that could result in an unlawful agreement to fix resale prices.[34] Onkyo may, consistent with the order, as modified, announce in advance its intention to terminate any dealer who fails to adhere to its previously announced resale prices, and it may terminate any such dealer, but "it may not threaten a dealer to coerce compliance with or agreement to suggested retail prices."[35]

6. Onkyo's request to delete subparagraph I.6 in its entirety or, in the alternative, delete the word "Terminating" from subparagraph I.6.[36]

Onkyo states that the word "Terminating" in subparagraph I.6 of the order is inconsistent with the new Colgate rights proviso and that the word "Terminating" has a chilling effect on Onkyo's ability unilaterally to terminate a dealer in response to price complaints by other dealers.[37]

Onkyo's request to delete the word "Terminating" from subparagraph I.6 of the order is granted. Deleting this word is consistent with the Commission's action in *Lenox, Inc.*, 111 FTC 612, 617-18 & 620 (1989). In Lenox, the Commission modified the order by deleting the words "or acting on reports so obtained by refusing or threatening to refuse sales to the dealers so reported" from a provision barring Lenox from requesting its dealers to report any retailer that did not observe the resale prices suggested by Lenox. The conduct prohibited by the deleted words in Lenox includes termination of a dealer. Likewise, in Pioneer, the Commission deleted the word "terminating" from a similar order provision "as [that word] relates to advertising," and issued an Order to Show Cause why the Pioneer order should not be "further modified to remove the restriction on Pioneer to unilaterally terminate a dealer for not following suggested

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[34] *See Monsanto Co. v. Spray-Rite Corporation*, 465 U.S. 752, 765 and n.10 (1984); *see also Lenox, Inc.* 111 FTC 612, 617 (1989).

[35] *See* In re Interco Incorporated, et al., Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995) at 10.

[36] Subparagraph I.6 prohibits Onkyo from: "Terminating, coercing or taking any other action to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product." 100 FTC at 63.

[37] *See Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-764 (1984) (Court held that a *per se* unlawful agreement could not be inferred from nothing more than a dealer termination following competitors' complaints); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) (vertical agreement to terminate a price-cutting dealer is not *per se* unlawful unless there is also an agreement on price or price levels).

resale prices."[38] Unilateral termination of a dealer for discounting is not in itself unlawful.[39]

The request to adopt Onkyo's proposed new language for subparagraph I.6 is denied. The proposed language is not consistent with similar provisions in other orders, and its prohibition on Onkyo's "preventing" the sale of products because of a dealer's deviation from any resale price is narrow and vague. The language proposed by Onkyo for subparagraph I.6 implicitly would allow Onkyo to "restrict" or "limit" (conduct currently expressly prohibited by subparagraph I.6) the sale of products because of a dealer's deviation from resale prices acceptable to Onkyo. Other than the termination of a dealer, subparagraph I.6 involves conduct that if engaged in with regard to resale prices could lead to or be used as part of a resale price maintenance scheme. Subparagraph I.6 should be retained as written, with the exception of deletion of the word "Terminating." For clarity, the words "(other than termination)" should be added to subparagraph I.6 following the word "action."

7. Onkyo's request to delete subparagraph I.7 in its entirety.[40]

In support of its request to delete subparagraph I.7, Onkyo states that to the extent that the law would permit Onkyo to take steps to prevent unauthorized dealers from using its trademarks, "Onkyo should be permitted, like its competitors, [to take] appropriate steps to prevent such use."[41] Onkyo is concerned that unauthorized "free-riding" dealers have created a situation "in which authorized [Onkyo] dealers lose interest in carrying Onkyo products because they cannot profitably distribute such products."[42] Onkyo asserts that in the context of the order's broad definition of the term "dealer,"[43] and unlike its competitors, it feels constrained in its ability to take action against authorized dealers who deviate from Onkyo's performance criteria and against dealers who sell Onkyo products but are not authorized by Onkyo to do so. According to Onkyo, "[t]rademark law

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38 U.S. Pioneer Electronics Corp., Docket No. C-2755, Order Reopening and Modifying Order Issued October 24, 1975 (April 8, 1992) at 28-30.

39 *See* Interco Incorporated, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995) at 10.

40 Subparagraph I.7 prohibits Onkyo from: "Taking any action to hinder or preclude the lawful use by any dealer of respondent's trademarks in conjunction with the sale or advertising of any product." 100 FTC at 63.

41 *Id.* at 16.

42 *Id.*

43 The term "dealer" is defined to mean "any person, partnership, corporation or firm which sells any product in the course of its business." 100 FTC at 63.

itself provides protection for any dealer who lawfully utilizes the Onkyo trademark,"[44] and dealers who "unlawfully or inappropriately" use the Onkyo trademark "and thereby injure Onkyo's competitiveness in the market or its image and reputation should not be shielded by the existing prohibition in the order."[45]

Onkyo's request to delete subparagraph I.7 from the order is denied. Given the two new order paragraphs allowing Onkyo to employ price restrictive cooperative advertising programs and to exercise Colgate rights, subparagraph I.7 does not prevent Onkyo from taking lawful steps to prevent the unlawful use of its trademark by authorized and unauthorized Onkyo dealers. Subparagraph I.7 prohibits coercion or threats against discounting retailers, which may form the basis of *per se* unlawful resale price maintenance agreements.[46]

A threat by Onkyo, to hinder or preclude a retailer from using the Onkyo trademark if the retailer did not stop discounting Onkyo products[47] could result in an implicit, yet nonetheless *per se* unlawful, resale price maintenance agreement. Onkyo will continue to be able to prevent the unauthorized use of its trademarks by any dealer. Of course, this provision also does not prohibit Onkyo from entering into and enforcing so-called transshipment bans.

8. Onkyo's request with respect to its obligations under paragraphs II and IV of the order.[48]

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[44] Petition at 17.

[45] *Id.*

[46] *See, e.g., Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1159 (7th Cir. 1987) (Posner, J.), *cert. denied*, 486 U.S. 1005 (1988), (manufacturer's threat to mix up a retailer's orders if the retailer did not raise prices to have resulted in an implicit, yet nonetheless *per se* unlawful, agreement).

[47] Similarly, fixing advertised prices, entering into advertised price agreements with dealers, sanctioning dealers who fail to enter into advertising agreements and threatening, intimidating or coercing dealers that do not comply with suggested advertised prices are all conduct which, depending on the circumstances, could fall within the *per se* ban. *See, e.g.*, Pioneer, Docket No. C-2755, Order Reopening and Modifying Order Issued October 25, 1975 (April 8, 1992) at 25-26. Although advertising price arrangements standing alone may not be *per se* unlawful, threats, or Onkyo "taking any [other] action" to hinder or preclude the lawful use of its trademarks in conjunction with the sale of its products, may come dangerously close to or be used in conjunction with unlawful resale price maintenance activities.

[48] Paragraph II of the order reads as follows:

It is further ordered, That respondent shall clearly and conspicuously state the following on each page of any list, advertising, book, catalogue or promotional material where respondent has suggested any resale price to any dealer:

THE RESALE PRICES QUOTED HEREIN ARE SUGGESTED ONLY.

YOU ARE FREE TO DETERMINE YOUR OWN RESALE PRICES.

100 FTC at 64.

Paragraph IV of the order provides:

It is further ordered, That respondent shall forthwith distribute a copy of this order to all operating divisions of said corporation, and to present and future personnel, agents or representatives having sales,

Onkyo states that these provisions of the order "have outlived their usefulness and are inconsistent with more recent FTC consent orders."[49] In addition, Onkyo asserts that its competitors are not subject to similar obligations and that Onkyo, unlike its competitors, incurs "a significant expenditure of employee time and management supervision, which cut into Onkyo's profitability"[50] in connection with its perpetual compliance obligations under paragraphs II and IV of the order. Onkyo's Petition, however, does not include any information supporting its assertion that it incurs significant costs in connection with its obligations under paragraphs II and IV of the order.

Paragraph II restricts Onkyo's use of suggested resale prices. Specifically, Onkyo must clearly and conspicuously state on each page of any material on which such suggested price is stated that such price is suggested only and that dealers are free to determine their own resale prices. In Clinique[51] the Commission concluded that a similar provision addressed conduct (suggested prices) that may not be unlawful and was no longer necessary to ensure compliance with the law. Consistent with Clinique, paragraph II should be set aside.

Onkyo's request to delete the paragraph IV requirement to distribute a copy of the order to present and future employees having sales, advertising or policy responsibilities with respect to resale prices is denied. In support of its request, Onkyo states that it "has been in effect for 13 years and has outlived its usefulness."[52] Paragraph IV has not "outlived its usefulness." Onkyo's failure to comply with this provision may have contributed to the violation of the order alleged in the civil penalty complaint recently filed by the Commission against Onkyo. To help prevent future violations of the order by Onkyo, the order distribution requirement should be retained for two years after the date on which the modified Onkyo order

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advertising or policy responsibilities with respect to the subject matter of this order, and that respondent secure from each such person a signed statement acknowledging receipt of said order. *Id.*

[49] Petition at 23. In support of its position, Onkyo cites the Commission's Policy Statement Regarding Duration of Competition Orders, 59 Fed. Reg. 45,286, 45,288 (September 1, 1994) (supplemental provisions that impose affirmative obligations similar to those imposed by paragraph II of the order terminate after three or five years). In addition, recent consent orders limited comparable relief to five years. *See, e.g.*, Reebok, Docket No. C-3592, Keds, Docket No. C-3490, *Nintendo of America, Inc.*, 114 FTC 702 (1991) and *Kreepy Krauly USA, Inc.*, 114 FTC 777 (1991). Similarly, fencing-in provisions similar to paragraph IV of the order usually expire within ten years. *See* 60 Fed. Reg. 42,569, 42,571 (August 16, 1995). *See also* Reebok and Keds.

[50] Green Aff. ¶¶ 25-26.

[51] Clinique Laboratories, Inc., Docket No. C-3027 (Feb. 8, 1993), reprinted in [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,330.

[52] Petition at 24.

becomes final, to familiarize Onkyo employees with the modified order and help ensure Onkyo's compliance with the order's core provisions.

9. Onkyo's request that the Commission retain the order's original sunset date.

Onkyo requests that the Commission "exercise its discretion"[53] to provide for termination of the order consistent with Section 3.72(b)(3)(i) of the Rules[54] and with the Commission's Statement of Policy with Respect to Duration of Competition and Consumer Protection Orders.[55] Specifically, Onkyo requests the Commission to add a new paragraph to the order stating that: "*It is further ordered*, That this order shall terminate on July 2, 2002."[56] In support of its request, Onkyo asserts that the "modest . . . circumstances of the recent enforcement proceeding"[57] justify "establishing the sunset date for the order as twenty years from its original entry."[58]

Onkyo's request is denied. On July 25, 1995, the Commission brought a civil penalty action against Onkyo because it had reason to believe the order had been violated. The usual presumption that Onkyo should not remain subject to the order beyond twenty years does not apply and the Onkyo order should remain in effect until July 25, 2015, consistent with Section 3.72(b)(3)(ii) of the Rules.[59] But for the filing of the complaint against Onkyo alleging the order violations, the order in this matter would have terminated on July 2, 2002, pursuant to Section 3.72(b)(3)(i) of the Rules.

The Policy Statement and the Rules are clear on the duration of existing competition orders. Existing administrative orders automatically sunset twenty years after they were issued, unless the Commission or the Department of Justice has filed a complaint (with or without an accompanying consent decree) in federal court to

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53 Petition at 29.

54 Section 3.72(b)(3)(i) of the Rules states that "an order issued by the Commission before August 16, 1995, will be deemed, without further notice or proceedings, to terminate 20 years from the date on which the order was first issued . . . ."

55 *See* Fed. Reg., Vol. 60, No. 158 (August 16, 1995) at 42,569.

56 Petition at 28-29.

57 *Id*. at 29. According to Onkyo, it consented to settle charges involving only supplemental order provisions. In addition, Onkyo states that it was not charged with *de novo* violations and with conspiring with its dealers to enter into unlawful RPM schemes. *Id.*

58 *Id.*

59 Section 3.72(b)(3)(ii) states that "where a complaint alleging a violation of the order was. . . filed . . . in federal court by the United States or the Federal Trade Commission while the order remains in force . . . [the] order subject to this paragraph will terminate 20 years from the date on which a court complaint . . . was filed . . . ."

enforce such order pursuant to Section 5(l) of the FTC Act during the twenty years preceding the adoption of the Policy Statement. In that event, "the order would run another twenty years from the date that the most recent complaint was filed with the court."[60] The Commission can adopt a different sunset period for core provisions "[o]nly in an exceptional case,"[61] which has not been shown.

The request to terminate the order twenty years from the date of its entry is denied. A new paragraph is added to the order stating that the order shall terminate on July 25, 2015.[62]

V. CONCLUSION

Onkyo has shown that reopening the order is in the public interest and that the order should be modified as described above.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened and that the Commission's order in Docket No. C-3092 be, and it hereby is, modified, as of the effective date of this order, as follows:

(a) By adding the following paragraphs at the end of the order:

It is further ordered, That nothing in this order shall be construed to prohibit respondent from offering, establishing or maintaining cooperative advertising programs under which respondent will pay for certain dealer advertising of its products on conditions established by respondent, including conditions as to the prices at which respondent's products are offered in such dealer advertising.

It is further ordered, That nothing in this order shall prohibit respondent from announcing any resale prices for any products in advance and unilaterally refusing to deal with or terminating any dealer who fails to advertise, offer for sale or sell such products at the announced prices.

(b) Onkyo's request to delete the words "directly or indirectly," from the order's preamble is denied.

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60 *See* Fed. Reg., Vol. 60, No. 158 (August 16, 1995) at 42,481. The filing of such a complaint, however, does not affect the duration of the order if the complaint is dismissed or the 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. In the enforcement action against Onkyo, the complaint was not dismissed and there was no court ruling that Onkyo did not violate the order.

61 *Id.* at 42,573 n.18.

62 Onkyo may file another petition to reopen and modify the order pursuant to Section 5(b) of the FTC Act, 15 U.S.C. 45(b), or Section 2.51 of the Rules, 16 CFR 2.51. If Onkyo files such a petition requesting the Commission to terminate the order prior to its termination date, it would have to make a satisfactory showing that changed conditions of law or fact require reopening of the order or that the public interest so requires.

(c) Onkyo's request to delete the words "advertise, promote," from subparagraph I.1 is denied.

(d) Subparagraphs I.1, I.2 and I.3 are modified by deleting the words "directly or indirectly,".

(e) Onkyo's request to delete the word "Requesting" from subparagraph I.2 is denied.

(f) Onkyo's request to delete subparagraph I.4, or, in the alternative, to delete the words "requesting, or" from subparagraph I.4 is denied; subparagraph I.4 is modified to read as follows:

Requesting or requiring that any dealer refrain from or discontinue selling any product at any resale price.

(g) Onkyo's request to delete subparagraph I.3 is denied; subparagraph I.3 is modified to read as follows:

Requesting or requiring any dealer to report the identity of any other dealer who deviates from any resale price.

(h) Onkyo's request to delete subparagraph I.5 is denied; subparagraph I.5 is modified to read as follows:

Conducting any surveillance program to determine whether any dealer is offering for sale or selling any product at any resale price, where such surveillance program is conducted to fix, maintain, control or enforce the resale price at which any product is sold.

(i) Onkyo's request to delete subparagraph I.6 is denied; subparagraph I.6 is modified to read as follows:

Coercing, or taking any action (other than termination) to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold, is selling or is suspected of selling any product.

(j) Onkyo's request to delete subparagraph I.7 is denied.

(k) Paragraph II of the order is set aside.

(l) Onkyo's request to delete paragraph IV is denied; paragraph IV is modified to read as follows:

It is further ordered, That for a period ending two (2) years from the date this order becomes final, the respondent shall forthwith distribute a copy of the July 2, 1982, order in Docket No. C-3092, as modified, to all operating divisions of said corporation, and to present and future personnel, agents or representatives having sales, advertising or policy responsibilities with respect to the subject matter of the order in Docket No. C-3092, and that respondent secure from each such person a signed statement acknowledging receipt of said order.

(m) Onkyo's request to terminate the order on July 2, 2002 is denied; the order is modified by adding the following paragraph:

It is further ordered, That the order in Docket No. C-3092, as modified, shall terminate on July 25, 2015.

Commissioner Starek concurring in the result only.

IN THE MATTER OF

GREY ADVERTISING, INC.

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

Docket C-3690. Complaint, Oct. 30, 1996--Decision, Oct. 30, 1996

This consent order prohibits, among other things, the New York-based advertising agency, that handled the Hasbo, Inc., paint-sprayer toy account, from using deceptive demonstrations or otherwise misrepresenting the performance of any toy.

Appearances

For the Commission: *Rosemary Rosso* and *Michael Ostheimer.*

For the respondent: *Leonard Orkin, Kay, Collyer & Boose,* New York, N.Y.

COMPLAINT

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

PARAGRAPH 1. Respondent Grey Advertising, Inc. is a New York corporation, with its principal office or place of business at 777 Third Avenue, New York, New York.

PAR. 2. Respondent, at all times relevant to this complaint, was an advertising agency of Hasbro, Inc., and prepared and disseminated advertisements to promote the sale of Colorblaster Design Toys, spray painting toys.

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. The Colorblaster Design Toy consists of a plastic drawing tray with an oblong plastic air tank underneath. An attached handle is used to pump up pressure inside the air tank. Special color pens are inserted into a sprayer connected to a hose attached to the air tank. Several sets of stencils, four color pens and blank paper are

included with the toy. The enclosed instructions state: "Fully extend handle and pump it quickly 50 strokes. . . The more you pump, the more you spray."

PAR. 5. Respondent has disseminated or has caused to be disseminated advertisements for the Colorblaster Design Toy ("Colorblaster"), including but not necessarily limited to the attached Exhibits A and B. These advertisements contain the following statements and depictions:

A.	VIDEO	AUDIO
	Children playing with a Colorblaster.	Boy: It's a blast!
	Tight shot of hand spraying stencil and removing it to reveal a picture of a car followed by a scene of children using the Colorblaster.	Song: Something hip just blew into town spraying art with a blast of air. It's the Colorblaster.
		Girl: Nothing like it anywhere!
	Hand pumping toy four times.	Boy: It's a blast!
	Several scenes of the Colorblaster spraying stencils and quickly creating multi-colored pictures.	Song: PPPump, pump...
		Song: Spray. Blast away. Spray'n stencils. Hot designs. Spray cool colors. Pictures so fine.
	Girl pumping toy twice.	Boy: Wild!
	Red spray filling screen.	Song: It's the Colorblaster.
	(Exhibit A, television advertisement).	Spraying art with a blast of air.

B.	VIDEO	AUDIO
	Hand pumping toy four times.	Announcer: Get the feel...
	Super: FEEL	
	Super: REAL	Announcer: of the real...
	Close-up of the Colorblaster	Announcer: Colorblaster.
	Tight shot of hand spraying car stencil and removing stencil to reveal multi-colored picture of car followed by shot of boy free spraying the car picture.	Song: The super hot way to spray with a blast of air.
		Boy: Wow!
		Song: Pump, pump. Spray.
	Split-screen image of hand pumping toy four times.	Song: Blast away. The real Colorblaster.
	Several scenes of the Colorblaster spraying stencils and quickly creating multi-colored pictures.	
	Hand pumping toy three times.	
	Super: FEEL	Announcer: Get the feel...
	Super: REAL	Announcer: Of the real...
	The Colorblaster.	Announcer: Colorblaster.
	(Exhibit B, television advertisement).	

PAR. 6. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondent has represented, directly or by implication, that the demonstrations in the television advertisements of the operation of the Colorblaster Design Toy were unaltered and that the results shown accurately represent the performance of actual, unaltered Colorblaster Design Toys under the depicted conditions.

PAR. 7. In truth and in fact, the demonstrations in the television advertisements of the operation of the Colorblaster Design Toy were not unaltered and the results shown do not accurately represent the performance of actual, unaltered Colorblaster Design Toys under the depicted conditions. Among other things, the Colorblaster Design Toy depicted in the advertisements was not manually pumped to provide the air pressure necessary to operate the paint sprayer. Instead, a motorized air compressor was attached to the Colorblaster Design Toy to provide the air pressure necessary to operate the paint sprayer, making it appear that children can operate the Colorblaster Design Toy and complete multi-part stencils with a small amount of pumping and little effort. Therefore, the representations set forth in paragraph six were, and are, false and misleading.

PAR. 8. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondent has represented, directly or by implication, that children can operate the Colorblaster Design Toy and complete multi-part stencils with a small amount of pumping and little effort.

PAR. 9. In truth and in fact, children cannot operate the Colorblaster Design Toy and complete multi-part stencils with a small amount of pumping and little effort. To operate the Colorblaster Design Toy and complete multi-part stencils, children must engage in substantial pumping and significant manual effort. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. Respondent knew or should have known that the representations set forth in paragraphs six and eight were, and are, false and misleading.

PAR. 11. The acts and practices of the respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or

affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT B

DECISION AND ORDER

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

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the 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 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 Grey Advertising, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office or place of business at 777 Third Avenue, New York, New York.

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

ORDER

I.

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

A. In connection with any advertisement depicting a demonstration, experiment or test, making any representation, directly or by implication, that the demonstration, experiment, or test depicted in the advertisement proves, demonstrates, or confirms any material quality, feature, or merit of any toy when such demonstration, experiment, or test does not prove, demonstrate, or confirm the representation for any reason, including but not limited to:

1. The undisclosed use or substitution of a material mock-up or prop;
2. The undisclosed material alteration in a material characteristic of the advertised toy or any other material prop or device depicted in the advertisement; or
3. The undisclosed use of a visual perspective or camera, film, audio, or video technique;

that, in the context of the advertisement as a whole, materially misrepresents a material characteristic of the advertised toy or any other material aspect of the demonstration or depiction.

Provided, however, that notwithstanding the foregoing, nothing in this order shall be deemed to otherwise preclude the use of fantasy segments or prototypes which use otherwise is not deceptive.

Provided further, however, that it shall be a defense hereunder that respondent neither knew nor had reason to know that the demonstration, experiment or test did not prove, demonstrate or confirm the representation.

B. Misrepresenting, in any manner, directly or by implication, any performance characteristic of any Colorblaster Design Toy or any other toy.

II.

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

III.

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

IV.

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

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

2. 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, and complaints or inquiries from governmental organizations; and

3. Any and all affidavits or certificates submitted by an employee, agent, or representative of respondent to a television network or to any other individual or entity, other than counsel for respondent, which affidavit or certification affirms the accuracy or integrity of a

demonstration or demonstration techniques contained in a toy advertisement.

V.

This order will terminate on October 30, 2016, or twenty 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 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.

VI.

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

IN THE MATTER OF

GREY ADVERTISING, INC.

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

Docket C-3691. Complaint, Oct. 30, 1996--Decision, Oct. 30, 1996

This consent order prohibits, among other things, the New York-based advertising agency, that handled The Dannon Company's Pure Indulgence frozen yogurt account, from misrepresenting the fat, saturated fat, cholesterol, or calories in any frozen yogurt, frozen sorbet, and most ice cream products.

Appearances

For the Commission: *Rosemary Rosso* and *Michael Ostheimer.*

For the respondent: *Leonard Orkin, Kay, Collyer & Boose,* New York, N.Y.

COMPLAINT

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

PARAGRAPH 1. Respondent Grey Advertising, Inc. is a New York corporation, with its principal office or place of business at 777 Third Avenue, New York, New York.

PAR. 2. Respondent, at all times relevant to this complaint, was an advertising agency of The Dannon Company, Inc., and prepared and disseminated advertisements to promote the sale of Dannon Pure Indulgence frozen yogurt, a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements for Dannon Pure Indulgence frozen

yogurt ("DPI"), including but not necessarily limited to the attached Exhibit A. This advertisement contains the following statements and depictions:

VIDEO	AUDIO
Super: BEWARE: THE FOLLOWING GRAPHIC IMAGES MAY PROMPT FEELINGS OF GUILT AMONG VIEWERS. Close-ups of frozen dessert. Super: HEY Super: IT'S OK Man with frozen dessert container. Scoops of frozen dessert falling into dish. Super: It's FROZEN YOGURT Close-up of container of DPI. Woman eating DPI. Super: It's Pure Heaven Scoops of DPI variously identified in supers as caramel pecan, heath bar crunch, and cookies n cream.	Announcer: The following graphic images may prompt feelings of guild among viewers.
Containers of DPI. Super: New Dannon Pure Indulgence Frozen Yogurt	Announcer: New Dannon Pure Indulgence Frozen Yogurt.
Scoops of DPI. Super: PROCEED WITHOUT CAUTION (Exhibit A, television advertisement).	Announcer: Very well... Proceed without caution.

PAR. 5. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that Dannon Pure Indulgence frozen yogurt is low in fat, low in calories, and lower in fat than ice cream.

PAR. 6. In truth and in fact, at the time the advertisements were disseminated, certain flavors of Dannon Pure Indulgence frozen yogurt were not low in fat, not low in calories, and not lower in fat than many ice creams. Therefore, the representations set forth in paragraph five were false and misleading.

PAR. 7. Respondent knew or should have known that the representations set forth in paragraph five were false and misleading.

PAR. 8. The acts and practices of the respondent as alleged in this complaint constitute unfair or deceptive acts or practices and the

making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

DECISION AND ORDER

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

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the 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 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 Grey Advertising, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office or place of business at 777 Third Avenue, New York, New York.

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

ORDER

I.

It is ordered, That respondent Grey Advertising, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any frozen yogurt, frozen sorbet or ice cream product (excluding all other food or confection products in which ice cream is an ingredient comprising less than fifty percent of the total weight of the involved product) in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, through numerical or descriptive terms or any other means, the existence or amount of fat, saturated fat, cholesterol, or calories in any such product. If any representation covered by this Part either directly or by implication conveys any nutrient content claim defined (for purposes of labeling) by any regulation promulgated by the Food and Drug Administration, compliance with this Part shall be governed by the qualifying amount for such defined claim as set forth in that regulation.

II.

Nothing in this order shall prohibit respondent from making any representation that is specifically permitted in labeling for any frozen yogurt, frozen sorbet or ice cream by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

III.

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

IV.

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

V.

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

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

2. 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, and complaints or inquiries from governmental organizations.

VI.

This order will terminate on October 30, 2016, or twenty 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 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.

VII.

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

IN THE MATTER OF

RUSTEVADER CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE MAGNUSON-MOSS WARRANTY ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9274. Complaint, Aug. 30, 1995--Decision, Oct. 30, 1996

This consent order prohibits, among other things, David F. McCready, a Pennsylvania-based former owner and officer of RustEvader Corporation, from representing that the products he markets are effective in preventing or substantially reducing corrosion in motor vehicle bodies or making any representation concerning the performance, efficacy or attributes of such products, unless such representations are true and the respondent possesses competent and reliable evidence to substantiate such claims, and from misrepresenting the existence or results of any test or study. In addition, the consent order requires the respondent to pay $200,000 in consumer redress.

Appearances

For the Commission: *Michael Milgrom, John Mendenhall, Brinley H. Williams* and *Dana C. Barragate.*

For the respondents: *Keith Whann* and *Jay McKirahan, Whann & Associates*, Dublin, OH. *Mark Wendekier*, Patton, PA.

COMPLAINT

The Federal Trade Commission, having reason to believe that RustEvader Corporation, and David F. McCready, individually and as an officer of RustEvader Corporation (referred to collectively herein as "respondents), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent RustEvader Corporation a/k/a Rust Evader Corporation, sometimes d/b/a REC Technologies ("REC") is a Pennsylvania corporation with its office and principal place of business located at 1513 Eleventh Avenue, Altoona, Pennsylvania.

At times material to the allegations of this complaint, respondent David F. McCready ("McCready") has been the president and an

owner and director of REC. His business address is the same as that of REC. Individually, or in concert with others, McCready has directed, formulated and controlled the acts and practices of REC, including the acts and practices alleged in this complaint.

PAR. 2. Respondents manufacture, label, advertise, offer for sale, sell, and distribute an electronic corrosion control device for use on automobiles, trucks and vans (hereinafter "motor vehicles") under the names Rust Evader, Rust Buster, Electro-Image, Eco-Guard and others (referred to collectively herein as "Rust Evader").

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

PAR. 4. Respondents have disseminated, or have caused to be disseminated, advertisements and promotional materials for the Rust Evader including, but not necessarily limited to, the attached Exhibits A through E. These advertisements and promotional materials contain the following statements:

(a) Rust Buster Electronic Corrosion Control

This is the original multi-patented Electronic Corrosion Control for automobiles. Over a decade of test market experience and Consumer satisfaction guarantees our product as the best in today's hi-tech market.

MOST COMMONLY ASKED QUESTIONS

What can I expect from this product? Corrosion rate is reduced and auto body life is extended.

. . . .

The Rust Buster C.D.O.I. interferes with the rusting process. Since the rusting process is gradual, the amount of energy consumed is very small. Rust Buster C.D.O.I. effectively reduces corrosion rate.

. . . .

Rust Buster C.D.O.I. provides a source of free electrons that interfere with coupling of ferrous metal electrons with oxygen -- reducing the corrosion rate.

. . . .

. . . complete interference in the rusting process cannot be expected, but rust retardation is dramatically demonstrated.

. . . .

You want your car to look good while you're driving it, when you are ready to sell or trade it and particularly if you decide to give the car a major overhaul. If you lease a car, you are responsible to maintain a certain cosmetic standard or pay a penalty. Rust Buster C.D.O.I. wants your car to last and maintain its maximum value.

. . . .

Over a decade of proven effectiveness. Thousands of satisfied customers. Inside-out & outside-in corrosion reduction. (Exhibit A)

(b) The invisible shield of protection for your vehicle!

The invisible shield of protection used worldwide!

Protect your car, truck or van 24 hours a day -- rain or shine -- with the world leader in electronic automotive rust control! The RustEvader * system retards rust and corrosion, and protects your vehicle with a lifetime guarantee. Common nicks, scratches and abrasions won't deteriorate into rust-through damage from the outside in -- or inside out. The RustEvader* system safeguards your investment. . .

. . . .

-- helps increase your car's value at trade-in time
-- protection against rust-through damage as result of stone chips, abrasions, salt, snow, sleet and sea-spray
-- the original multi-patented electronic corrosion control device
-- over 10 years of consumer satisfaction

. . . .

Your best investment in your vehicle's future value!

*See printed warranty for exact description of warranty coverage and exclusions! (Exhibit B)

(c) Rust Evader

ELECTRONIC CORROSION CONTROL

The RustEvader interferes with rusting process. Electro-chemists have made great progress in understanding corrosion. RustEvader Corp. has applied the results of this progress in developing the RustEvader Automotive Corrosion Control System and since the rusting process is gradual, the amount of energy consumed is very small -- RustEvader reduces the corrosion rate.

RustEvader Electronic Corrosion Control gives you unmatched protection from salt, snow, sleet and sea spray corrosion. Rust perforation (rust-through) from either side of the sheet metal is warranted not to occur on your vehicle.

. . . .

THE INTELLIGENT APPROACH TO PRESERVING AUTOMOTIVE APPEARANCE

. . . .

* Established track record in reducing corrosion -- documented by users.
* Recapture your investment at trade-in time. . .for New and Used cars. (Exhibit C)

(d) NOW!! ELECTRONIC CORROSION CONTROL

Rust Evader Automotive Corrosion Control

. . . .

The Rust Evader interferes with the rusting process. . . . Environmental conditions that promote rusting also prompt a counter response from the RustEvader system. Energy for the electron bath is provided by the car's battery and since the rusting process is gradual, the amount of energy consumed is very small -- RustEvader reduces the corrosion rate. "The Logical Choice for Controlling Rust" (Exhibit D, reduced copy of dealer display board)

(e) The Rust Buster system Beats Rust!

The Rust Buster system keeps your car, truck or van beautiful for years! Common nicks, scratches and road salt won't deteriorate into rust-through damage, so you'll save on costly autobody repairs and preserve your investment!

The Rust Buster system also offers unmatched protection! Unlike traditional undercoatings, it protects hard to reach, corrosively vulnerable areas by impressing

electrons throughout the metal body panels of the vehicle and interferring [sic] with oxygen's natural ability to couple with these ferrous metals. (Exhibit E, reduced copy of dealer display board)

PAR. 5. Through the use of the trade names "Rust Evader" and "Rust Buster" and the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the promotional materials attached as Exhibits A-E, respondents have represented, directly or by implication, that the Rust Evader is effective in substantially reducing corrosion in motor vehicle bodies.

PAR. 6. In truth and in fact, the Rust Evader is not effective in substantially reducing corrosion in motor vehicle bodies. Therefore, respondents' representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the use of the trade names "Rust Evader" and "Rust Buster" and the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the promotional materials attached as Exhibits A-E, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph five, respondents possessed and relied upon a reasonable basis that substantiated such representation.

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

PAR. 9. In connection with the promotion and sale of the Rust Evader, respondents have disseminated or caused to be disseminated to distributors and dealers materials to conduct a demonstration of the efficacy of the Rust Evader. Respondents have also disseminated depictions of the same demonstration, of which Exhibit G, attached hereto, is an example. The demonstration places two pieces of metal in a transparent tank containing salt water. One piece of metal is connected to a Rust Evader and the other is not. In connection with this demonstration, respondents make, and instruct the distributors and dealers to make the following (or similar) statements:

This Laboratory Test provides the "worst case scenario" to test RustEvader Technology. Two (2) identical pieces of sheet steel are suspended in salt bath. The RustEvader protects Sample "A" while Sample "B" rusts severely. (Exhibit G)

PAR. 10. Through the use of the depictions, materials and statements set forth in paragraph nine, respondents have represented, directly or by implication, that the demonstration described in paragraph nine accurately represents how the Rust Evader protects motor vehicle bodies from corrosion.

PAR. 11. In truth and in fact, the demonstration described in paragraph nine does not accurately represent how the Rust Evader protects a motor vehicle body from corrosion. The process utilized in the demonstration -- impressed current cathodic protection -- is much more effective under water than under conditions that a motor vehicle would normally encounter. Therefore, respondents' representation set forth in paragraph ten was, and is, false and misleading.

PAR.12. In connection with the promotion and sale of Rust Evader, respondents have disseminated or have caused to be disseminated, to distributors and dealers, reports of laboratory and other tests performed on the Rust Evader. Some of these reports represent, directly or by implication, that the reported test constitutes scientific proof that Rust Evader is effective in substantially reducing corrosion in motor vehicle bodies. In addition, respondents have represented orally, directly or by implication, that these tests constitute scientific proof that the Rust Evader is effective in substantially reducing corrosion in motor vehicle bodies.

PAR. 13. In truth and in fact, such tests do not constitute scientific proof that the Rust Evader is effective in substantially reducing corrosion in motor vehicle bodies. Therefore, respondents' representation set forth in paragraph twelve was, and is, false and misleading.

PAR. 14. In connection with the sale of the Rust Evader, respondents have provided purchasers with a limited warranty in the form attached hereto as Exhibit F. That warranty contains the following provision:

INSPECTIONS REQUIRED: The vehicle must be inspected every 24 months within 30 days of anniversary of installation date, by an authorized Rust Evader Dealer who may charge his current labor rate up to one hour for the inspection. FAILURE TO HAVE VEHICLE INSPECTED AS REQUIRED VOIDS THE WARRANTY.

PAR. 15. The warranty provision described in paragraph fourteen is in violation of Section 102(c) of the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act (15 U.S.C. 2302(c)) because it conditions a warranty pertaining to a consumer product actually costing the consumer more than $5 on the consumer's use of a service (other than a service provided without charge) which is identified by brand, trade, or corporate name.

PAR. 16. In providing advertisements, promotional materials and product demonstrations, such as those referred to in paragraphs four through thirteen, to their distributors and dealers, respondents have furnished the means and instrumentalities to those distributors and dealers to engage in the acts and practices alleged in paragraphs five through thirteen.

PAR. 17. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT A

EXHIBIT B

EXHIBIT B

EXHIBIT C

EXHIBIT C

EXHIBIT D

EXHIBIT E

EXHIBIT F

EXHIBIT G

EXHIBIT G

DECISION AND ORDER

The Commission having heretofore issued its complaint charging David F. McCready (hereinafter "respondent") and RustEvader Corporation with violation of Section 5 of the Federal Trade Commission Act, as amended, and respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

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

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

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

1. RustEvader Corporation, a/k/a Rust Evader Corporation, sometimes d/b/a REC Technologies(REC)is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 1513 Eleventh Avenue, Altoona, Pennsylvania.

Respondent David F. McCready has been an owner, officer and director of said corporation. At times material to the complaint herein, he formulated, directed, and controlled the policies, acts, and practices of said corporation. His address is RD 4 Box 92 B, Altoona, Pennsylvania.

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

ORDER

DEFINITIONS

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

A. *"Electronic corrosion control device"* shall mean any device or mechanism that is intended, through the use of electricity, static or current, to control, retard, inhibit or reduce corrosion in motor vehicles.

B. *"Rust Evader"* shall mean the electronic corrosion control device sold under the trade names Rust Evader, Rust Buster, Electro-Image, Eco-Guard, and any other substantially similar product sold under any trade name.

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

I.

It is ordered, That respondent David F. McCready, individually and as an officer of RustEvader Corporation, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, packaging, labeling, advertising, promotion, offering for sale, sale, or distribution of the Rust Evader, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from representing, in any manner, directly or by implication, that such product is effective in preventing or substantially reducing corrosion in motor vehicle bodies.

II.

It is further ordered, That respondent David F. McCready, individually and as an officer of RustEvader Corporation, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, packaging, labeling, advertising, promotion, offering for sale, sale, or distribution of any product for use in motor vehicles in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from making any representation, directly or by implication, concerning the performance, efficacy or attributes of such product unless such representation is true and, at the time such representation is made, respondent possesses and relies upon competent and reliable evidence, which, when appropriate, must be competent and reliable scientific evidence, that substantiates the representation.

III.

It is further ordered, That respondent David F. McCready, individually and as an officer of RustEvader Corporation, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, packaging, labeling, advertising, promotion, offering for sale, sale, or distribution of any product for use in motor vehicles in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions, interpretations or purpose of any test, study, or survey.

IV.

It is further ordered, That respondent David F. McCready, individually and as an officer of RustEvader Corporation, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, packaging, labeling, advertising, promotion, offering for sale, sale, or distribution of any product for use in motor vehicles in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from misrepresenting, in any manner, directly or by implication, that any demonstration, picture, experiment or test proves, demonstrates or confirms any material quality, feature or merit of such product.

V.

It is further ordered, That respondent David F. McCready, individually and as an officer of RustEvader Corporation, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, packaging, labeling, advertising, promotion, offering for sale, sale, or distribution of the Rust Evader in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from employing the terms Rust Evader or Rust Buster in conjunction with or as part of the name for such product or the product logo.

VI.

It is further ordered, That respondent David F. McCready, individually and as an officer of RustEvader Corporation, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, packaging, labeling, advertising, promotion, offering for sale, sale, or distribution of any consumer product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act and actually costing the consumer more than five dollars ($5.00), shall forthwith cease and desist from conditioning any written or implied warranty of such product on the consumer's purchase or use, in connection with such product, of any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name.

VII.

It is further ordered, That respondent David F. McCready, individually and as an officer of RustEvader Corporation, his successors and assigns, shall be liable for consumer redress in the amount of two hundred thousand dollars ($200,000.00) as provided herein:

A. Not later than five (5) days from the date this order becomes final, respondent shall deposit into an escrow account to be established by the Commission for the purpose of receiving payment

due under this order ("Commission escrow account"), the sum of two hundred thousand dollars ($200,000.00).

B. Provided however, that if, at the time this order becomes final, respondent has not completed the sale of respondent's property known as RD 4 Box 92B, Altoona, Pennsylvania, then respondent shall deposit, into the Commission escrow account, not later than five (5)days from the date this order becomes final, the sum of forty thousand dollars ($40,000.00). Respondent shall deposit the remaining one hundred sixty thousand dollars ($160,000.00) into the Commission escrow account upon the sale of respondent's property known as RD 4 Box 92B, Altoona, Pennsylvania at the time of the sale of said property or six months from the date that this order becomes final, whichever first occurs. Respondent shall provide security for the one hundred sixty thousand dollars ($160,000.00) by means of a mortgage on the property known as RD 4 Box 92B, Altoona, Pennsylvania. Such mortgage shall be in a form, and shall be entered into by such date as agreed to by the parties, but no later than five (5) days from the date this order becomes final.

C. In the event of any default in payment to the Commission escrow account, which default continues for more than ten (10) days beyond the date of payment, respondent shall also pay interest as computed under 28 U.S.C. 1961, which shall accrue on the unpaid balance from the date of default until the date the balance is fully paid.

D. The funds deposited by respondent in the Commission escrow account, together with accrued interest, shall, in the discretion of the Commission, be used by the Commission to provide direct redress to purchasers of the Rust Evader in connection with the acts or practices alleged in the complaint, and to pay any attendant costs of administration. If the Commission determines, in its sole discretion, that redress to purchasers of this product is wholly or partially impracticable or is otherwise unwarranted, any funds not so used shall be paid to the United States Treasury. Respondent shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty, or punitive assessment.

E. At any time after this order becomes final, the Commission may direct the agent for the Commission escrow account to transfer funds from the escrow account, including accrued interest, to the

Commission to be distributed as herein provided. The Commission, or its representative, shall, in its sole discretion, select the escrow agent.

F. Respondent relinquishes all dominion, control and title to the funds paid into the Commission escrow account, and all legal and equitable title to the funds vests in the Treasurer of the United States and in the designated consumers. Respondent shall make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of respondent, respondent acknowledges that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

VIII.

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

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

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

IX.

It is further ordered, That respondent David F. McCready shall, for a period of ten (10) years from the date of issuance of this order, notify the Federal Trade Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business or employment shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

X.

It is further ordered, That this order will terminate on October 30, 2016, 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 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.

XI.

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

IN THE MATTER OF

DEL MONTE FOODS COMPANY, ET AL.

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-3569. Consent Order, April 11, 1995--Modifying Order, Oct. 31, 1996

This order reopens a 1995 consent order -- that required the Del Monte Corporation and Pacific Coast Producers to terminate the purchase option agreement and certain provisions of the supply agreement, and also required respondents to obtain Commission approval before acquiring any stocks or assets of a U.S. canned fruit manufacturer and before entering into agreements with competitors -- and this order modifies the consent order by ending Del Monte's obligation to obtain Commission approval before making certain acquisitions or entering into certain marketing agreements and co-pack arrangements. The Commission substituted the prior-approval requirement with a requirement that Del Monte provide to the Commission prior notice of the specified transactions.

ORDER REOPENING AND MODIFYING ORDER

On May 24, 1996, Del Monte Foods Company and its wholly-owned subsidiary Del Monte Corporation ("Del Monte"), respondents named in the consent order issued by the Commission on April 11, 1995, in Docket No. C-3569 ("order"), filed a Petition To Reopen and Modify Consent Order ("Petition") in this matter. On October 3, 1996, Pacific Coast Producers ("PCP"), a respondent subject to the requirements of paragraphs VII and VIII of the order, filed a Statement In Support of Petition to Reopen and Modify Consent Order ("Statement"). Del Monte and PCP ("respondents"), in their Petition and Statement, respectively, ask that the Commission reopen and modify the order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement").[1] Del Monte's Petition requests that the Commission reopen and modify the order to remove the prior approval requirements and replace them with

[1] 60 Fed. Reg. 39,745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

prior notice requirements by deleting paragraphs III, VI.A and VII in their entirety, substituting the phrase "without providing advance written notification" for the prior approval requirement in paragraph V, and modifying the current advance written notification requirement in paragraph VI.B of the order by replacing the phrase "for a period beginning on the fifth anniversary of the date this order becomes final until ten years from the date this order becomes final" with the phrase "for a period of ten (10) years from the date this order becomes final."[2] The thirty-day public comment period on the Petition ended on July 1, 1996. No comments were received. For the reasons discussed below, the Commission has determined to grant the Petition in part and modify the order as set forth herein.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement.[3] The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements."[4]

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or

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[2] Petition at 2. In its Statement, PCP requests that paragraph VII be modified by replacing the prior approval requirement with the phrase "without providing advance written notification to the Commission," or otherwise in a manner consistent with the Prior Approval Policy Statement. Statement at 1.

[3] Prior Approval Policy Statement at 2.

[4] *Id.*

attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger."[5] As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order."[6] The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement.[7]

The presumption is that setting aside the general prior approval requirement in this order is in the public interest. No facts have been presented that overcome this presumption, and nothing in the record suggests that respondents would engage in the same transaction as alleged in the complaint but for the existence of the prior approval provision. Accordingly, the Commission has determined to reopen the proceedings and modify the order by deleting the prior approval provisions and by substituting prior notification provisions pursuant to the exception set out in the Prior Approval Policy Statement.

The record in this case evidences a credible risk that respondents could engage in future anticompetitive transactions that would not be reportable under the HSR Act. Among other things, the challenged transactions that led to issuance of the complaint and order in this matter were not subject to the premerger notification and waiting period requirements of the HSR Act. The complaint in this case charged that Del Monte's supply agreement with PCP, pursuant to which PCP was to provide to Del Monte virtually all of PCP's output of canned fruit, and Del Monte's option agreement with PCP, pursuant to which Del Monte acquired an irrevocable and exclusive option to purchase certain rights in, and title to, certain assets of PCP,

5 *Id.* at 3.

6 *Id.* at 4.

7 *Id.*

including long term contracts with growers, substantially lessened competition in the manufacture and sale of canned fruit in the United States in violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act. There has been no showing that the competitive conditions that gave rise to the complaint and the order no longer exist. Accordingly, pursuant to the Prior Approval Policy Statement, the Commission has determined to modify paragraphs III, V, VI.A and VII of the order to substitute a prior notification requirement for the prior approval requirement in those provisions.

Del Monte's Petition requests that the prior approval requirements of the order be removed, and prior notice requirements substituted, by deleting paragraphs III, VI.A and VII in their entirety, replacing the prior approval requirements in paragraph V with an advance written notification requirement, and modifying the current advance written notification requirement in paragraph VI.B of the order. PCP's Statement alternatively requests that paragraph VII be modified by replacing the prior approval requirement with the phrase "without providing advance written notification to the Commission." However, Del Monte's request that paragraph III be deleted in its entirety does not, for example, address the credible risk that future transactions now covered only by paragraph III.A of the order could be anticompetitive but would not be reportable under the HSR Act. In addition, advance written notification, the form of prior notice which respondents propose to substitute for the order's prior approval requirements, is significantly different from the HSR-like prior notification which the Prior Approval Policy Statement states may be used in circumstances where narrow prior notification is appropriate.[8] There has been no showing that a deviation from this form of prior notification, which has been employed in all previous order modifications granted pursuant to the Prior Approval Policy Statement, is warranted in this case. Finally, Del Monte requests that the Commission modify the advance written notification provision in paragraph VI.B by replacing the phrase "for a period beginning on the fifth anniversary of the date this order becomes final until ten years from the date this order becomes final" with the phrase "for a period of ten (10) years from the date this order becomes final." The Prior Approval Policy Statement provides that:

[8] *Id.* at 3 n.4.

No presumption will apply to existing prior notice requirements, which have been adopted on a case-by-case basis and will continue to be considered on a case-by-case basis under the policy announced in this statement.[9]

Thus, Del Monte may not rely on the Statement in seeking such a modification. Furthermore, Del Monte has not alleged that changed conditions of law or fact or the public interest requires the Commission to reopen this provision of the order. The Commission has determined that, consistent with the Prior Approval Policy Statement, the order's prior approval requirements will be set aside and HSR-like prior notification substituted for acquisitions not otherwise reportable under the HSR Act. Respondents' requested modifications inconsistent with this determination are therefore denied.[10]

Finally, the Commission has determined to correct a typographical error in paragraph VIII of the order by changing the incorrect cross-reference to paragraph VI in that provision to a correct cross-reference to paragraph VII. Respondents have consented to this modification.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened;

It is further ordered, That paragraphs I, III, IV, V, VI.A., VII and VIII of the Commission's order issued on April 11, 1995, be, and they hereby are, modified, as of the effective date of this order, to read as follows:

I.

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

* * *

K. *"Prior Notification"* means the Prior Notifications required by paragraphs III, V, VI.A and VII of this order 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

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9 *Id.* at 4-5.

10 Del Monte's Petition does not explicitly seek the precise modifications which the Commission has determined to grant. However, because Del Monte seeks reopening of the order pursuant to the Prior Approval Policy Statement, it has invoked the Commission's authority to modify the order consistent with the Statement. PCP's Statement expressly requests, as an alternative to the specific modification sought, modification "in a manner consistent with the Prior Approval Policy Statement." Statement at 1.

(hereinafter referred to as "the Notification"), and shall be prepared and transmitted 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, notification need not be made to the United States Department of Justice, and notification is required only of respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, respondents shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods pursuant to the required Prior Notifications may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding the foregoing, Prior Notification shall not be required 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.

* * *

III.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Del Monte shall not, without Prior Notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged, at the time of such acquisition or within the two years preceding such acquisition, in the manufacture of any type of Canned Fruit in the United States; provided, however, that an acquisition shall be exempt from the requirements of this paragraph if it is solely for the purpose of investment and Del Monte will not hold more than one percent of the shares of any publicly traded class of security; or

B. Acquire any assets, other than in the ordinary course of business, used for or used anytime within the two years preceding such acquisition (and still suitable for use for) the manufacture of any

type of Canned Fruit in the United States; provided, however, that an acquisition of assets will be exempt from the requirements of this paragraph if the purchase price of the assets-to-be-acquired is less than $1,500,000.00, and the purchase price of all assets used for, or previously used for (and still suitable for use for) the manufacture of any type of Canned Fruit in the United States that Del Monte has acquired from the same person (as that term is defined in the premerger notification rules, 16 CFR 801.l(a)(1)) in the twelve-month period preceding the proposed acquisition, when aggregated with the purchase price of the to-be-acquired assets, does not exceed $1,500,000.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, unless Del Monte is required to give Prior Notification to the Commission pursuant to paragraph III, and unless Del Monte has given such Prior Notification, Del Monte shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, acquire any assets other than in the ordinary course of business, used for or used anytime within the two years preceding such acquisition for (and still suitable for use for) the manufacture of any type of Canned Fruit in the United States.

* * *

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Del Monte shall not, without Prior Notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Except with respect to agreements covered by paragraphs VII and VIII, enter into any agreement or other arrangement to purchase or market any type of Canned Fruit with any corporate or non-corporate entity, engaged, at the time of entering into such agreement or other arrangement or within two years preceding entering into such agreement or other arrangement, in the manufacture of any type of Canned Fruit in the United States; provided, however, that entering

into such an agreement or other arrangement will be exempt from the requirements of this paragraph if the agreement or other arrangement is for the purchase of Canned Fruit on the Spot Market; or

B. Enter into any agreement or other arrangement with Tri Valley Growers to have any type of Canned Fruit manufactured on Del Monte's behalf.

VI.

It is further ordered, That,

A. For a period of five (5) years from the date this order becomes final, Del Monte shall not, without Prior Notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, except with respect to agreements covered by paragraphs V, VII, and VIII, enter into any agreement or other arrangement to have Canned Fruit manufactured on Del Monte's behalf ("co-pack agreement") with any corporate or non-corporate entity, engaged, at the time of entering into such co-pack agreement or within the two years preceding entering into such co-pack agreement, in the manufacture of any type of Canned Fruit in the United States;

* * *

VII.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not, without Prior Notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, enter into an agreement requiring PCP to manufacture any type of Canned Fruit on behalf of Del Monte ("co-pack agreement"); provided, however, that such a co-pack agreement between Del Monte and PCP will be exempt from the requirements of this paragraph if the aggregate of all co-pack agreements entered into in any calendar year meet all of the following criteria: 1) the amount of retail sizes (net weight under two pounds) does not exceed ten percent of PCP's output of Canned Fruit, measured in basic cases (24 2 1/2 can sizes), manufactured in the same year as the Canned Fruit manufactured pursuant to the co-pack agreements; 2) the amount of peaches grown by PCP used for the co-pack agreements does not exceed 8,000 tons in any year and none of PCP's peaches is used for retail sizes manufactured pursuant to the co-pack agreements; and 3) the total amount of the Canned Fruit manufactured pursuant to the co-pack agreements a) in each of the years 1995 and 1996 constitutes forty percent or less of PCP's output of Canned Fruit manufactured in each of those years, measured in basic cases; and b) in each year thereafter constitutes thirty percent or

less of PCP's output of Canned Fruit manufactured in that year, measured in basic cases.

VIII.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, unless respondents are required to give Prior Notification to the Commission pursuant to paragraph VII, and unless respondents have given such Prior Notification, respondents shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, enter into a co-pack agreement with each other. Said notification shall be provided to the Commission by PCP on or before March 1 of each year in which Del Monte and PCP plan to enter into a co-pack agreement. Said notification shall include a copy of the proposed co-pack agreement, all schedules and attachments, the amount of the planned co-pack stated in basic cases (24 2 1/2 can sizes) and the amount, stated in basic cases, for PCP's planned production of Canned Fruit for the same year.

IN THE MATTER OF

GEORGETOWN PUBLISHING HOUSE LIMITED PARTNERSHIP, ET AL.

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

Docket C-3692. Complaint, Nov. 19, 1996--Decision, Nov. 19, 1996

This consent order prohibits, among other things, the Washington, D.C.-based publishing firms from misrepresenting that any advertisement is an independent review or article, or that it is not a paid advertisement.

Appearances

For the Commission: *Joel Winston* and *Lesley Anne Fair*.
For the respondents: *Pro se,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Georgetown Publishing House Limited Partnership, a limited partnership, Georgetown Publishing House, Inc., a corporation, and Daniel Levinas, an officer of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Georgetown Publishing House Limited Partnership is a District of Columbia limited partnership with its principal office or place of business at 1101 30th Street, N.W., Washington, D.C.

Respondent Georgetown Publishing House, Inc., is a District of Columbia corporation with its principal office or place of business at 1101 30th Street, N.W., Washington, D.C. Georgetown Publishing House, Inc., is General Partner of Georgetown Publishing House Limited Partnership.

Respondent Daniel Levinas is an officer of Georgetown Publishing House, Inc. Individually or in concert with others, he formulates, directs, and controls the policies, acts and practices of

Georgetown Publishing House, Inc., including the acts and practices alleged in this complaint. His principal office or place of business is 1101 30th Street, N.W., Washington, D.C.

PAR. 2. Respondents have advertised, offered for sale, sold, and distributed books, including "The American Speaker: Your Guide to Successful Speaking," to the public.

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

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for "The American Speaker: Your Guide to Successful Speaking," including but not necessarily limited to the attached Exhibit A, entitled "Applause, Applause." Exhibit A, a print advertisement, was disseminated by respondents via direct mail to consumers. It appears to be a review of the book "The American Speaker: Your Guide to Successful Speaking." The advertisement is printed on glossy stock that has been ripped along the left edge. The page is headed with the word "REVIEW" and includes the byline "By Leah Thayer." On the bottom of the page is the date "NOVEMBER 1994." The advertisement bears the page numbers 17 and 18. On the reverse side of the page is the carry-over conclusion of an unrelated article that begins "(continued from page 12)." Affixed to the advertisement is a small stick-on paper with the handwritten note:

> [Recipient's name],
> Try this
> It works!
> J.

PAR. 5. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that "Applause, Applause" is a book review written by an independent journalist or reviewer, containing the independent opinions of the journalist or reviewer, and was disseminated in a magazine or other independent publication.

PAR. 6. In truth and in fact, "Applause, Applause" is not a book review written by an independent journalist or reviewer, does not

contain the independent opinions of a journalist or reviewer, and was not disseminated in a magazine or other independent publication. "Applause, Applause" is an advertisement written and disseminated by respondents for the purpose of selling the book, "The American Speaker: Your Guide to Successful Speaking." Therefore, the representation set forth in paragraph five was, and is, false and misleading.

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

EXHIBIT A

EXHIBIT A

DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft 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 that 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 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 received, 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 Georgetown Publishing House Limited Partnership is a limited partnership organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its office and principal place of business at 1101 30th Street, N.W., Washington, D.C.

Respondent Georgetown Publishing House, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its office and principal place of business at 1101 30th Street, N.W., Washington, D.C.

Respondent Daniel Levinas is an officer of Georgetown Publishing House, Inc. He formulates, directs, and controls the

policies, acts and practices of said corporation, and his office and principal place of business is located at the above stated address.

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

ORDER

I.

It is ordered, That respondents Georgetown Publishing House Limited Partnership, a limited partnership, and its successors and assigns; Georgetown Publishing House, a corporation, its successors and assigns, and its officers; and Daniel Levinas, individually and as an officer of said corporation; and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, directly or indirectly, that such product has been independently reviewed or evaluated;

B. Misrepresenting, directly or indirectly, that an advertisement is an independent review or article or is not a paid advertisement.

II.

It is further ordered, That respondents Georgetown Publishing House Limited Partnership and Georgetown Publishing House, Inc., their successors and assigns, shall for a period of five (5) years from the date of entry of this order maintain and make available to the Federal Trade Commission, within seven (7) business days of the date of the receipt of a written request, business records demonstrating compliance with the terms and provisions of this order.

III.

It is further ordered, That respondents Georgetown Publishing House Limited Partnership and Georgetown Publishing House, Inc., their successors and assigns, shall:

A. Within thirty (30) days after service of this order, provide a copy of this order to each of its current principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order; and

B. For a period of ten (10) years from the date of entry of this order, provide a copy of this order to each of its future principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order within three (3) days after the person commences his or her responsibilities.

IV.

It is further ordered, That respondents Georgetown Publishing House Limited Partnership and Georgetown Publishing House, Inc., their successors and assigns, shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in structure, including but not limited to dissolution, assignment, or sale resulting in the emergence of a successor corporation or partnership, the creation or dissolution of subsidiaries or affiliates, the planned filing of a bankruptcy petition, or any other change in the corporation or partnership that may affect compliance obligations arising out of this order.

V.

It is further ordered, That respondent Daniel Levinas shall, for a period of five (5) years from the date of entry of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment which involves the sale of consumer products. Each notice of affiliation with any new business or employment shall include the respondent's new business address and telephone number, current home address, and a statement describing

the nature of the business or employment and his duties and responsibilities.

VI.

It is further ordered, That this order will terminate on November 19, 2016, or twenty 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 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.

VII.

It is further ordered, That respondents shall, within sixty (60) days after 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 they have complied with this order.

IN THE MATTER OF

HALE PRODUCTS, INC.

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

Docket C-3694. Complaint, Nov. 22, 1996--Decision, Nov. 22, 1996

This consent order prohibits, among other things, the Pennsylvania-based manufacturer of fire truck-mounted fire pumps from entering into, continuing or enforcing any requirement that fire truck manufacturers refrain from purchasing mid-ship mounted fire pumps from any company, or that any purchaser sell only the relevant respondent's pumps. In addition, the respondent is required to send a specifically-worded notice to fire truck manufacturers stating that it has entered into an agreement with the Commission concerning the sale and installation of fire pumps.

Appearances

For the Commission: *William Baer* and *Mark Whitener.*

For the respondent: *James F. Rill, Collier, Shannon, Rill & Scott,* Washington, D.C.

COMPLAINT

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

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

a. *"Mid-Ship Mounted Fire Pumps"* are truck mounted fire pumps that meet the National Fire Protection Association Standard for Pumper Fire Apparatus known as "NFPA 1901."

b. *"OEM's"* [sic] are original equipment manufacturers who buy and install Mid-Ship Mounted Fire Pumps, as well as many other components, into a final fire truck. OEM's then sell the trucks to fire departments in the United States.

RESPONDENT

2. Respondent Hale Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the state of Pennsylvania with its principal place of business located at 700 Spring Mill Avenue, Conshohocken, Pennsylvania. Respondent Hale Products manufactures and sells Mid-Ship Mounted Fire Pumps in the United States, and in 1993 accounted for approximately 50 percent of Mid-Ship Mounted Fire Pump sales in the United States.

JURISDICTION

3. Respondent Hale Products sells and ships Mid-Ship Mounted Fire Pumps from its production facility located in Pennsylvania to customers located throughout the United States. Respondent maintains and has maintained a substantial course of business, including the acts and practices herein alleged, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

MID-SHIP MOUNTED FIRE PUMP INDUSTRY

4. The market for Mid-Ship Mounted Fire Pumps in the United States includes three principal competitors. In addition to respondent Hale Products, two other companies sell Mid-Ship Mounted Fire Pumps to OEM's in the United States, Waterous Company, Inc. (sometimes referred to as "Waterous"), and W.S. Darley & Company, Inc. (sometimes referred to as "Darley"). These three firms have each sold fire pumps in the United States for over 50 years, and in that time there has been little if any attempted *de novo* entry into the United States market. Respondent Hale Products and Waterous are the two largest manufacturers and together account for close to or more than 90 percent of Mid-Ship Mounted Fire Pump sales in the United States.

EXCLUSIVE DEALING PRACTICES

5. For over 50 years, and until approximately 1991, respondent Hale Products sold Mid-Ship Mounted Fire Pumps through a network of exclusive OEM's. Respondent Hale Products sold or contracted for the sale of such pumps to OEM's with the understanding that those OEM's would commit to selling only Hale Mid-Ship Mounted Fire Pumps. Waterous also sold on an exclusive basis, but to a different group of OEM's. Thus, prior to approximately 1991, few if any OEM's offered Mid-Ship Mounted Fire Pumps manufactured by more than one fire pump manufacturer, and fire truck buyers were able to choose between Mid-Ship Mounted Fire Pumps manufactured by different firms only by considering different OEM's.

6. Respondent Hale Products believed that continued adherence to the exclusive sales policy by both itself and Waterous would exclude or tend to exclude other competitors and would tend to reduce competition between manufacturers of Mid-Ship Mounted Fire Pumps over price and over non-price terms such as quality differences and delivery times.

7. During the 1980's and until approximately 1991, respondent Hale Products continued to adhere to its exclusive dealing policy. Hale Products solicited new OEM's on the condition that they deal in Mid-Ship Mounted Fire Pumps manufactured by Hale Products exclusively. Hale Products told prospective OEM's that they must deal exclusively in Mid-Ship Mounted Fire Pumps manufactured by Hale Products, asked newly approved OEM's to sign written acknowledgments of the exclusive term, and threatened to terminate OEM's who failed to honor the exclusive term.

ANTICOMPETITIVE EFFECTS

8. The acts, practices, and methods of competition of respondent Hale Products, as alleged in paragraphs five through seven, were and are substantially to the injury of the public in the following ways, among others:

a. By substantially lessening competition in the sale and marketing of Mid-Ship Mounted Fire Pumps, or by excluding or tending to exclude other actual or potential pump manufacturers from

selling Mid-Ship Mounted Fire Pumps to a substantial number of OEM's; and

b. By facilitating an allocation of customers between respondent Hale Products and Waterous.

VIOLATION OF LAW

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

Commissioners Azcuenaga and Starek dissenting.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of 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 had violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues

its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Hale Products is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal place of business at 700 Spring Mill Avenue, Conshohocken, Pennsylvania.

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) *"Respondent Hale Products"* means (1) Hale Products, Inc.; (2) its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Hale Products, Inc., and their successors and assigns; (3) all companies or entities that any parent of Hale Products, Inc., creates in the future and that engage in the manufacture or sale of Mid-Ship Mounted Fire Pumps, or Hale's parent if it engages in the manufacture or sale of Mid-Ship Mounted Fire Pumps; (4) the respective directors, officers, employees, agents and representatives of any of the entities described in subparagraphs (1), (2) and (3) above.

(b) *"Mid-Ship Mounted Fire Pumps"* [sic] are truck mounted fire pumps that meet the National Fire Protection Association Standard for Pumper Fire Apparatus known as "NFPA 1901."

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

(d) *"OEM's"* [sic] are original equipment manufacturers who buy and install Mid-Ship Mounted Fire Pumps, as well as many other components, into a final fire truck. OEM's then sell the trucks to fire departments in the United States.

II.

It is further ordered, That respondent Hale Products, directly or through any corporation, subsidiary, division, or other device, including franchisees or licensees, in connection with the offering for sale or sale of any Mid-Ship Mounted Fire Pump in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, does forthwith cease and desist from entering into, continuing, or enforcing any condition, agreement or understanding with any OEM that such OEM will refrain from the purchase or sale of Mid-Ship Mounted Fire Pumps of any manufacturer, or will purchase or sell Mid-Ship Mounted Fire Pumps of only respondent Hale Products; provided however, that nothing in this order shall prohibit any price differentials that make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which Mid-Ship Mounted Fire Pumps are sold or delivered, or that are otherwise lawful under the provisions of the Robinson-Patman Act, 15 U.S.C. 13.

III.

It is further ordered, That respondent Hale Products shall provide a copy of this order with the attached complaint, and a copy of the notice set out in Appendix A:

(a) Within thirty (30) days after the date this order becomes final, one notice to each OEM to whom it sold a Mid-Ship Mounted Fire Pump at any time during the two (2) years prior to the date this order becomes final; and

(b) For a period of three (3) years after the date this order becomes final, to each OEM not covered by subparagraph (a) above to whom it provides a price list for or a price quotation on a Mid-Ship Mounted Fire Pump. Such notice shall accompany the price list or price quotation, or in the case of telephone quotations shall be delivered as soon as practical after such quotation, and need only be provided once to each OEM not covered by subparagraph (a) above.

IV.

It is further ordered, That respondent Hale Products shall file with the Commission within sixty (60) days after the date this order becomes final, and annually on the anniversary of the date this order

becomes final for each of the three (3) years thereafter, a report, in writing, signed by the respondent, setting forth in detail the manner and form in which it has complied and is complying with this order.

V.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or 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 this order. Such notification shall be at least thirty (30) days in cases not subject to the notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a, and at least ten (10) days in the case of transactions subject to the notification provisions of the Hart-Scott-Rodino Act.

VI.

It is further ordered, That this order shall terminate on November 22, 2016.

Commissioners Azcuenaga and Starek dissenting.

APPENDIX A

[Hale Products' Letterhead]

PLEASE READ THIS

Enclosed with this notice is a copy of a Consent Order agreed to between the Federal Trade Commission and Hale Products, Inc. In the order, Hale has agreed that it will not refuse to sell, or refuse to contract to sell, Mid-Ship Mounted Fire Pumps on the grounds that an OEM refuses to sell Hale pumps exclusively. The order does not prohibit OEMs from purchasing only Hale Mid-Ship Mounted Fire Pumps if, in the OEM's sole discretion, it deems it advisable. Moreover, Hale retains the right to refuse to sell Mid-Ship Mounted Fire Pumps to any OEM for lawful reasons. THE TYPE OF PUMP YOU USE IS YOUR BUSINESS, AND YOU ARE FREE TO OFFER AND INSTALL COMPETING PUMPS AS ALTERNATIVES TO HALE PUMPS.

# # # # #

SEPARATE STATEMENT OF CHAIRMAN PITOFSKY, AND COMMISSIONERS VARNEY AND STEIGER

We write separately to respond to some of the concerns raised in Commissioner Starek's dissent.

First, we cannot concur with Commissioner Starek's suggestion that, for customer allocation of a component product to work, the participants must be able to allocate the ultimate customers of the finished product (p.1). There will be situations where downstream competition will undermine a customer allocation scheme of a component of a final good. For example, that might be the case where the component is a significant part of the cost of the final product, or where the ultimate consumers have a much stronger preference for the component than the ultimate good.

None of those conditions was present in this case. Fire truck buyers make purchase decisions primarily on the basis of truck brand, the pump price is only a small part of the final purchase price, and pump features are only a small part of the entire truck package. Evidence of relatively high profits at the component level supports this interpretation.

Second, Commissioner Starek suggests that these exclusive dealing arrangements would not increase the likelihood of successful collusion because of the difficulty of detecting cheating. (p.2) We agree that maintaining collusion requires the ability to detect and discipline cheating. But here that methodology was simple: if a fire engine manufacturer used an alternative pump it would be readily identified. Moreover, the fact that the customer allocation through exclusive dealing was maintained over almost five decades suggests that there was an effective method for enforcing the exclusive dealing arrangements.

Third, Commissioner Starek observes that instability at the truck manufacturing stage (*i.e.*, changes in market share) may lead to the demise of any customer allocation agreement with respect to a component. We agree that might be the case where a very large portion of a pump manufacturer's sales were tied to a single truck manufacturer. Here, however, the arrangements were durable; the fact is that instability among truck manufacturers did not deter the effectiveness of these agreements.

Finally, Commissioner Starek suggests that the arrangements did not foreclose new entry because they were not really exclusive. He relies on the fact that some OEMs were willing to install the pumps of a third manufacturer at customers' request. (p.3) The fact that the

exclusive policy was not perfect and that some truck manufacturers may have offered the pumps of a third pump manufacturer, accounting for a very small share of pump sales, did not have a significant effect on competition at the pump level. The key to competition in this market was the competitive positions of Hale and Waterous, which together account for more than 90% of the market. The evidence establishes that Hale and Waterous understood that as long as both firms maintained the exclusive dealing arrangements, competition between them would be diminished, prices would be higher and entry would be more difficult. That is in fact how things worked in this industry for several decades, and those are the anticompetitive effects that the Commission's orders are intended to address.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I generally endorse the views expressed by Commissioner Starek in his dissenting statement. The evidence does not in my view suggest a market in which competition has been unlawfully restrained, and I do not find reason to believe that the law has been violated.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the Commission's decision to issue complaints and final consent orders against Waterous Company, Inc., and Hale Products, Inc., two producers of midship-mounted pumps for fire trucks. The complaints claim anticompetitive effects arising from alleged exclusive dealing arrangements between each respondent and its direct customers, the original equipment manufacturers of fire trucks ("OEMs"), in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. I remain unpersuaded that the arrangements between respondents and their customers can be characterized accurately as "exclusive." More important, however, there is no sound theoretical or empirical basis for believing that these relationships, even if exclusive, harmed competition; in fact, there are good reasons to believe the contrary. In any event, even if one assumes *arguendo* the validity of the theories of anticompetitive effects, the orders issued today are unlikely to remedy those alleged effects.

The complaints allege, *inter alia*, that the arrangements between Waterous, Hale, and their OEM customers reduce competition in two

ways -- by facilitating an allocation of customers between Waterous and Hale, and by creating a barrier to the entry of new pump manufacturers. The first theory posits that Waterous and Hale wish to set the prices of their fire pumps collusively but find themselves unable to reach and maintain a direct agreement on price. Under this hypothesis, in order to achieve collusive pricing without a direct agreement on prices, Waterous and Hale have entered into a *de facto* agreement to allocate fire truck OEMs between themselves. That agreement, combined with an agreement not to bid for each other's OEM business, makes each pump maker a monopolist with respect to its OEMs. As monopolists, it is argued, the pump manufacturers are able to set supracompetitive prices.

This theory is fatally flawed. For a customer allocation scheme to allow Waterous and Hale to set supracompetitive prices, it *necessarily* must entail the allocation of the *final* customers -- the fire departments -- between the two pump makers. Absent such an allocation, an exclusive dealing contract between a pump maker and one or more OEMs -- or even outright vertical integration between the pump producer and one or more OEMs -- does not allow the pump producer to raise prices anticompetitively. Under the Commission's theory of competitive harm, Waterous and Hale "allocate customers" in lieu of trying to enter into direct pump price agreements that presumably would break down under each party's incentives to undercut the collusive price. In other words, the pump makers'"customer allocation" scheme solves this instability problem. However, unless Waterous and Hale also agree not to compete against one another for the patronage of the fire departments -- *i.e.*, unless they collusively allocate fire departments between themselves -- each pump maker retains its incentive to take business from its rival through price cuts. Absent allocation of fire department customers, one should expect the same sort of "cheating," with the equivalent competitive result, that the Commission believes frustrated direct collusion between Waterous and Hale.[1]

Thus, it is implausible that "exclusive dealing" arrangements between respondents and their OEMs increase the likelihood of successful collusion between Waterous and Hale. Indeed, there are

[1] The majority's assertion that pump prices and pump brands are relatively unimportant to final consumers (*i.e.*, fire departments) is inconsistent with the events that triggered this investigation -- namely, complaints from OEMs that they suffered significant competitive harm from their alleged inability to offer multiple pump brands. It is hard to reconcile those complaints with the majority's claimed end-user indifference to pump brands.

compelling reasons why such an arrangement might actually *reduce* this likelihood. Maintaining collusion requires the reasonably accurate identification and punishment of cheating.[2] If Waterous and Hale bid directly and repeatedly for OEM business, cheating might be inferable from one firm's loss of a pump sale to its rival. On the other hand, when Waterous and Hale compete indirectly -- *i.e.*, when, as here, their affiliated OEMs submit bids to a fire department incorporating not merely the pump price but rather the prices of all of the truck's components -- it will be more difficult for a pump maker to determine whether a loss of business is attributable to price-cutting by the rival pump maker or to reductions in the prices of other components.[3]

The difficulty of maintaining coordination is exacerbated if there is substantial market share volatility among the affiliated customers for reasons unrelated to the pumps. Such volatility makes it difficult for a pump maker to infer whether a sales loss stems from secret pump price concessions or from some other cause. Moreover, if the fortunes of buyers (here, fire truck OEMs) are expected to differ over time -- some flagging, others flourishing -- the utility of customer allocation as a long-run aid to collusion appears questionable. The pump producer with the misfortune to have affiliated with unsuccessful buyers will have still greater incentives to depart from the collusive scheme. In this regard, the fire truck OEM market witnessed substantial turnover during the period in which Waterous and Hale allegedly maintained exclusive distribution agreements.[4] Thus, even if one could overcome the defects in the Commission's collusion theory, these other factors would continue to cast substantial doubt upon this theory's applicability.[5]

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[2] *See, e.g.*, Stigler, "A Theory of Oligopoly," 72 *J. Pol. Econ.* 44 (1964), *reprinted in* THE ORGANIZATION OF INDUSTRY, ch. 5 (1968).

[3] The majority appears to have misunderstood my point with regard to the detection of cheating. By "cheating," I am not referring to an effort by, say, Hale to sell to Waterous OEMs (or vice-versa). Rather, I refer to Hale's hidden reduction in pump prices to its own customers, which consequently allows those customers to take business from OEMs affiliated with the rival pump brand. This form of cheating is extremely difficult to detect, because an OEM's capture of sales from a rival OEM could be attributable to many reasons other than a reduced pump price.

[4] For example, just since 1990, at least four major OEMs -- Grumman, Mack, FMC, and Beck -- have exited the market. This period also witnessed entry by such OEMs as Firewolf and Becker. As discussed below, substantial entry into and exit from the OEM market also bear on the applicability of the complaints' second theory of competitive harm (entry deterrence).

[5] With regard to the pump makers' ostensibly high accounting profits, antitrust economists no longer consider accounting profits as a reliable indicator of high economic profits (which can themselves be as consistent with superior efficiency as with collusion). Fisher and McGowan, "On the Misuse of Accounting Rates of Return to Infer Monopoly Profits," 73 *Am. Econ. Rev.* 82 (1983).

The Commission's second theory of harm alleges that exclusive arrangements between pump makers and OEMs have created a barrier to the entry of new pump manufacturers, thereby allowing the incumbent pump sellers to set and maintain supracompetitive prices. Although the vertical section of the 1984 Merger Guidelines[6] is not cited explicitly, the theory here appears to have been drawn from those Guidelines. That analysis focuses on a market in which, but for ease of entry, conditions are favorable to the exercise of market power, and asks whether a vertical merger (or, in the current case, vertical integration through contract) might reduce entry so that market power could be exercised.[7]

Although this effect might occur in some settings, in this case I find the evidence to support invoking this theory tenuous at best. The Commission's complaints apparently rest on the difficulty allegedly experienced by another pump maker in obtaining the patronage of OEMs.[8] An alternative explanation for that firm's failure to achieve a larger market share is that fire departments find its pumps significantly less attractive than those of Hale and Waterous for reasons unrelated to the pump makers' distribution policies. The evidence adduced by the staff is far from sufficient to establish that this firm, or any other actual or potential competitor, was anticompetitively excluded from selling pumps to OEMs.[9]

Moreover, concerning the longevity of the arrangements between pump makers and OEMs, that factor testifies only to their profitability; it does not distinguish between anticompetitive and procompetitive (or competitively neutral) explanations for their use. Indeed, the asserted instability of OEMs' market shares lends greater credence to an efficiency explanation: one would not expect the parties to an efficient exclusive dealing arrangement to abandon it simply because a customer loses market share, while (as I have explained above) the same cannot be said of an anticompetitive arrangement.

[6] U.S. Department of Justice, Merger Guidelines, 4.2 (1984), 4 Trade Reg. Rep. (CCH) ¶ 13,103.

[7] The 1984 Merger Guidelines (4.21) identify three necessary but not sufficient conditions for this problem to exist. First, the market in which power would be exercised (the "primary" market) must be sufficiently conducive to anticompetitive behavior that the impact of vertical integration in reducing entry would allow such behavior to occur. Second, the degree of vertical integration subsequent to the merger must be so extensive that an entrant into the primary market would also have to enter the other market (the "secondary" market). If substantial unintegrated capacity remains in the secondary market after the vertical merger, it is less likely that the merger will facilitate an anticompetitive outcome. Third, the requirement that a firm enter both the primary and secondary markets -- rather than just the primary market – must make entry into the primary market significantly more difficult and therefore less likely to occur. 4 Trade Reg. Rep. (CCH) ¶ 13,103 at 20,565-66; *see also* Blair and Kaserman, LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL 152 (1983).

[8] The evidence supporting the Commission's entry-deterrence theory appears to consist of that producer's experience in trying to erode OEMs' preferences for Waterous and Hale pumps.

[9] The majority's assertion with respect to the entry-deterring effects of the arrangements is simply that -- an assertion. All of the evidence gathered in this investigation is easily reconciled with an efficiency rationale for the challenged arrangements between pump makers and OEMs. In this

In addition to the weaknesses in the anticompetitive theories outlined above, a factual problem plagues this case: evidence gathered in the investigation calls into question whether Waterous's and Hale's relationships with their respective OEM customers can even be characterized as "exclusive." Although many OEMs have tended to deal principally with only one pump maker -- a fact, I note in passing, that is as consistent with an efficiency rationale for exclusivity as it is with an anticompetitive theory -- several larger OEMs affiliated with Waterous and Hale have expressed a willingness to install another manufacturer's pumps at customers' request. Indeed, several OEMs -- including at least one of the largest ones affiliated with Hale -- have installed another competitor's pumps, and this investigation produced no evidence to suggest that any dealer was terminated for selling that firm's pumps. In any case, however, even if OEM exclusivity could be convincingly demonstrated, it should be clear from the discussion above that a great deal more is required to prove that the exclusive arrangements had anticompetitive effects.[10] The evidence on the competitive effects of existing arrangements between pump makers and OEMs is as consistent with the view that the arrangements induce greater efficiency in the production and marketing of pumps as it is with a market power theory.

I am therefore unpersuaded that respondents' distribution policies have harmed competition in any relevant market. Even had I concluded otherwise, however, I would not endorse the consent orders, which require each respondent to cease and desist from requiring OEM exclusivity as a condition of sale. As I have noted elsewhere,[11] the problems with remedies of this sort are significant.[12] A formal ban on exclusive dealing accomplishes little if respondents have alternative means available to achieve the same end. One readily available method in this case, fully consistent with the terms of the orders, would be to establish a set of quantity discounts providing a customer with substantial financial incentives to procure all of its

market, as in any other, superior efficiency on the part of incumbents is a powerful entry deterrent. It is not an antitrust violation.

[10] *Cf. Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977) (plaintiff must demonstrate anticompetitive effects and defendant's market power when challenging vertical restraints).

[11] Dissenting Statement of Commissioner Roscoe B. Starek, III, in Silicon Graphics, Inc., Docket No. C-3626.

[12] For a discussion of why nondiscrimination remedies are problematic, *see* Brennan, "Why regulated firms should be kept out of unregulated markets: understanding the divestiture in *United States v. AT&T*," 32 *Antitrust Bull.* 741 (1987).

pumps from a single seller. Moreover, nothing in the orders would prevent a pump manufacturer from unilaterally refusing to sell to an OEM so long as the refusal was not conditioned on a promise of exclusivity. Another possible method would be to give exclusive OEMs better service (*e.g.*, faster delivery times) than their non-exclusive rivals receive.

I cannot endorse an ineffective remedy for a nonexistent harm.

IN THE MATTER OF

WATEROUS COMPANY, INC.

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

Docket C-3693. Complaint, Nov. 22, 1996--Decision, Nov. 22, 1996

This consent order prohibits, among other things, the Minnesota-based manufacturer of fire truck-mounted fire pumps from entering into, continuing or enforcing any requirement that fire truck manufacturers refrain from purchasing mid-ship mounted fire pumps from any company, or that any purchaser sell only the relevant respondent's pumps. In addition, the respondent is required to send a specifically-worded notice to fire truck manufacturers stating that it has entered into an agreement with the Commission concerning the sale and installation of fire pumps.

Appearances

For the Commission: *William Baer* and *Mark Whitener.*

For the respondent: *Gary M. London, Burr & Forman,* Birmingham, AL.

COMPLAINT

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

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

a. *"Mid-Ship Mounted Fire Pumps"* are truck mounted fire pumps that meet the National Fire Protection Association Standard for Pumper Fire Apparatus known as "NFPA 1901."

b. *"OEM's"* [sic] are original equipment manufacturers who buy and install Mid-Ship Mounted Fire Pumps, as well as many other

components, into a final fire truck. OEM's then sell the trucks to fire departments in the United States.

RESPONDENT

2. Respondent Waterous Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the state of Minnesota with its principal place of business located at 300 John E. Carroll Avenue East, South Saint Paul, Minnesota. Waterous manufactures and sells Mid-Ship Mounted Fire Pumps in the United States. In 1993, Waterous accounted for more than 40 percent of U.S. Mid-Ship Mounted Fire Pump sales.

JURISDICTION

3. Respondent Waterous sells and ships Mid-Ship Mounted Fire Pumps from its production facility located in Minnesota to customers located throughout the United States. Respondent maintains and has maintained a substantial course of business, including the acts and practices herein alleged, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

MID-SHIP MOUNTED FIRE PUMP INDUSTRY

4. The market for Mid-Ship Mounted Fire Pumps in the United States includes three principal competitors. In addition to respondent Waterous, two other companies sell Mid-Ship Mounted Fire Pumps to OEM's in the United States, Hale Products, Inc. (sometimes referred to as "Hale Products"), and W.S. Darley & Company, Inc. (sometimes referred to as "Darley"). These three firms have each sold fire pumps in the United States for over 50 years, and in that time there has been little if any attempted *de novo* entry into the United States market. Respondent Waterous and Hale Products are the two largest manufacturers and together account for close to or more than 90 percent of Mid-Ship Mounted Fire Pump sales in the United States.

5. For over 50 years, and until approximately 1991, respondent Waterous sold Mid-Ship Mounted Fire Pumps through a network of exclusive OEM's. Respondent Waterous sold or contracted for the sale of such pumps to OEM's with the understanding that those

OEM's would commit to selling only Waterous Mid-Ship Mounted Fire Pumps. Hale Products also sold on an exclusive basis, but to a different group of OEM's. Thus, prior to approximately 1991, few if any OEM's offered Mid-Ship Mounted Fire Pumps manufactured by more than one fire pump manufacturer, and fire truck buyers were able to choose between Mid-Ship Mounted Fire Pumps manufactured by different firms only by considering different OEM's.

6. Respondent Waterous believed that continued adherence to the exclusive sales policy by both itself and Hale Products would exclude or tend to exclude other competitors and would tend to reduce competition between manufacturers of Mid-Ship Mounted Fire Pumps over price and over non-price terms such as quality differences and delivery times.

7. During the 1980's and until approximately 1991, respondent Waterous continued to adhere to its exclusive dealing policy. Waterous terminated or threatened to terminate OEM's that resold Mid-Ship Mounted Fire Pumps manufactured by Waterous Company to OEM's outside of Waterous Company's exclusive OEM network, or delayed or threatened to delay shipments to such OEM's.

ANTICOMPETITIVE EFFECTS

8. The acts, practices, and methods of competition of respondent Waterous as alleged in paragraphs five through seven, were and are substantially to the injury of the public in the following ways, among others:

a. By substantially lessening competition in the sale and marketing of Mid-Ship Mounted Fire Pumps, or by excluding or tending to exclude other actual or potential pump manufacturers from selling Mid-Ship Mounted Fire Pumps to a substantial number of OEM's; and

b. By facilitating an allocation of customers between respondent Waterous and Hale Products.

VIOLATION OF LAW

9. Therefore, the acts, practices and methods of competition of respondent Waterous, as herein alleged, were and are all to the prejudice and injury of the public and constitute unfair methods of

competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. The acts practices and methods of competition of respondent, as herein alleged, or the effects thereof, are continuing or could recur in the absence of the relief herein requested.

Commissioners Azcuenaga and Starek dissenting.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of 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 had violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Waterous is a corporation organized, existing and doing business under and by virtue of the laws of the State of

Minnesota, with its principal place of business at 300 John E. Carroll Avenue East, South Saint Paul, Minnesota.

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) *"Respondent Waterous"* means (1) Waterous Company, Inc.; (2) its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Waterous Company, Inc., and their successors and assigns; (3) all companies or entities that any parent of Waterous Company, Inc., creates in the future and that engage in the manufacture or sale of Mid-Ship Mounted Fire Pumps, or Waterous' parent if it engages in the manufacture or sale of Mid-Ship Mounted Fire Pumps; (4) the respective directors, officers, employees, agents and representatives of any of the entities described in subparagraphs (1), (2) and (3) above.

(b) *"Mid-Ship Mounted Fire Pumps"* are truck mounted fire pumps that meet the National Fire Protection Association Standard for Pumper Fire Apparatus known as "NFPA 1901."

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

(d) *"OEM's"* [sic] are original equipment manufacturers who buy and install Mid-Ship Mounted Fire Pumps, as well as many other components, into a final fire truck. OEM's then sell the trucks to fire departments in the United States.

II.

It is further ordered, That respondent Waterous, directly or through any corporation, subsidiary, division, or other device, including franchisees or licensees, in connection with the offering for sale or sale of any Mid-Ship Mounted Fire Pump in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, does forthwith cease and desist from entering into,

continuing, or enforcing any condition, agreement or understanding with any OEM that such OEM will refrain from the purchase or sale of Mid-Ship Mounted Fire Pumps of any manufacturer, or will purchase or sell Mid-Ship Mounted Fire Pumps of only respondent Waterous; provided however, that nothing in this order shall prohibit any price differentials that make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which Mid-Ship Mounted Fire Pumps are sold or delivered, or that are otherwise lawful under the provisions of the Robinson-Patman Act, 15 U.S.C. 13.

III.

It is further ordered, That respondent Waterous shall provide a copy of this order with the attached complaint, and a copy of the notice set out in Appendix A:

(a) Within thirty (30) days after the date this order becomes final, one notice to each OEM to whom it sold a Mid-Ship mounted fire pump at any time during the two (2) years prior to the date this order becomes final; and

(b) For a period of three (3) years after the date this order becomes final, to each OEM not covered by subparagraph (a) above to whom it provides a price list for or a price quotation on a Mid-Ship mounted fire pump. Such notice shall accompany the price list or price quotation, or in the case of telephone quotations shall be delivered as soon as practical after such quotation, and need only be provided once to each OEM not covered by subparagraph (a) above.

IV.

It is further ordered, That respondent Waterous shall file with the Commission within sixty (60) days after the date this order becomes final, and annually on the anniversary of the date this order becomes final for each of the three (3) years thereafter, a report, in writing, signed by the respondent, setting forth in detail the manner and form in which it has complied and is complying with this order.

V.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or 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 this order. Such notification shall be at least thirty (30) days in cases not subject to the notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a, and at least ten (10) days in the case of transactions subject to the notification provisions of the Hart-Scott-Rodino Act.

VI.

It is further ordered, That this order shall terminate on November 22, 2016.

Commissioners Azcuenaga and Starek dissenting.

APPENDIX A

[Waterous' Letterhead]

PLEASE READ THIS

Enclosed with this notice is a copy of a Consent Order agreed to between the Federal Trade Commission and Waterous Company, Inc. In the order, Waterous has agreed that it will not refuse to sell, or refuse to contract to sell, Mid-Ship mounted fire pumps on the grounds that an OEM refuses to sell Waterous pumps exclusively. The order does not prohibit OEMs from purchasing only Waterous Mid-Ship mounted fire pumps if, in the OEM's sole discretion, it deems it advisable. Moreover, Waterous retains the right to refuse to sell Mid-Ship mounted fire pumps to any OEM for lawful reasons. THE TYPE OF PUMP YOU USE IS YOUR BUSINESS, AND YOU ARE FREE TO OFFER AND INSTALL COMPETING PUMPS AS ALTERNATIVES TO WATEROUS PUMPS.

# # # # #

SEPARATE STATEMENT OF CHAIRMAN PITOFSKY, AND COMMISSIONERS VARNEY AND STEIGER

We write separately to respond to some of the concerns raised in Commissioner Starek's dissent.

First, we cannot concur with Commissioner Starek's suggestion that, for customer allocation of a component product to work, the participants must be able to allocate the ultimate customers of the finished product (p.1). There will be situations where downstream competition will undermine a customer allocation scheme of a component of a final good. For example, that might be the case where the component is a significant part of the cost of the final product, or where the ultimate consumers have a much stronger preference for the component than the ultimate good.

None of those conditions was present in this case. Fire truck buyers make purchase decisions primarily on the basis of truck brand, the pump price is only a small part of the final purchase price, and pump features are only a small part of the entire truck package. Evidence of relatively high profits at the component level supports this interpretation.

Second, Commissioner Starek suggests that these exclusive dealing arrangements would not increase the likelihood of successful collusion because of the difficulty of detecting cheating. (p.2) We agree that maintaining collusion requires the ability to detect and discipline cheating. But here that methodology was simple: if a fire engine manufacturer used an alternative pump it would be readily identified. Moreover, the fact that the customer allocation through exclusive dealing was maintained over almost five decades suggests that there was an effective method for enforcing the exclusive dealing arrangements.

Third, Commissioner Starek observes that instability at the truck manufacturing stage (*i.e.*, changes in market share) may lead to the demise of any customer allocation agreement with respect to a component. We agree that might be the case where a very large portion of a pump manufacturer's sales were tied to a single truck manufacturer. Here, however, the arrangements were durable; the fact is that instability among truck manufacturers did not deter the effectiveness of these agreements.

Finally, Commissioner Starek suggests that the arrangements did not foreclose new entry because they were not really exclusive. He relies on the fact that some OEMs were willing to install the pumps of a third manufacturer at customers' request. (p.3) The fact that the exclusive policy was not perfect and that some truck manufacturers may have offered the pumps of a third pump manufacturer, accounting for a very small share of pump sales, did not have a

significant effect on competition at the pump level. The key to competition in this market was the competitive positions of Hale and Waterous, which together account for more than 90% of the market. The evidence establishes that Hale and Waterous understood that as long as both firms maintained the exclusive dealing arrangements, competition between them would be diminished, prices would be higher and entry would be more difficult. That is in fact how things worked in this industry for several decades, and those are the anticompetitive effects that the Commission's orders are intended to address.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I generally endorse the views expressed by Commissioner Starek in his dissenting statement. The evidence does not in my view suggest a market in which competition has been unlawfully restrained, and I do not find reason to believe that the law has been violated.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the Commission's decision to issue complaints and final consent orders against Waterous Company, Inc., and Hale Products, Inc., two producers of midship-mounted pumps for fire trucks. The complaints claim anticompetitive effects arising from alleged exclusive dealing arrangements between each respondent and its direct customers, the original equipment manufacturers of fire trucks ("OEMs"), in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. I remain unpersuaded that the arrangements between respondents and their customers can be characterized accurately as "exclusive." More important, however, there is no sound theoretical or empirical basis for believing that these relationships, even if exclusive, harmed competition; in fact, there are good reasons to believe the contrary. In any event, even if one assumes *arguendo* the validity of the theories of anticompetitive effects, the orders issued today are unlikely to remedy those alleged effects.

The complaints allege, *inter alia*, that the arrangements between Waterous, Hale, and their OEM customers reduce competition in two ways -- by facilitating an allocation of customers between Waterous and Hale, and by creating a barrier to the entry of new pump

manufacturers. The first theory posits that Waterous and Hale wish to set the prices of their fire pumps collusively but find themselves unable to reach and maintain a direct agreement on price. Under this hypothesis, in order to achieve collusive pricing without a direct agreement on prices, Waterous and Hale have entered into a *de facto* agreement to allocate fire truck OEMs between themselves. That agreement, combined with an agreement not to bid for each other's OEM business, makes each pump maker a monopolist with respect to its OEMs. As monopolists, it is argued, the pump manufacturers are able to set supracompetitive prices.

This theory is fatally flawed. For a customer allocation scheme to allow Waterous and Hale to set supracompetitive prices, it *necessarily* must entail the allocation of the *final* customers -- the fire departments -- between the two pump makers. Absent such an allocation, an exclusive dealing contract between a pump maker and one or more OEMs -- or even outright vertical integration between the pump producer and one or more OEMs -- does not allow the pump producer to raise prices anticompetitively. Under the Commission's theory of competitive harm, Waterous and Hale "allocate customers" *in lieu* of trying to enter into direct pump price agreements that presumably would break down under each party's incentives to undercut the collusive price. In other words, the pump makers' "customer allocation" scheme solves this instability problem. However, unless Waterous and Hale also agree not to compete against one another for the patronage of the fire departments -- *i.e.*, unless they collusively allocate fire departments between themselves -- each pump maker retains its incentive to take business from its rival through price cuts. Absent allocation of fire department customers, one should expect the same sort of "cheating," with the equivalent competitive result, that the Commission believes frustrated direct collusion between Waterous and Hale.[1]

Thus, it is implausible that "exclusive dealing" arrangements between respondents and their OEMs increase the likelihood of successful collusion between Waterous and Hale. Indeed, there are compelling reasons why such an arrangement might actually reduce this likelihood. Maintaining collusion requires the reasonably

[1] The majority's assertion that pump prices and pump brands are relatively unimportant to final consumers (*i.e.*, fire departments) is inconsistent with the events that triggered this investigation -- namely, complaints from OEMs that they suffered significant competitive harm from their alleged inability to offer multiple pump brands. It is hard to reconcile those complaints with the majority's claimed end-user indifference to pump brands.

accurate identification and punishment of cheating.[2] If Waterous and Hale bid directly and repeatedly for OEM business, cheating might be inferable from one firm's loss of a pump sale to its rival. On the other hand, when Waterous and Hale compete indirectly -- *i.e.*, when, as here, their affiliated OEMs submit bids to a fire department incorporating not merely the pump price but rather the prices of all of the truck's components -- it will be more difficult for a pump maker to determine whether a loss of business is attributable to price-cutting by the rival pump maker or to reductions in the prices of other components.[3]

The difficulty of maintaining coordination is exacerbated if there is substantial market share volatility among the affiliated customers for reasons unrelated to the pumps. Such volatility makes it difficult for a pump maker to infer whether a sales loss stems from secret pump price concessions or from some other cause. Moreover, if the fortunes of buyers (here, fire truck OEMs) are expected to differ over time -- some flagging, others flourishing -- the utility of customer allocation as a long-run aid to collusion appears questionable. The pump producer with the misfortune to have affiliated with unsuccessful buyers will have still greater incentives to depart from the collusive scheme. In this regard, the fire truck OEM market witnessed substantial turnover during the period in which Waterous and Hale allegedly maintained exclusive distribution agreements.[4] Thus, even if one could overcome the defects in the Commission's collusion theory, these other factors would continue to cast substantial doubt upon this theory's applicability.[5]

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[2] *See, e.g.*, Stigler, "A Theory of Oligopoly," 72 *J. Pol. Econ.* 44 (1964), *reprinted in* THE ORGANIZATION OF INDUSTRY, ch. 5 (1968).

[3] The majority appears to have misunderstood my point with regard to the detection of cheating. By "cheating," I am not referring to an effort by, say, Hale to sell to Waterous OEMs (or vice-versa). Rather, I refer to Hale's hidden reduction in pump prices *to its own customers*, which consequently allows those customers to take business from OEMs affiliated with the rival pump brand. This form of cheating is extremely difficult to detect, because an OEM's capture of sales from a rival OEM could be attributable to many reasons other than a reduced pump price.

[4] For example, just since 1990, at least four major OEMs -- Grumman, Mack, FMC, and Beck -- have exited the market. This period also witnessed entry by such OEMs as Firewolf and Becker. As discussed below, substantial entry into and exit from the OEM market also bear on the applicability of the complaints' second theory of competitive harm (entry deterrence).

[5] With regard to the pump makers' ostensibly high accounting profits, antitrust economists no longer consider accounting profits as a reliable indicator of high economic profits (which can themselves be as consistent with superior efficiency as with collusion). Fisher and McGowan, "On the Misuse of Accounting Rates of Retum to Infer Monopoly Profits," 73 *Am. Econ. Rev.* 82 (1983). Moreover, concerning the longevity of the arrangements between pump makers and OEMs, that factor testifies only to their profitability; it does not distinguish between anticompetitive and procompetitive (or competitively neutral) explanations for their use. Indeed, the asserted instability of OEMs' market shares lends greater credence to an efficiency explanation: one would not expect the parties to an

The Commission's second theory of harm alleges that exclusive arrangements between pump makers and OEMs have created a barrier to the entry of new pump manufacturers, thereby allowing the incumbent pump sellers to set and maintain supracompetitive prices. Although the vertical section of the 1984 Merger Guidelines[6] is not cited explicitly, the theory here appears to have been drawn from those Guidelines. That analysis focuses on a market in which, but for ease of entry, conditions are favorable to the exercise of market power, and asks whether a vertical merger (or, in the current case, vertical integration through contract) might reduce entry so that market power could be exercised.[7]

Although this effect might occur in some settings, in this case I find the evidence to support invoking this theory tenuous at best. The Commission's complaints apparently rest on the difficulty allegedly experienced by another pump maker in obtaining the patronage of OEMs.[8] An alternative explanation for that firm's failure to achieve a larger market share is that fire departments find its pumps significantly less attractive than those of Hale and Waterous for reasons unrelated to the pump makers' distribution policies. The evidence adduced by the staff is far from sufficient to establish that this firm, or any other actual or potential competitor, was anticompetitively excluded from selling pumps to OEMs.[9]

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efficient exclusive dealing arrangement to abandon it simply because a customer loses market share, while (as I have explained above) the same cannot be said of an anticompetitive arrangement.

[6] U.S. Department of Justice, Merger Guidelines, 4.2 (1984), 4 Trade Reg. Rep. (CCH) ¶ 13,103.

[7] The 1984 Merger Guidelines (4.21) identify three necessary but not sufficient conditions for this problem to exist. First, the market in which power would be exercised (the "primary" market) must be sufficiently conducive to anticompetitive behavior that the impact of vertical integration in reducing entry would allow such behavior to occur. Second, the degree of vertical integration subsequent to the merger must be so extensive that an entrant into the primary market would also have to enter the other market (the "secondary" market). If substantial unintegrated capacity remains in the secondary market after the vertical merger, it is less likely that the merger will facilitate an anticompetitive outcome. Third, the requirement that a firm enter both the primary and secondary markets -- rather than just the primary market -- must make entry into the primary market significantly more difficult and therefore less likely to occur. 4 Trade Reg. Rep. (CCH) ¶ 13,103 at 20,565-66; *see also* Blair and Kaserman, LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL 152 (1983).

[8] The evidence supporting the Commission's entry-deterrence theory appears to consist of that producer's experience in trying to erode OEMs' preferences for Waterous and Hale pumps.

[9] The majority's assertion with respect to the entry-deterring effects of the arrangements is simply that -- an assertion. All of the evidence gathered in this investigation is easily reconciled with an efficiency rationale for the challenged arrangements between pump makers and OEMs. In this market, as in any other, superior efficiency on the part of incumbents is a powerful entry deterrent. It is not an antitrust violation.

In addition to the weaknesses in the anticompetitive theories outlined above, a factual problem plagues this case: evidence gathered in the investigation calls into question whether Waterous's and Hale's relationships with their respective OEM customers can even be characterized as "exclusive." Although many OEMs have tended to deal principally with only one pump maker -- a fact, I note in passing, that is as consistent with an efficiency rationale for exclusivity as it is with an anticompetitive theory -- several larger OEMs affiliated with Waterous and Hale have expressed a willingness to install another manufacturer's pumps at customers' request. Indeed, several OEMs -- including at least one of the largest ones affiliated with Hale -- have installed another competitor's pumps, and this investigation produced no evidence to suggest that any dealer was terminated for selling that firm's pumps. In any case, however, even if OEM exclusivity could be convincingly demonstrated, it should be clear from the discussion above that a great deal more is required to prove that the exclusive arrangements had anticompetitive effects.[10] The evidence on the competitive effects of existing arrangements between pump makers and OEMs is as consistent with the view that the arrangements induce greater efficiency in the production and marketing of pumps as it is with a market power theory.

I am therefore unpersuaded that respondents' distribution policies have harmed competition in any relevant market. Even had I concluded otherwise, however, I would not endorse the consent orders, which require each respondent to cease and desist from requiring OEM exclusivity as a condition of sale. As I have noted elsewhere,[11] the problems with remedies of this sort are significant.[12] A formal ban on exclusive dealing accomplishes little if respondents have alternative means available to achieve the same end. One readily available method in this case, fully consistent with the terms of the orders, would be to establish a set of quantity discounts providing a customer with substantial financial incentives to procure all of its pumps from a single seller. Moreover, nothing in the orders would

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[10] *Cf. Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977) (plaintiff must demonstrate anticompetitive effects and defendant's market power when challenging vertical restraints).

[11] Dissenting Statement of Commissioner Roscoe B. Starek, III, in Silicon Graphics, Inc., Docket No. C-3626.

[12] For a discussion of why nondiscrimination remedies are problematic, *see* Brennan, "Why regulated firms should be kept out of unregulated markets: understanding the divestiture in *United States v. AT&T*," 32 *Antitrust Bull.* 741 (1987).

prevent a pump manufacturer from unilaterally refusing to sell to an OEM so long as the refusal was not conditioned on a promise of exclusivity. Another possible method would be to give exclusive OEMs better service (*e.g.*, faster delivery times) than their non-exclusive rivals receive.

I cannot endorse an ineffective remedy for a non-existent harm.

IN THE MATTER OF

HYDE ATHLETIC INDUSTRIES, INC.

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

Docket C-3695. Complaint, Dec. 4, 1996--Decision, Dec. 4, 1996

This consent order prohibits, among other things, a Massachusetts-based corporation from misrepresenting that footwear made wholly abroad is made in the United States, and the consent order contains a provision indicating that the respondent would not be in violation of the order if the company makes truthful statements concerning domestic production of footwear, as long as it is accompanied by certain disclosures.

Appearances

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

For the respondent: *David Wolf, Wolf, Greenfield & Sachs,* Boston, MA.

COMPLAINT

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

PARAGRAPH 1. Respondent Hyde Athletic Industries, Inc., is a Massachusetts corporation which manufactures and sells footwear. Its principal office or place of business is located at 13 Centennial Industrial Park Drive, Peabody, Massachusetts.

PAR. 2. Respondent has manufactured, assembled, advertised, labeled, offered for sale, sold, and distributed athletic and other footwear under the trademark "Saucony," to consumers.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including product labeling, and other

promotional materials for footwear sold under the Saucony trademark including, but not necessarily limited to, the attached Exhibits 1-8.

The "Help The Country" advertisement (Exhibit 1) states:

"IT CAN EVEN HELP THE COUNTRY GET BACK ON ITS FEET."
"Built With Pride In BANGOR MAINE USA"
" Any running shoe company can help keep Americans in shape. At Saucony, we've helped keep America in shape. That's because we've been a major employer in New England since 1906. Generation after generation, our family-owned company has worked with the families of Bangor, Maine to build Saucony shoes and a history of quality craftsmanship."
"For 86 years, we've worked in America. And helped make America work. After all, it's the best way we know to keep athletes - and the economy - running smoothly."

The "Front-Runners" advertisement (Exhibit 2) states:

"IF ONLY THE OTHER FRONT-RUNNERS COULD KEEP A PROMISE FOR 86 YEARS."
"Built With Pride In BANGOR MAINE USA"
"Eight-six years ago, we pledged to build out footwear at home in New England. Since then, out family-owned company has worked with the families of Bangor, Maine to build Saucony shoes and a history of quality craftsmanship."

The "Economic Problems" advertisement (Exhibit 3) states:

"FURTHER PROOF THAT ECONOMIC PROBLEMS CAN BE SOLVED AT THE GRASS ROOTS LEVEL."
"Built With Pride In BANGOR MAINE USA"
"At Saucony, we've been a major employer in New England for 86 years. Generation after generation, our family-owned company has worked with the families of Bangor, Maine to build Saucony shoes and a history of quality craftsmanship."
"Through it all, we've discovered that the best way to solve economic problems is to build from the ground up."

The advertisements attached as Exhibits 4 and 5 include the statements made in Exhibits 2 and 3, respectively, and also include a fine print statement at the bottom of each advertisement which states:

"In-Line running shoes built in Bangor, Maine. 'Classic' running styles and some components are imported. Call 1-800-365-7282 for more details."

The advertisement attached as Exhibit 6 is a different version of the "Help The Country" Advertisement (Exhibit 1) which states:

"IT CAN EVEN HELP THE COUNTRY GET BACK ON ITS FEET."
"Built With Pride In BANGOR MAINE USA"
"Any running shoe company can help keep Americans in shape. At Saucony, we've helped keep America in shape. That's because we've been a major employer in New England since 1906. Generation after generation, our family-owned company has worked with the families of Bangor, Maine to build Saucony shoes and a history of quality craftsmanship."
A fine print statement at the bottom of this advertisement states:
"In-Line running shoes built in Bangor, Maine. 'Classic' running styles and some components are imported. Call 1-800-365-7282 for more details."

The "American" advertisement (Exhibit 7) states:

"PROUD TO BE AN AMERICAN"
"Built With Pride In BANGOR MAINE USA"
"The new wave of American patriotism sweeping the country has a few of our competitors shaking in their imported shoes. At Saucony, we've been a major employer in New England for 86 years. Generation after generation, our family-owned company has worked with the families of Bangor, Maine to build Saucony running shoes and a history of quality craftsmanship."
A fine print statement at the bottom of this advertisement states:
"In-Line running shoes built in Bangor, Maine. 'Classic' running styles and some components are imported. Call 1-800-365-7282 for more details."

The "PRIDE IN AMERICA" advertisement (Exhibit 8) states:

"PROUD TO BE AN AMERICAN."
"Built With Pride In BANGOR MAINE USA"
"For decades, the people of Bangor, Maine have been building Saucony running shoes with superior American craftsmanship."
"In honor of these American shoemakers..."
"The Saucony Bangor is the newest addition to our line of high quality American-built running shoes."
"TRADE IN YOUR IMPORTS AND WE'LL SEND YOU $10 FOR BUYING THE SAUCONY BANGOR."

A fine print statement at the bottom of this advertisement states:

"In Line Running Shoes are built in Bangor, Maine using imported components, except the Class Running styles which are assembled abroad."

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including, but not necessarily limited to, the advertisements attached as Exhibits 1-8, respondent has represented, directly or by implication, that all Saucony footwear is made in the United States.

PAR. 6. In truth and in fact, a substantial amount of Saucony footwear is wholly made in foreign countries. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. 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.

Commissioner Starek Dissenting.

EXHIBIT 1

EXHIBIT 2

EXHIBIT 3

EXHIBIT 4

EXHIBIT 5

EXHIBIT 6

EXHIBIT 7

EXHIBIT 8

DECISION AND ORDER

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

The respondent, its counsel, 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, 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 Hyde Athletic Industries, Inc., is a Massachusetts corporation with its principal office or place of business at 13 Centennial Industrial Park Drive, Peabody, Massachusetts. Proposed respondent is a U.S. manufacturer, importer, and seller of footwear, with manufacturing facilities in Bangor, Maine.

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

DEFINITION

For purposes of this order, the term *"clearly and prominently"* shall mean as follows:

A. In a television or video advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

B. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

C. In a print advertisement, the disclosure shall be in a type size, and in a location, that is sufficiently noticeable so that an ordinary consumer will bee and read it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.

D. On a product label, the disclosure shall be in a type size, and in a location on the principal display panel, that is sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

I.

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

directly or by implication, that footwear made wholly abroad is made in the United States.

Provided, however, that respondent will not be in violation of this order, if, in connection with a truthful representation about domestic production of its footwear, it makes one of the following disclosures, if truthful, in a clear and prominent manner.

A. "Most Saucony models are made in the USA"; or
B. "Models __ are not made in the USA"; or
C. "Only models __ are imported"; or
D. "__% of Saucony footwear is made in the USA."

This proviso shall not apply to any advertising, labeling or promotional material containing any depiction of or other representation relating to footwear made wholly abroad.

II.

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

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

III.

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

IV.

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

V.

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

VI.

It is further ordered, That this order will terminate on December 4, 2016, 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.

Commission Starek dissenting.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I would have preferred to have issued the original consent agreement rejected by the Commission last fall. As I have consistently stated, case-by-case enforcement -- rather than a regulatory proceeding -- is the appropriate means to evaluate the "Made in USA" standard.[13] Since a majority of the Commission has opted to conduct a broad review of the "Made in USA" standard, however, it is premature for the Commission to condone use of the Made in USA claims set forth in the safe harbor until it proclaims what the standard is.

[13] *See* Request for Public Comment in Preparation for Public Workshop Regarding "Made in USA" Claims in Product Advertising and Labeling, 60 FR 53930 (October 18, 1995) (Dissenting Statement of Commissioner Roscoe B. Starek, III); Hyde Athletic Industries, Inc., File No. 922-3236 (Dissenting Statement of Commissioner Roscoe B. Starek, III).

427 Dissenting Statement

IN THE MATTER OF

RBR PRODUCTIONS, INC., ET AL.

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

Docket C-3696. Complaint, Dec. 10, 1996--Decision, Dec. 10, 1996

This consent order prohibits, among other things, a New Jersey-based company and its officer from misrepresenting the health, safety and environmental benefits of its beauty salon disinfectant products and aerosol spray, and requires the respondents to possess reliable and competent scientific evidence to substantiate such representations.

Appearances

For the Commission: *Janet Evans* and *C. Lee Peeler.*
For the respondents: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that RBR Productions, Inc., a corporation, and Richard Rosenberg, individually and as an officer and director of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent RBR Productions, Inc., is a New Jersey corporation, with its offices and principal place of business located at 1010 Hoyt Avenue, Ridgefield, New Jersey. From time to time, RBR Productions, Inc., does business under the name of Isabel Cristina Beauty Care Products.

Respondent Richard Rosenberg is or was at relevant times herein an officer and director of RBR Productions, Inc. Individually or in concert with others, he formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His office and principal place of business is the same as that of RBR Productions, Inc.

PAR. 2. Respondents have advertised, offered for sale, sold, and distributed products for use in beauty salons, including Let's Dance, a concentrated disinfectant product that contains o-phenylphenol, para-tertiary amylphenol and phosphoric acid and is designed to be diluted and used for disinfection of non-metal instruments and other non-metal, non-porous surfaces; Let's Touch, a concentrated disinfectant product that contains o-phenylphenol and is designed to be diluted and used for cleaning and storage of metal beauty care instruments such as manicure scissors; and Let's Go spray, an aerosol spray that contains the volatile organic compounds ("VOCs") isobutane and propane and is designed for speeding nail glue drying.

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

PAR. 4. Respondents have disseminated or caused to be disseminated advertisements and promotional materials for Let's Dance and Let's Touch, including but not necessarily limited to the advertisements and promotional materials attached hereto as Exhibits A through D. These advertisements and promotional materials contain the following statements and depictions:

(a) Brochure front:

Let's Touch
* * *
- Sold in pre-measured packets
Let's Dance
* * *
- Ultra concentrated for ease of use and storage. . .
[depiction of concentrated and diluted products]

Brochure back:

Here's why the combination of scientific and beauty care industry experience of the ISABEL CRISTINA team means more professional results for you.
[depiction of concentrated and diluted products] Let's Touch and Let's Dance
* * *
- EPA registered and meet or exceed all federal OSHA and State Board requirements. Environmental safe, biodegradable and non-toxic.
- Sold as concentrates for reduced shipping, storage and handling costs Packet-only re-orders reduce costs even more.
* * *

Let's Dance use dilution: pH 2.6
Let's Touch use dilution: pH 10.6

Let's Dance and Let's Touch are:
-- Environmentally Safe -- Non-Toxic
-- Non-Corrosive to Skin and Eyes -- Bio-degradable

Comparative Disinfectants Chart						
	Let's Touch	Let's Dance	Quats	Alcohol	Ultra-Violet	Glass Bead
* * *						
No Damage to Environmental Surfaces	Yes	Yes	Yes[1]	No	No	No
Non-Corrosive to Skin and Eyes	Yes	Yes	Yes[1]	No	No	No
Non-Toxic	Yes	Yes	No[1]	No	__	__
* * *						

[1] Perhaps. Consult EPA offices.

[EXHIBIT A-chart is abbreviated]

(b) Magazine ad:

LET'S DANCE!
BECAUSE. . .
TOMORROW'S WORLD DEPENDS ON YOU

Environmentally Safe One Step Hospital Grade Disinfectant, Cleaner, and Deodorizer for Salons

[depiction of concentrated and diluted product]

Let's Dance!
- Environmentally Safe
- PH Buffered
- Non-Corrosive to Skin and Eyes
- Biodegradable and Non-Toxic
- Ultraconcentrated

Protect Yourself, Your Clients, Your Family

[EXHIBIT B]

(c) Magazine ad:

IS YOUR DISINFECTANT ENVIRONMENTAL SAFE?
LET'S TOUCH IS!
* * * *
IN HANDY PREMEASURED FOIL PACKETS
* * * *
BIODEGRADABLE

NON-TOXIC
NON-CORROSIVE TO SKIN AND EYES
[depiction of concentrated and diluted product]
[EXHIBIT C]

(d) Brochure:

Let's Touch and Let's Dance use-solutions as defined by the latest Federal Hazardous Substances Act Regulations are
NON-TOXIC AND NON-CORROSIVE TO SKIN AND EYES
* * * *

Let's Touch and Let's Dance are pH buffered phenolic products which deliver excellent Broad Spectrum Performance even under the most demanding use situations while offering the greatest degree of safety to the end user and the environment. Let's Touch and Let's Dance use-solutions are defined by the latest Federal Hazardous Substances Act Regulations as NON-TOXIC AND NON-CORROSIVE TO SKIN AND EYES.

. . . .
[EXHIBIT D]

(e) Proper Disinfection For The Beauty Industry--Video Transcript:

* * * *

Speaker: Phenols are another group of disinfectants. They are a benzene molecule derivative -- which means they are a very safe way to disinfect. Phenols are about 3 to 5 times less toxic than Quats when ingested. Buffered Phenols are non-corrosive to skin and eyes, non-toxic, they're biodegradable, environmentally safe, and last longer than other forms of disinfection because they're not as sensitive to organic matter. . . .

Super: Phenols
- very safe way to disinfect
- 3 to 5 times less toxic than quats
- buffered phenols are non-corrosive to skin and eyes
- biodegradable & non-toxic
- environmentally safe
- last longer-not as sensitive to organic matter
- little residue

* * *

Speaker: Armed with the knowledge you now have, you're just beginning to get an appreciation for some of the complexities, and variables involved with just trying to keep your instruments clean. . . . You might even be thinking -- "Does a disinfecting system exist out there that answers my needs?" Well, there is, and that's were we fit in . . . . We are ISABEL CRISTINA. We have developed a superior Disinfecting System -- consisting of LET'S TOUCH AND LET'S DANCE . . . . Let's Touch and Let's Dance are extremely unique products designed specifically for people in the salon industry, by people in the salon industry. Let's Touch and Let's Dance use solutions are completely non-corrosive to the

skin and eyes, non-toxic, biodegradable and environmentally safe, which means you can pour them down the drain.

Super: Let's Touch & Let's Dance

_____

Non-corrosive to Skin & Eyes
Non-toxic
Biodegradable
Environmentally Safe

* * *

Speaker: Let's Touch comes in pre-measured packets with a mixing jar and a starting kit. A child could mix it, its so simple!

* * *

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

a) Let's Dance concentrate is non-corrosive to skin and eyes, non-toxic, and does not pose a risk of adverse health effects;

b) Let's Touch concentrate is non-toxic and does not pose a risk of adverse health effects; and

c) Let's Dance and Let's Touch use dilutions are classified as non-toxic under the Federal Hazardous Substances Act regulations.

PAR. 6. In truth and in fact:

a) Let's Dance concentrate is corrosive to skin and eyes, toxic, and poses a risk of adverse health effects;

b) Let's Touch concentrate is toxic and poses a risk of adverse health effects; and

c) Let's Dance and Let's Touch use dilutions are not classified as non-toxic under the Federal Hazardous Substances Act regulations. In fact, Let's Dace and Let's Touch are not regulated under the Federal Hazardous Substances Act, but under the Federal Insecticide, Rodenticide and Pesticide Act which requires that these products bear various label warnings about their potential for harmful health effects.

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

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

a) Let's Dance and Let's Touch use dilutions are non-toxic and do not pose a risk of adverse health effects;

b) Let's Dance and Let's Touch are three to five times less toxic than quaternary aluminum compound disinfectants;

c) Let's Dance is safe for the environment after ordinary use, and

d) Let's Dance will completely break down and return to nature -- *i.e.*, decompose into elements found in nature -- within a reasonably short period of time after customary disposal.

PAR. 8. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through D, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs five and seven, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 9. In truth and in fact, at the time they made the representations set forth in paragraphs five and seven, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. Respondents have disseminated or caused to be disseminated advertisements and promotional materials for Let's Go spray, including product labeling, including but not necessarily limited to the advertisements and labeling attached hereto as Exhibits E and F. These advertisements and labeling contain the following statements and depictions:

(f) Let's Go aerosol can front label:

ENVIRONMENTAL FORMULA
Will not harm the ozone

Contains No Freon, Chlorofluorocarbons
Methylene Chloride, or
1,1,1-Trichloroethane.
[product logo]
Let's Go aerosol can back label:
Let's Go
* * *
[chasing arrows symbol]
RECYCLABLE ALUMINUM
[EXHIBIT E]

(g) Magazine ad:

LET'S GO
* * *
Environmental Formula -- Freon Free Ozone Friendly . . . .
Recyclable aluminum
[EXHIBIT F]

PAR. 11. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph ten, including but not limited to the advertisement and labeling attached as Exhibits E and F, respondents have represented, directly or by implication, that the Let's Go spray aluminum aerosol can is recyclable.

PAR. 12. In truth and in fact, while the Let's Go aluminum aerosol can is capable of being recycled, there are only a few collection facilities that accept aluminum aerosol cans for recycling. Therefore, the representation set forth in paragraph eleven was, and is, false and misleading.

PAR. 13. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph ten, including but not necessarily limited to the advertisements and labeling attached as Exhibits E and F, respondents have represented, directly or by implication, that Let's Go spray does not contain any ingredients that harm or damage the environment.

PAR. 14. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph ten, including but not necessarily limited to the advertisements and labeling attached as Exhibits E and F, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs eleven and thirteen, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 15. In truth and in fact, at the time they made the representations set forth in paragraph eleven and thirteen, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph fourteen was, and is, false and misleading.

PAR. 16. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBIT D

IC

ISABEL CRISTINA

LET'S TOUCH® / LET'S DANCE®
NON-TOXIC CONFIRMATION

Brief Summary

Both LET'S TOUCH and LET'S DANCE decrease exposure to the active ingredients by using highly buffered germicidal cleansers and offer the greatest degree of Broad Spectrum Efficacy. Both LET'S TOUCH and LET'S DANCE work within a pH range, which acts against supporting the growth and reproduction of bacteria in the salons (always follow the label directions). The Disinfectants, Harmful Bacteria and pH Chart represents the three pH areas: Environmental Destruction, Risk and Sale Zones. LET'S TOUCH and LET'S DANCE fall within the safe Zone, while other products, *e.g.* Quats, Alcohol and other non-buffered phenolic disinfectants, perhaps, fall within the Zones of Risk and Environmental Destruction.

LET'S TOUCH and LET'S DANCE use-solutions
as defined by the latest Federal Hazardous Substances Act Regulations are
NON-TOXIC AND NON-CORROSIVE TO SKIN AND EYES

Specific Data

LET'S TOUCH
The acute oral LD_{50} of LET'S TOUCH concentrate is 12.6 grams per kilogram. This acute oral LD_{50} is equivalent to the ingestion of 23 fluid ounces of concentrate or 5.8 gallons of 1:32 use-dilution by a 150 lb. adult. As the term is defined in the Federal Hazardous Substances Act Regulations, LET'S TOUCH is not a toxic substance.
The acute Dermal LD_{50} of LET'S TOUCH concentrate is greater than 10.0 ml/kg of body weight. As the term is defined in the Federal Hazardous Substances Act Regulations, LET'S TOUCH is not a toxic substance.
A 1:32 use dilution of LET'S TOUCH when tested according to procedures accepted by the Environmental Protection Agency (EPA), showed a score of zero for the primary eye irritation test (16 CFR 1500.42). Therefore, a properly made use-solution of LET'S TOUCH is not considered a primary eye irritant as defined by regulations of the Federal Hazardous Substances Act.

Let's Dance

The normal use dilution of 1:256 of LET'S DANCE germicidal detergent is not considered toxic, nor is it classified as corrosive to skin and eyes. When tested according to protocol prescribed by the US Environmental Protection Agency (EPA) with a twenty-four hour exposure time, the use-solution was found to have a maximum Primary Irritation Score (skin) of 0.0. LET'S DANCE is considered as not a Primary Irritant as defined by the Federal Hazardous Substances Act.
A use-dilution (1:256) was tested according to protocol prescribed by the US Environmental Protection Agency (EPA). All tests were free from any signs of eye irritation at the 48-hour and subsequent readings. The investigating laboratory concluded that LET'S DANCE is not a Primary Eye Irritant.

Please note that Disinfectant products are
labeled for the concentrate contained within.

LET'S TOUCH and LET'S DANCE use-solutions
as defined by the latest Federal Hazardous Substances Act Regulations are
NON-TOXIC AND NON-CORROSIVE TO SKIN AND EYES

NOTE: When purchasing our products, you are purchasing them in a concentrated form. Thus, you purchase pure product and not watered down product. Additionally, unless a product falls within the 2.5 - 3.2 pH and 10 - 11 pH Range, the product cannot possibly last for estended periods of time. Considering the needs of today's salon, the extended life offered by Buffered Disinfection systems more than meet the practical level, the safety requirements of both operator and client. LET'S TOUCH and LET'S DANCE are pH buffered phenolic products which deliver excellent Broad Spectrum Performance even under the most demanding use situations while offering the greatest degree of safety to the end user and the environment. LET'S TOUCH and LET'S DANCE use-solutions are defined by the latest Federal Hazardous Substances Act Regulations as NON-TOXIC AND NON-CORROSIVE TO SKIN AND EYES. Some common examples of Phenolics are: INK and Chloroseptic throat spray medication.
Quatenary Ammonium Compounds (Quats) due to their significant number of drawbacks as a Disinfectant are not classified for Instrument Disinfection by many of the most significant authorities in both the Medical and the Dental fields.

EXHIBIT E

EXHIBIT F

DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or 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 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 RBR Productions, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 1010 Hoyt Avenue in the City of Ridgefield, State of New Jersey. From time to time, RBR Productions, Inc. does business under the name of Isabel Cristina Beauty Care Products.

Respondent Richard Rosenberg is an officer and director of RBR Productions, Inc. he formulates, directs, and controls the policies, acts, and practices of said corporation and his office and principal place of business is the same as that of said corporation.

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

ORDER

DEFINITIONS

For the purposes of this order:

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

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

I.

It is ordered, That respondents, RBR Productions, Inc., a corporation, its successors and assigns, and its officers, and Richard Rosenberg, individually and as an officer and director of said corporation, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Let's Dance and Let's Touch disinfectants, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, that:

A. Let's Dance concentrate is non-corrosive to skin or eyes, non-toxic, or does not pose a risk of adverse health effects;

B. Let's Touch concentrate is non-toxic or does not pose a risk of adverse health effects; or

C. Let's Dance and Let's Touch use dilutions are classified as non-toxic under the Federal Hazardous Substances Act regulations.

II.

It is further ordered, That respondents, RBR Productions, Inc., a corporation, its successors and assigns, and its officers, and Richard Rosenberg, individually and as an officer and director of said corporation, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device:

A. In connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Let's Dance and Let's Touch disinfectants, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

1. Let's Dance or Let's Touch use dilutions are non-toxic or do not pose a risk of adverse health effects;

2. Let's Dance or Let's Touch concentrates or use dilutions are less toxic than quaternary ammonium compound disinfectants or any other disinfectant or product;

3. Let's Dance is biodegradable;

4. Let's Dance is safe for the environment after ordinary use; and

B. In connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Let's Go spray or any other product containing any volatile organic compound, through the use of such terms as "environmental formula," "environmental formula, freon free, ozone friendly," "environmental formula, will not harm the ozone, contains no freon, chlorofluorocarbons, methylene chloride, or 1,1,1-trichloroethane," or any other term or expression, that any such product will not harm the environment; and

C. In connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any disinfectant or aerosol product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that such product will offer any absolute or comparative health, safety, or environmental evidence.

III.

A. *It is further ordered,* That respondents, RBR Productions, Inc., a corporation, its successors and assigns, and its officers, and Richard Rosenberg, individually and as an officer and director of said corporation, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or package, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the extent to which:

(1) Any such product or package is capable of being recycled; or,

(2) Recycling collection programs for such product or package are available.

B. Provided, however, respondents will not be in violation of Part III.A(2) of this order, in connection with the advertising, labeling, offering for sale, sale or distribution of any aluminum aerosol can, if it truthfully represents that such package is recyclable, provided that:

(1) Respondent discloses clearly, prominently, and in close proximity to such representation:

(a) That such packaging is recyclable in the few communities with recycling collection programs for aluminum aerosol cans; or

(b) The approximate number of U.S. communities with recycling collection programs for such aluminum aerosol cans; or

(c) The approximate percentage of U.S. communities or the U.S. population to which recycling collection programs for such aluminum aerosol cans are available.

For the purposes of this order, a disclosure elsewhere on the product package shall be deemed to be "in close proximity" to such representation if there is a clear and conspicuous cross-reference to the disclosure. The use of an asterisk or other symbol shall not constitute a clear and conspicuous cross-reference. A cross-reference shall be deemed clear and conspicuous if it is of sufficient prominence to be readily noticeable and readable by the prospective purchaser when examining the part of the package on which the representation appears.

IV.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondents, or their successors or assigns, shall maintain and upon request make available to the Federal Trade Commission or its staff 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 their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers and complaints or inquiries from governmental organizations.

V.

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

VI.

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

VII.

It is further ordered, That respondent Richard Rosenberg shall, for a period of five (5) years from the date of entry of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business or employment shall include respondent's new business address and telephone number, and a statement describing the nature of the business or employment and his duties and responsibilities.

VIII.

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

IN THE MATTER OF

THE B.F. GOODRICH COMPANY, ET AL.

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

Docket 9159. Modified Final Order, July 18, 1989--Modifying Order, Dec. 12, 1996

This order reopens a 1989 modified final order -- that required Goodrich to divest its Calvert City, Kentucky facility, for the production of vinyl chloride monomer ("VCM") and ethylene dichloride, instead of the LaPorte VCM plant, and also required Commission approval before acquiring any interest in any producer of VCM located in the United States -- and this order modifies the order by setting aside the prior approval requirement.

ORDER REOPENING AND MODIFYING ORDER

On August 23, 1996, The Geon Company ("Geon") filed a Petition to Reopen and Modify Order ("Petition") in this matter. Geon was formed by respondent The B.F. Goodrich Company ("Goodrich") in 1993, and became the wholly-owned subsidiary of Goodrich into which Goodrich placed its vinyl chloride monomer ("VCM") and polyvinyl chloride ("PVC") resin and compound businesses. Goodrich subsequently sold all of its shares of Geon in two public offerings. As a result, Geon is currently the owner and operator of Goodrich's former operations in the VCM industry. Geon is joined in its Petition by respondent Goodrich.[1] In its Petition, Geon asks that the Commission reopen and modify the Modified Final Order issued on July 18, 1989, in Docket No. 9159 ("order") to delete the prior approval provision set forth in paragraph IX of the order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement").[2] Should the Commission determine that deletion of the prior approval requirement would be inconsistent with the

[1] Goodrich has joined in Geon's Petition by stating in an affidavit by Jon V. Heider, Goodrich's Executive Vice President and General Counsel, that it does not object to the modification sought by Geon.

[2] 60 Fed. Reg. 39,745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

public interest, Geon requests that the Commission modify paragraph IX to remove the prior approval requirement and replace it with a prior notice requirement.[3] In the alternative, Geon requests that the Commission determine that the order does not apply to Geon.[4] The thirty-day public comment period on the Petition ended on September 30, 1996. No comments were received.

The order for which Geon seeks reopening and modification arises from the Commission's 1988 decision that Goodrich's acquisition of the VCM business of respondent Diamond Shamrock Chemicals Company violated 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.[5] On appeal from the Commission's decision and final order, the Commission and Goodrich stipulated to a modification of the Commission's final order which substituted divestiture of Goodrich's Calvert City, Kentucky, VCM plant ("Calvert City VCM plant") for divestiture of the La Porte, Texas, VCM plant originally ordered by the Commission to be divested. The order was further modified to require Goodrich to provide the acquirer with raw material feedstocks and services necessary for operation of the Calvert City VCM plant. On July 18, 1989, the Commission entered its Modified Final Order, which became final on July 25, 1989.

On February 21, 1990, the Commission approved Goodrich's divestiture of its Calvert City VCM plant to Westlake Monomers Corporation ("Westlake") in compliance with its divestiture obligations under paragraph II of the order. In connection with the divestiture, Goodrich, among other things, provided Westlake with VCM technology and certain agreements pertaining to the Calvert City VCM plant, entered into agreements to supply or exchange raw material feedstocks and to supply necessary services and utilities, and granted Westlake a right of first refusal on the purchase of its retained ethylene plant, chlorine plant and utilities and services facilities ("Calvert City Assets") located adjacent to the Calvert City VCM plant, pursuant to the requirements of paragraphs III, IV, VI, VII and VIII of the order.

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[3] Petition at 2.

[4] *Id*. Geon states that, although it does not believe the order applies to it, it is concerned that the Commission or its staff might take a contrary view. *See* Petition at 1.

[5] *The B.F. Goodrich Co.*, 110 FTC 207 (1988), order modified, 112 FTC 83 (1989) (entered pursuant to stipulation between Commission and Goodrich during appeal of Commission decision and final order).

Following divestiture of the Calvert City VCM plant up until 1993, Goodrich's remaining VCM business and its PVC resin and compound businesses were conducted by Goodrich through its Geon Vinyl Division. Goodrich's remaining VCM operations consisted of its VCM plant located at La Porte, Texas, which is the plant designated for purposes of the feedstock exchange requirements set forth in paragraph VII of the order. Goodrich also continued to own and operate the Calvert City Assets which are the subject of the supply agreements with Westlake pursuant to paragraph VI of the order, as well as the right of first refusal pursuant to paragraph VIII of the order.

In 1993, Goodrich assigned all of the assets of its Geon Vinyl Division, including Goodrich's remaining VCM and PVC resin and compound businesses, to Geon, then a newly-formed subsidiary corporation wholly-owned by Goodrich. By the end of 1993, Goodrich had sold off all of the voting securities of Geon through two public offerings. As a result of its divestiture to Westlake and its spinoff of Geon, Goodrich no longer operates in the VCM industry and has no equity interest in Geon.[6] Goodrich's former operations in the VCM industry are now owned and operated entirely by Geon.[7] However, Goodrich continues to own and operate the Calvert City Assets, and to supply Westlake pursuant to agreements entered into at the time of divestiture pursuant to paragraphs VI and VII.[8]

Paragraph I.A of the order defines respondent "Goodrich" to mean The B.F. Goodrich Company as well as, among other things, "its. . . successors, and assigns." The Commission believes that Geon, by virtue of its acquisition and operation of Goodrich's remaining VCM business, is a successor under the order for purposes of the prior approval obligations of paragraph IX.[9] For the reasons discussed below, Geon's Petition to modify the order by setting aside the prior approval requirement in paragraph IX is granted.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification

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6 Petition at 1.

7 *Id.*

8 Goodrich's ongoing order obligations, including supply agreements with Westlake entered pursuant to the order, continue in effect for a period of ten years from the date of divestiture to Westlake.

9 Geon may be a successor, or may in the future become a successor, to other ongoing obligations under the order.

and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement.[10] The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements."[11]

Narrow prior approval or prior notification requirements may be appropriate in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger."[12] The need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order."[13] The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement.[14]

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10 Prior Approval Policy Statement at 2.

11 *Id.*

12 *Id.* at 3.

13 *Id.* at 4.

14 *Id.*

The presumption is that setting aside the general prior approval requirement in this order is in the public interest. No facts have been presented that overcome this presumption, and nothing in the record, including the complaint and order, suggests that the exceptions described in the Prior Approval Policy Statement are warranted.[15] The Commission has therefore determined to reopen the proceeding in Docket No. 9159 and modify the order to set aside the prior approval requirement set forth in paragraph IX.[16]

Accordingly, *It is hereby ordered*, That this matter be, and it hereby is, reopened;

It is further ordered, That the Commission's order issued on July 18, 1989, be, and it hereby is, modified, as of the effective date of this order, to set aside paragraph IX of the order.

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[15] In its Petition, Geon states:

The industry covered by the order -- the production and sale of VCM -- is at least national in scope and manufacturing facilities are expensive to acquire. It is unlikely that the acquisition of any competitively significant VCM plant in the United States could be completed without the parties first filing an HSR Form. Petition at 2.

[16] This modification applies both to respondent Goodrich and to successor Geon.

IN THE MATTER OF

NGC CORPORATION

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-3697. Complaint, Dec. 12, 1996--Decision, Dec. 12, 1996

This consent order permits, among other things, NGC Corporation ("NGC"), a Texas-based corporation, to acquire certain natural gas transportation and processing assets from Chevron Corporation, and requires NGC to divest the Mont Belvieu I plant to a Commission-approved buyer. If the transaction is not completed as specified, the consent order requires the respondent to agree to a Commission- appointed trustee.

Appearances

For the Commission: *Arthur Nolan, Phillip Broyles* and *William Baer*.

For the respondent: *Alex Kogan, Akin, Gump, Strauss, Hauer & Feld*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondent NGC Corporation ("NGC"), a corporation subject to the jurisdiction of the Commission, has entered into an agreement to acquire certain assets of Chevron U.S.A. Inc. ("Chevron USA"), a wholly-owned subsidiary of Chevron Corporation ("Chevron"), a corporation 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 FTC Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

DEFINITIONS

PARAGRAPH 1. For purposes of this complaint:

"Natural gas liquids" means hydrocarbon compounds produced when natural gas (methane) is purified, with molecules containing two to five or more carbon atoms, whether commingled as raw mix from gas processing plants or fractionated into individual specification products. Natural gas liquids specification products are ultimately used in the manufacture of petrochemicals, in the refining of gasoline, and as bottled fuel, among others uses.

"Fractionation" means separating raw mix natural gas liquids into natural gas liquids specification products such as ethane or ethane-propane, propane, iso-butane, normal-butane, and natural gasoline via a series of distillation processes.

THE RESPONDENT

PAR. 2. Respondent NGC 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 at 13430 Northwest Freeway, Suite 1200, Houston, Texas.

PAR. 3. Respondent NGC is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

THE ACQUISITION

PAR. 4. Chevron 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 at 575 Market Street, San Francisco, California.

PAR. 5. Chevron U.S.A. 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 at 575 Market Street, San Francisco, California.

PAR. 6. Chevron and Chevron USA 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 affect commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

PAR. 7. Respondent NGC entered into an agreement with Chevron USA, dated May 22, 1996, to acquire certain assets of Chevron USA in exchange for a 28% ownership interest in NGC along with $300 million in cash and debt assumption. The assets to be acquired include natural gas and natural gas liquids processing facilities, transportation and terminaling assets, the fractionation facility at Mont Belvieu, Texas and associated underground storage, and gas marketing and sales contracts.

THE RELEVANT MARKET

PAR. 8. The relevant line of commerce in which to analyze the effects of the acquisition described herein is the fractionation of natural gas liquids.

PAR. 9. The relevant section of the country in which to analyze the effects of the acquisition is the vicinity of Mont Belvieu, Texas. Mont Belvieu offers extensive storage facilities, unmatched pipeline connections for raw mix and specification products, and numerous specification products buyers. As a result, Mont Belvieu is the U.S. hub for fractionation of raw mix natural gas liquids. And it is the nation's premier marketplace for sales of fractionated specification products. Producers of raw mix natural gas liquids throughout much of Texas, New Mexico, western Wyoming, and western Colorado have no good alternative to Mont Belvieu for their fractionation needs.

PAR. 10. The relevant line of commerce is highly concentrated in the relevant section of the country whether measured by Herfindahl-Hirschmann Indices or two-firm and four-firm concentration ratios.

PAR. 11. NGC is an actual and potential competitor of Chevron in the relevant line of commerce in the relevant section of the country. NGC would, after the acquisition, have the largest market share in the relevant line of commerce throughout the relevant section of the country. NGC would, after the acquisition of Chevron's fractionator, control three of the four fractionators at Mont Belvieu. NGC's

control would extend over approximately 70 percent of the current fractionating capacity at Mont Belvieu.

PAR. 12. Entry into the relevant line of commerce is difficult and would not be timely, likely or sufficient to prevent anticompetitive effects in the relevant section of the country.

EFFECTS OF THE ACQUISITION

PAR. 13. The effects of the acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the relevant line of commerce in the relevant section of the country in 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, in the following ways, among others:

a. By eliminating actual and potential competition between NGC and Chevron to provide fractionation services to producers of natural gas liquids,

b. By increasing the likelihood that NGC will unilaterally exercise market power, and

c. By increasing the likelihood of, or facilitating, collusive or coordinated interaction,

each of which increases the likelihood that the prices of fractionation services will increase in the relevant section of the country.

VIOLATIONS CHARGED

PAR. 14. The acquisition agreement described in paragraph seven violates Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

PAR. 15. The proposed acquisition described in paragraph seven, would, if consummated, violate 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 having initiated an investigation of the proposed acquisition by respondent of certain assets and businesses of Chevron Corporation ("Chevron"), and the respondent

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 respondent with violations 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

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent 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 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 NGC 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 13430 Northwest Freeway, Suite 1200, Houston, Texas.

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

ORDER

I.

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

A. *"Combination"* means the transactions contemplated by the Combination Agreement and Plan of Merger, dated as of May 22, 1996, among NGC Corporation, Chevron U.S.A. Inc., and Midstream Combination Corp.

B. *"Commercial operator"* means the person or entity with the legal authority to enter into contracts on behalf of a fractionation facility to provide third parties with the service of Fractionation for a fee and to set the prices offered to third parties for such service.

C. *"Facility operator"* means any person or entity with the legal authority to engage in any activity involved in the routine management, supervision or operation of a fractionation facility, including, but not limited to: the receipt, measurement, handling and storage of raw natural gas liquids delivered to the fractionation facility; the maintenance, repair and operation of any equipment, machinery or other assets used in the course of the operation of the fractionation facility; the handling, storage and movement of specification products produced at the fractionation facility prior to receipt by a third party; the purchase and use of material and supplies in connection with the operation, maintenance and repair of the fractionation facility; the provision of accounting, billing and scheduling functions necessary for the processing of transactions with fractionation customers; the provision of engineering services necessary for operation of the fractionation facility; preparation and submission of any necessary reports to governmental authorities; the procurement of any necessary licenses and permits on behalf of the fractionation facility; the purchase of services necessary for the fractionation facility's operation; and the supervision of the implementation of any decision to expand or modify, repair or maintain the fractionation facility.

D. *"Fractionation"* means the process of separating raw natural gas liquids into specification products.

E. *"Fractionation facility"* means a facility that separates raw natural gas liquids into specification products.

F. *"GCF"* means Gulf Coast Fractionators, a Texas general partnership.

G. *"GCF Expansion Project"* means any current or future project involving an expenditure for equipment or other capital assets reasonably necessary to increase the capacity of the GCF fractionation facility beyond its effective capacity level at the time the expenditure is undertaken.

H. *"GCF Fractionation Facility"* means the Fractionation Facility owned by GCF located at 1.5 miles west of Highway 146 on FM 1942, Mont Belvieu, Chambers County, Texas.

I. *"GCF Partnership Agreement"* means the Amended and Restated Partnership Agreement between Trident NGL, Inc. and Liquid Energy Corporation and Conoco Inc., effective December 1, 1992.

J. *"MB I"* means Mont Belvieu I, a Fractionation Facility, originally constructed by Cities Service Company in 1970, located at 9900 FM 1942, Mont Belvieu, Chambers County, Texas.

K. *"MB I Ownership Agreement"* means the Agreement for the Construction, Ownership and Operation of the Mont Belvieu I Fractionation Facility between Trident NGL, Inc. and Union Pacific Fuels, Inc., dated November 17, 1993, and any subsequent amendments thereof.

L. *"NGC"* means NGC Corporation, its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, and groups and affiliates controlled by NGC, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

M. *"Property to be divested"* means NGC's interest in (1) MB I; and (2) all assets, title, properties, interest, rights and privileges, of whatever nature, tangible and intangible, and other property of whatever description and location used in the business of MB I including, without limitation:

1. All buildings, machinery, fixtures, equipment, vehicles, pipelines, storage facilities, furniture, tools, supplies, spare parts and other tangible personal property located in Mont Belvieu, Texas;

2. All rights, title and interest in and to real property located in Mont Belvieu, Texas, together with appurtenances, licenses, and permits;

3. All books, records and files;

4. All rights under warranties and guarantees for equipment, express or implied;

5. All technical information and drawings for equipment;

6. All vendor lists, catalogs, sales promotion literature, and advertising materials;

7. All inventory of finished goods, work in progress, raw materials and supplies;

8. At the option of the acquirer all rights, title and interests in and to the contracts and leases entered into in the ordinary course of business with suppliers, measurement equipment operators, storage facility operators, transmission pipeline operators, Fractionation customers and personal property lessors and licensors, pertaining to the operation of MB I, provided that where third party consent is required to complete the transfer described in this subparagraph, NGC shall use best efforts to obtain such third party's consent.

N. *"Specification products"* mean ethane, propane, ethane-propane mix, iso-butane, normal-butane and natural gasoline.

II.

It is further ordered, That:

A. Within six (6) months after the signing of the agreement containing consent order, NGC shall divest, absolutely and in good faith, the property to be divested. The property to be divested shall be divested only to an acquirer or acquirers that receive the prior approval of the Commission, and only in a manner that receives the prior approval of the commission. The purpose of the divestiture required by this order is to ensure the continued operation of MB I in the fractionation business in the same manner as conducted by MB I at the time of the proposed divestiture and to remedy the lessening of competition alleged in the Commission's complaint.

B. Upon the signing of the agreement containing consent order, NGC shall immediately give the requisite six (6) month notice under the MB I Ownership Agreement of its intent to cease serving as the commercial and facility operator at MB I. Within thirty (30) days after the signing of the agreement containing consent order, NGC shall cease to serve as the commercial operator of MB I, provided the other party to the MB I Ownership Agreement agrees to be installed as the commercial operator of MB I by that date. In the event that the other party to the MB I Ownership Agreement has not elected to become the commercial operator within said thirty (30) day period, NGC may continue to serve as the commercial operator of MB I, but shall do so: (i) under the provisions of paragraph 3 of the Hold Separate Agreement ("Hold Separate"), attached hereto and made a part hereof as Appendix I; and (ii) only until the divestiture

contemplated in paragraph II.A of this order is achieved, provided such divestiture occurs within the six-month period described therein. If such divestiture does not occur within said six-month period, NGC shall cease to serve as the commercial operator of MB I by the date on which that six-month period expires and the provisions of paragraph III.C of this order shall apply. NGC may continue to serve as facility operator of MB I until the divestiture contemplated in paragraph II.A of this order is achieved, provided such divestiture occurs within the six-month period described therein. If such divestiture does not occur within that six-month period, NGC shall cease to serve as the facility operator of MB I by the date on which that six-month period expires and the provisions of paragraph III.C of this order shall apply.

C. NGC shall do nothing to prevent, impede or interfere with the person or entity that succeeds NGC as either the commercial operator or the facility operator of MB I in undertaking reasonable efforts to offer employment to any NGC employees who assist in the performance of any activities that NGC engages in as the commercial operator or facility operator at MB I, respectively.

D. Pending divestiture of the property to be divested, NGC shall take no action impairing the viability and marketability of the property to be divested and shall not cause or permit the destruction, removal, or impairment of any assets or business of the property to be divested, except in the ordinary course of business and except for ordinary wear and tear.

E. NGC shall comply with the Agreement to Hold Separate attached to this order and made a part hereof ("Hold Separate"). Said Hold Separate shall continue in effect until NGC has divested the property to be divested or until such other time as the Hold Separate provides.

III.

It is further ordered, That:

A. If NGC has not divested, absolutely and in good faith and with the Commission's prior approval, the property to be divested as required by paragraph II of this order within six (6) months after the signing of the agreement containing consent order, the Commission may appoint a trustee to divest the property to be divested. In the

event the Commission or the Attorney General brings an action pursuant to Section 5 (l)of the Federal Trade Commission Act, or any other statute enforced by the Commission, NGC 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(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by NGC to comply with this order.

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

1. The Commission shall select the trustee, subject to the consent of NGC, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If NGC has not opposed, in writing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to NGC of the identity of any proposed trustee, NGC 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 divest the property to be divested.

3. Within ten (10) days after appointment of the trustee, NGC 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 the 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.B.3 to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed trustee, by the court; provided,

however, that the Commission may extend the divestiture period only two (2) times.

5. NGC shall provide the trustee with full and complete access to the personnel, books, records and facilities relating to the property to be divested, or any other relevant information, as the trustee may request. NGC shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. NGC shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by NGC shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or for a court-appointed trustee, the court.

6. The trustee shall make reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to NGC's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II 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 NGC from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of NGC, on such reasonable and customary terms and conditions as the Commission or the court may set. The trustee shall have authority to employ, at the cost and expense of NGC, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the 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 NGC and the trustee's power shall be terminated. The trustee's compensation shall be based at least in a significant part on a commission arrangement contingent on the trustee's divesting the property to be divested.

8. NGC 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 paragraph III.A of this order.

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

11. The trustee shall have no obligation or authority to operate or maintain the property to be divested.

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

C. If NGC has not divested, absolutely and in good faith and with the Commission's prior approval, the property to be divested as required by paragraph II of this order within six (6) months after the signing of the agreement containing consent order, NGC shall, by such date: (i) cease to serve as the commercial operator of MB I (assuming NGC is then serving as commercial operator under the provisions of paragraph three of the Hold Separate); (ii) cease to serve as the facility operator of MB I; and (iii) take all necessary steps under the MB I Ownership Agreement to install the other party to said Ownership Agreement as the commercial operator and the facility operator of MB I.

IV.

It is further ordered, That:

A. Upon the signing of the agreement containing consent order, NGC shall immediately give the requisite six (6) month notice under the GCF Partnership Agreement of its intent to cease serving as the commercial and facility operator at GCF. Within thirty (30) days after

the signing of the agreement containing consent order, NGC shall cease to serve as the commercial operator of GCF, provided a replacement agrees to be installed as the commercial operator of GCF by that date. Within one hundred and twenty (120) days after the signing of the agreement containing consent order, NGC shall cease to serve as the facility operator of GCF, provided a replacement agrees to be installed as the facility operator of GCF by that date. In the event that a replacement has not elected to assume the activities of the commercial operator of GCF within the thirty (30) day period provided or that a replacement has not elected to assume the activities of the facility operator of GCF within the one hundred and twenty (120) day period provided, then the provisions of paragraph four of the Hold Separate shall apply, but only until six (6) months after the signing of the agreement containing consent order. NGC shall, by the end of said six (6) month period: (i) cease to serve as the commercial operator of GCF (assuming NGC is then serving as commercial operator under the provisions of paragraph four of the Hold Separate); (ii) cease to serve as the facility operator of GCF; and (iii) take all necessary steps under the GCF Partnership Agreement to install one of the other parties to said Partnership Agreement as the commercial operator and the facility operator of GCF.

B. NGC shall do nothing to prevent, impede or interfere with the person or entity that succeeds NGC as either the commercial operator or the facility operator of GCF in undertaking reasonable efforts to offer employment to any NGC employees who assist in the performance of any activities that NGC engages in as the commercial operator or as the facility operator at GCF, respectively.

C. In its capacity as a GCF partner, NGC shall sponsor and support an amendment to the GCF Partnership Agreement to allow any two partners (together holding at least a 50% ownership interest in GCF)to commit GCF to undertake a GCF Expansion Project, while providing that a partner may choose to limit its participation in the costs and benefits of such Project. Until such time as the GCF Partnership Agreement is so amended, NGC shall vote in favor of any GCF Expansion Project proposed by another GCF partner, and furthermore NGC shall take no action to prevent, block, delay or impede in any way any GCF Expansion Project, but rather shall provide all reasonable cooperation necessary to facilitate any such Project sought by other GCF partner or partners; provided however, that this provision does not obligate NGC to accept any financial

burden or legal responsibility with respect to such GCF Expansion Project to the extent that such burden or responsibility is out of proportion to NGC's ownership interest in GCF.

Except as permitted in the Hold Separate, NGC shall not participate in any matter or negotiations pertaining to fractionation fees or other terms pursuant to which customers other than NGC obtain fractionation services at GCF.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, NGC shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise: (i) acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged at the time of such acquisition, or within the two years preceding such acquisition, in the fractionation business within ten (10) miles of Mont Belvieu, Texas, or (ii) become the commercial operator or facility operator of any fractionation facility within ten (10) miles of Mont Belvieu, Texas, other than the fractionation facility currently operated by Chevron U.S.A. Inc. Said notification 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 and transmitted 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 Office of the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of NGC and not of any other party to the transaction. NGC shall provide the Notification to the Commission at least thirty (30) days prior to acquiring any such interest (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, NGC shall not consummate the acquisition until twenty (20) days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Commission's Bureau of Competition.

Provided, however, that prior notification shall not be required by this paragraph V of this order for:

A. The construction or development by NGC of a new fractionation facility or the installation of NGC as the commercial operator or facility operator of any such facility; or

B. The expansion or enhancement of an existing Fractionation Facility owned by NGC in whole or in part; or

C. Any 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.

VI.

It is further ordered, That:

A. Within sixty (60) days after the date the agreement containing consent order is signed and every sixty (60) days thereafter until NGC has fully complied with the provisions of paragraphs II or III of this order, NGC shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order. NGC shall include in its 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 the divestiture and the identity of all parties contacted. NGC shall include in its compliance reports, subject to any legally recognized privilege, copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, NGC shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraphs IV and V of this order. Such reports shall include, but not be limited to, a listing by name and location of all fractionation facilities in Mont Belvieu, Texas, in which NGC has any ownership interest, including but not limited to ownership interest obtained due to default, foreclosure proceedings or purchases in foreclosure, made by NGC during the twelve (12) months preceding the date of the report.

VII.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, NGC shall notify the Commission at least thirty (30) days prior to any proposed change in its organization that may affect compliance obligations under this order, such as dissolution, assignment or sale resulting in the emergence of a

successor, or the creation or dissolution of subsidiaries, or any other change that may affect compliance obligations under this order.

VIII.

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

A. Access, during the office hours of NGC 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 NGC relating to any matters contained in this order; and

B. Upon five (5) days' notice to NGC and without restraint or interference therefrom, to interview officers or employees of NGC, who may have counsel present, regarding such matters.

IX.

It is further ordered, That this order shall terminate on December 12, 2016.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Hold Separate") is by and between NGC Corporation ("NGC"), a corporation organized and existing under the laws of the state of Delaware, with its office and principal place of business located at 13430 Northwest Freeway, Suite 1200, Houston, Texas, and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, as amended, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

PREMISES

Whereas, on or about May 22, 1996, NGC entered into a Combination Agreement and Plan of Merger with Chevron U.S.A. Inc., a subsidiary of Chevron Corporation ("Chevron"), and Midstream Combination Corp., which contemplates certain transactions (hereinafter, such transactions collectively referred to as "the Proposed Combination"); and

Whereas, NGC and Chevron both operate fractionation facilities in Mont Belvieu, Texas; and

Whereas, the Commission is now investigating the Proposed Combination to determine whether it would violate any of the statutes enforced by the Commission; and

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

Whereas, the Commission is concerned that if an understanding is not reached preserving competition 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, and relief resulting from a proceeding challenging the legality of the Proposed Combination might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Proposed Combination is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Properties to be Divested as described in paragraph I of the Consent Order and the Commission's right to seek to restore the NGC and Chevron fractionation businesses at Mont Belvieu, Texas as independent, viable competitors; and

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

(i) Preserve the property to be divested as a viable independent business pending its divestiture as a viable and ongoing enterprise;

(ii) Remedy any anticompetitive effects of the Proposed Combination; and

(iii) Preserve the property to be divested as an ongoing, competitive entity engaged in the same business in which it is presently employed until divestiture is achieved; and

Whereas, NGC's entering into this Hold Separate shall in no way be construed as an admission by NGC that the Proposed Combination constitutes a violation of any statute; and

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

Now, therefore, the parties agree, upon the understanding that the Commission has not yet determined whether the Proposed Combination 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 periods for any transactions that are part of the Proposed Combination and are subject to any Hart-Scott-Rodino waiting period that has not yet expired, and unless the Commission determines to reject the Consent Agreement, it will not seek further relief from NGC with respect to the Proposed Combination, except that the Commission may exercise any and all rights to enforce this Hold Separate, the Consent Agreement to which it is annexed and made a part thereof, and the order contained therein, once it becomes final, and in the event that the required divestiture is not accomplished, to seek divestiture of the property to be divested, and other relief, as follows:

1. NGC agrees to execute and be bound by the Consent Agreement;

2. NGC agrees that from the date of its signing of the Consent Agreement until the earliest of the dates listed in subparagraphs 2.a - 2.c, it will comply with the provisions of paragraphs 3, 4, 5 and 6 of this Hold Separate:

a. Three 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;

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

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

3. With respect to the fractionation facility located in the city of Mont Belvieu, Chambers County, Texas, partially owned by NGC and known as Mont Belvieu I ("MB I"), NGC agrees to cease serving as the commercial operator within thirty days (30) after signing the Consent Agreement, provided that the other party to the MB I Ownership Agreement agrees to be installed as the commercial operator of MB I by that date. In the event that the other party to the MB I Ownership Agreement has not elected to become the Commercial Operator within said thirty (30) day period, NGC will hold its interests in the assets and business of MB I separate and apart on the following terms and conditions:

a. NGC's rights, obligations and duties as the commercial operator of MB I shall be exclusively administered by David Rook. All NGC employees who are necessary to perform, or in any way assist in the performance of, any of the activities of the commercial operator of MB I shall report to Mr. Rook, and NGC shall provide the Commission with a list of all such employees, together with a full description of the assigned duties of each listed employee and an explanation of how such duties are necessary for the effective functioning of the commercial operator of MB I, which list shall be updated whenever its membership or any member's assigned duties change. NGC shall have no authority to remove Mr. Rook or any other NGC employee thus assigned to report to him, except for cause.

b. Except as provided by this Hold Separate, neither Mr. Rook nor any employee of NGC named in the list required in paragraph 3.a. above shall disclose any confidential information concerning MB I to an NGC employee not named on any such list or use confidential information for any purpose other than in the performance of that employee's assigned duties enumerated in the list required in paragraph 3.a above. Said employees shall enter a confidentiality agreement prohibiting disclosure of confidential information. Neither Mr. Rook nor any NGC employee assigned to report to him pursuant to this Hold Separate shall participate in any business decision or

attempt to influence any such decision involving any other fractionation facility in which NGC has an interest. Neither Mr. Rook or any NGC employees assigned to report to him pursuant to this Hold Separate shall have access to any confidential information concerning any other fractionation facility in which NGC has an interest. Meetings of the MB I Management Committee during the term of this Hold Separate shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Hold Separate; and

c. NGC shall do nothing to prevent, impede or interfere with the person or entity that succeeds NGC as either the commercial operator or the facility operator of MB I in undertaking reasonable efforts to offer employment to any NGC employees who assist in the performance of any activities that NGC engages in as the commercial operator at MB I or as the facility operator at MB I, respectively.

4. With respect to the fractionation facility located in the city of Mont Belvieu, Chambers County, Texas, and owned by a partnership known as Gulf Coast Fractionators ("GCF") in which NGC is a partner, NGC agrees to cease serving as the commercial operator within thirty days(30) after signing the Consent Agreement, provided a replacement agrees to be installed as the commercial operator of GCF by that date. Within one hundred and twenty (120) days after the signing of the Consent Agreement, NGC shall cease to serve as the facility operator of GCF, provided a replacement agrees to be installed as the facility operator of GCF by that date. In the event that a replacement has not elected to assume the activities of the commercial operator of GCF within the thirty (30) day period provided or that a replacement has not elected to assume the activities of the facility operator of GCF within the one hundred and twenty (120) day period provided, NGC will hold its interests in the assets and business of GCF separate and apart on the following terms and conditions:

a. NGC's rights, obligations and duties as the commercial operator of GCF, in the first instance, and as the facility operator of GCF, in the second instance, shall be exclusively administered by an NGC designee. In either instance, all NGC employees who are necessary to perform, or in any way assist in the performance of, any of the activities being administered by said designee shall report to said

NGC designee, and NGC shall provide the Commission with a list of all such employees, together with a full description of the assigned duties of each listed employee and an explanation of how such duties are necessary for the effective functioning of, in the first instance, the commercial operator of GCF, and in the second instance, the facility operator of GCF, which list shall be updated whenever its membership or any member's assigned duties changes. NGC shall have no authority to remove its designee or any other NGC employee thus assigned to report to said designee, except for cause.

b. Except as provided by this Hold Separate, neither the NGC designee to be identified pursuant to paragraph 4.a. above nor any employee of NGC named in the list required by paragraph 4.a. above shall disclose any confidential information concerning GCF to an NGC employee not named on any such list or use confidential information for any purpose other than in the performance of that employee's assigned duties enumerated in the list required in paragraph 4.a. above. Said employees shall enter a confidentiality agreement prohibiting disclosure of confidential information. Neither the NGC designee nor any NGC employee assigned to report to this individual pursuant to this Hold Separate shall participate in any business decision or attempt to influence any such decision involving any other fractionation facility in which NGC has an interest. Neither the NGC designee nor any NGC employees assigned to report to him pursuant to this Hold Separate shall have access to any confidential information concerning any other fractionation facility in which NGC has an interest. Meetings of the GCF Management Committee during the term of this Hold Separate shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Hold Separate.

5. With respect to GCF, NGC further agrees:

a. To do nothing to prevent, impede or interfere with the person or entity that succeeds NGC as either the commercial operator or the facility operator of GCF in undertaking reasonable efforts to offer employment to any NGC employees who assist in the performance of any activities that NGC engages in as the commercial operator at GCF or as the facility operator at GCF, respectively; and

b. In its capacity as a GCF partner, NGC shall sponsor and support an amendment to the GCF Partnership Agreement to allow

any two partners (together holding at least a 50% ownership interest in GCF) to commit GCF to undertake a GCF Expansion Project, while providing that a partner may choose to limit its participation in the costs and benefits of such Project. Until such time as the GCF Partnership Agreement is so amended, NGC shall vote in favor of any GCF Expansion Project proposed by another GCF partner, and furthermore NGC shall take no action to prevent, block, delay or impede in any way any GCF Expansion Project, but rather shall provide all reasonable cooperation necessary to facilitate any such Project sought by other GCF partner or partners, provided however, that this provision does not obligate NGC to accept any financial burden or legal responsibility with respect to such GCF Expansion Project to the extent that such burden or responsibility is out of proportion to NGC's ownership interest in GCF; and

c. Except as permitted in this Hold Separate, NGC shall not participate in any matter or negotiations pertaining to fractionation fees or other terms pursuant to which customers other than NGC obtain fractionation services at GCF.

6. From the date of the signing of the Consent Agreement, NGC shall take no action impairing the viability and marketability of the Property to be Divested and shall not cause or permit the destruction, removal, or impairment of any assets or business of the property to be divested, except in the ordinary course of business and except for ordinary wear and tear. From the date of the signing of the Consent Agreement, NGC shall take no action that would in any manner impair, impede or restrict its ability to comply with any provisions of the Consent Agreement.

7. NGC waives all rights to contest the validity of this Hold Separate.

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

a. Access, during the office hours of NGC 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 NGC relating to compliance with this Hold Separate; and

b. Upon five (5) days' notice to NGC and without restraint or interference from it but in the presence of its counsel, to interview officers or employees of it regarding any such matters.

9. Should the Federal Trade Commission seek in any proceeding to compel NGC to divest itself of the property to be divested under the Consent Agreement, or any other assets that it may hold, or to seek any other injunctive or equitable relief, NGC shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Proposed Combination. NGC also waives all rights to contest the validity of this Hold Separate.

10. This Hold Separate shall be binding upon NGC upon the signing of the Consent Agreement. NGC agrees that should it violate any of the provisions of this Hold Separate, it is subject to the payment of up to ten thousand dollars ($10,000) for each such violation. NGC also agrees that the violation of any of the provisions of this Hold Separate may subject NGC to such other and further equitable relief as a United States district court may deem appropriate to grant.

IN THE MATTER OF

BUDGET MARKETING, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE ELECTRONIC FUND TRANSFER ACT, REGULATION E AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3698. Complaint, Dec. 13, 1996--Decision, Dec. 13, 1996

This consent order prohibits, among other things, an Iowa-based telemarketer of magazine subscriptions and 11 of its dealers from misrepresenting either that they are selling magazines or the cost and conditions of the subscriptions they are selling. The consent order also prohibits the respondents from: threatening and harassing consumers in order to collect payments; failing to honor offers that allow cancellation; and violating the Electronic Fund Transfer Act.

Appearances

For the Commission: *Joseph J. Koman.*

For the respondents: *John R. Mackaman, Dickinson, Mackaman, Tyler & Hagen,* Des Moines. IA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Electronic Fund Transfer Act and Regulation E, its implementing Regulation, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Budget Marketing, Inc., a corporation, and Charles A. Eagle, individually; Dennis H. Gougion, individually; Dale T. Lenard, individually, and who has done business as Mega-Magazine Service, Colorado Dawn, and key Concept; Charles P. Donly, individually, and doing business as Budget Renewal Service; Roy Golden, individually, and doing business as American Marketing Service; Dave Keown, individually, and who has done business as Publishers Marketing; Richard Prochnow, individually, and doing business as Direct Sales International; John Harrison, individually, and who has done business as a telemarketer of magazine subscriptions; Dale Branson, individually, and doing business as Leisuer Day Marketing; Steven Johnson, individually, and who has done business as a telemarketer of magazine subscriptions; and William J. Stemple, Sr., individually,

and doing business as Budget Marketing of Virginia; hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and it appearing to he Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Budget Marketing, Inc., hereinafter Budget Marketing, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa, with its office and principal place of business located at 1171 Seventh Avenue, in the city of Des Moines, State of Iowa.

Respondents Charles A. Eagle and Dennis H. Gougion have formulated, directed and controlled the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. Messrs. Eagle and Gougion's office and principal place of business are the same as that of respondent Budget Marketing.

Budget Marketing is engaged in the sale, by subscription, of magazines and other publications, throughout the United States, through its own representatives and its franchises, dealer and independent contractor activities.

PAR. 2. Respondents Dale T. Lenard, individually, and who has done business as Mega-Magazine Service, Colorado Dawn, and key Concept, Colorado Springs, Colorado; Charles P. Donly, individually, and doing business as Budget Renewal Service, Minneapolis, Minnesota; Roy Golden, individually, and doing business as American Marketing Service, Des Moines, Iowa; Dave Keown, individually, and who has done business as Publishers Marketing, Arvada, Colorado; Richard Prochnow, individually, and doing business as Direct Sales International, Atlanta, Georgia; John Harrison, individually, and who has done business as a telemarketer of magazine subscriptions, Buffalo, New York; Dale Branson, individually, and doing business as Leisure Day Marketing, Tampa, Florida; Steven Johnson, individually and who has done business as a telemarketer of magazine subscriptions, Des Moines, Iowa; and William J. Stemple, Sr., individually, and doing business as Budget Marketing of Virginia, Virginia Beach, Virginia, are engaged or have been engaged in the sale, by subscriptions, or magazines and other publications and services to the consuming public.

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

PAR. 3. Respondents are now and have been engaged in the advertising, offering for sale, sale, or distribution of magazines and other publications and of merchandise and services relating to such products, as well as of subscriptions to purchase such products, and in the collection or attempted collection of allegedly delinquent accounts for subscription or other contracts, in or affecting commerce.

The magazines and other publications which Budget Marketing, through its own representatives, as well as the above-named franchisees, dealers or individual contractors, sells nationwide, pursuant to subscription sales contracts include those published by national publishers of business and professional magazines and consumer magazines. All such products, whether magazines, books or any other printed matter, will hereinafter be referred to as "publications."

Subscriptions sales are made to consumers or members of the general public, hereinafter sometimes referred to as "customers," "subscribers" or "purchasers," pursuant to contracts which generally run from two to five years and, depending upon the number and type of publications selected by the customer, vary in price from approximately $600 to $1,000.

Budget Marketing's gross revenues derived from subscription sales of magazines and other publications through its own representatives, and its dealers, and independent contractors have averaged in excess of twenty (20) million dollars annually during the time period covered by this complaint.

PAR. 4. In the course and conduct of its business of selling publications pursuant to subscription contracts, as aforesaid, Budget Marketing has entered into agreements with numerous individuals located throughout the United States, including the parties named individually herein. Said individuals, referred to by respondents as "franchisees," "dealers," or independent contractors, through personnel variously designed as "telemarketers," "verifiers," "sales personnel," "closers," "solicitors," or otherwise hereinafter referred to as "representatives" have induced substantial numbers of customers to subscribe to national publications so offered for sale.

Respondents, through their said dealers and representatives, place into operation and, through various direct and indirect means and devices, control, direct, supervise, recommend and otherwise implement sales methods whereby members of the general public are

contacted by mail (post cards) and telephone calls and are induced to enter into subscription agreements, which provide for the purchase of publications and payment therefor on an installment basis. Said subscription contracts, among other things, make provisions for the listing of publications chosen by the purchaser; the period of delivery; and the terms and conditions for payment. Customers may pay for their subscriptions in monthly or bi-monthly installments via cash, credit card charge, or electronic fund transfer. This method of sale is referred to in the industry as "Paid-During-Service" (PDS).

The subscription order is thereafter returned by the representative to the dealer for processing. The dealer in turn forwards the contract and various forms, reports and other documents to respondent Budget Marketing for further processing.

Ultimately, the subscriber receives, if a monthly installment cash payment plan is selected, among other things, a book of coupons, prepared by respondent Budget Marketing, with instructions to detach and submit a single coupon with each monthly payment. Payments are made, as directed, either to the dealer or to the respondent Budget marketing depending upon whether or not the dealer is equipped to handle such deferred payments. If payment is made directly to Budget Marketing, it pays the dealer the amount due him or her, by credit or otherwise. If the dealer receives payment from the subscriber, he or she in turn remits to Budget Marketing the amount due it. In either event, respondent Budget Marketing receives and accepts the revenues from said sales of publications, either directly from the subscriber or indirectly from the dealer.

In the manner aforesaid, respondent Budget Marketing, directly or indirectly controls, furnishes the means, instrumentalities, services and facilities for, approves and accepts the pecuniary and other benefits flowing from the acts, practices and policies hereinafter set forth, of its respective dealers and representatives, hereinafter collectively referred to as respondent representatives.

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

PAR. 5. In the course and conduct of its subscription sales business, as aforesaid, respondent Budget Marketing causes, and has caused said publications, when sold, to be shipped from their places of business or sources of supply by mail to purchasers thereof located in the same and various States of the United States other than the state of origination and has transmitted and received and caused to be

transmitted and received in the course of selling, delivering, and collecting payment for said publications among and between the several states of the united States, subscription orders, contracts, invoices, checks, collection notices and various other kinds of commercial paper and documents. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of business in such products and commercial intercourse in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. In the course and conduct of their business, as aforesaid, and for the purpose of inducing members of the general public to enter into subscription agreements, respondents, directly or through their representatives, utilize sales promotional materials or other means and instrumentalities furnished, approved or ratified by respondent Budget Marketing. In conjunction therewith, they have made certain oral and written statements and representations concerning the terms and conditions of said subscription contracts, their renewal or cancellation, special offers, the nature and purpose of the solicitation, and the identity of an organization purportedly involved in the solicitation. In the foregoing manner, respondents and their representatives have represented, directly or indirectly:

(a) That they are conducting or participating in *bona fide* sweepstakes, surveys, or contests.

(b) That publications or other products will be given free, or for the cost of mailing, handling, editing or printing of said publications, or at special or reduced prices.

PAR. 7. In truth and in fact:

(a) Respondents and their representatives were not conduction or participating in *bona fide* sweepstakes, surveys, or contests but, to the contrary, were engaged in inducing the general public to enter into subscription agreements.

(b) Publications or other products were not given free, nor solely for the cost of mailing, handling, editing, printing of said publications, nor at special or reduced prices. To the contrary, the subscription contracts provided for payment to cover respondents' regular or prevailing subscription contract prices.

Therefore, the statements and representations as set forth in paragraph six hereof were, and are, misleading and deceptive.

PAR. 8. In the further course and conduct of their business, and in furtherance of their purpose of inducing the purchase of and payment for said publications by the general public, respondents and their representatives, directly or indirectly, have engaged in the following additional acts and practices:

(a) In a substantial number of instances, they have stated approximate costs of a subscription contract on a weekly basis, in conjunction with statements of typical subscription periods as, for example, a cost of a few dollars per week and a period of 60 months. Respondents and their representatives falsely and deceptively fail to disclose, in connection with such statements, the material fact that their contracts seldom, if ever, provide for weekly installment payments, or for payments spread over 60 months. In truth and in fact, the contracts require monthly installment payments of substantially higher amounts over a substantially shorter period of time than stated during such oral presentations.

(b) In a substantial number of instances, they have induced customers to enter into a subscription agreement by falsely and deceptively representing or implying that all publications covered by said contract will be delivered over the same period of time, such as 60 months. In truth and in fact, subscription periods for different publications covered by the same contract are frequently different.

(c) In a substantial number of instances, they have induced customers to enter into a subscription agreement by failing to fully inform the customers as to the following material facts: cost, name and number of issues of each publication; the total cost of the contract; the amount of the downpayment; the amount and due date of each payment and the total number of such payments.

(d) In their efforts to collect what respondents elect to treat as delinquent accounts of subscribers, they have, from time to time, resorted to telephone calls at unreasonable hours and other forms of harassment, including but not limited to those set forth below, by means of which they have unfairly, falsely and deceptively represented, directly or indirectly:

(1) That the general or public credit rating or standing of any such customer will be adversely affected unless payment is made.

(2) That the failure of a customer to remit money to respondents will result in the institution of legal action to affect payment. In truth and in fact, respondents seldom if ever take any action, including legal action, which adversely affects the general or public credit rating of such subscribers.

Therefore, respondents' statements, representations, acts and practices, and their failure to reveal material facts, as set forth herein were, and are, unfair, false, misleading, and deceptive acts and practices.

PAR. 9. In the course and conduct of their business, as described above, most of the respondents have, on numerous occasions, violated Section 1693e(a) of the Electronic Fund Transfer Act and Section 205.10(b) of Regulation E by failing to satisfy the requirement that preauthorized electronic fund transfers may be authorized by the consumer only in writing and not by a payee signing a written authorization on the consumer's behalf, with only an oral authorization from the consumer.

PAR. 10. By and through the use of the aforesaid acts and practices, respondents place in the hands of others the means and instrumentalities by and through which they may mislead and deceive the public in the manner and as to the things hereinabove alleged.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, and the Electronic Fund Transfer Act and Regulation E, its implementing regulation.

DECISION AND ORDER

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

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that 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 Budget Marketing, Inc. ("BMI") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa, with its office and principal place of business located at 1171 Seventh Avenue, in the City of Des Moines, State of Iowa.

Respondents Charles A. Eagle and Dennis H. Gougion have formulated, directed and controlled the policies, acts and practices of said corporation and their address is the same as that of said corporation.

2. Respondent Dale T. Lenard is an individual who has done business as Mega-Magazine Service, Colorado Dawn, and Key Concept, who currently resides at 245 N. Rancho Santa Fe Road, Suite 205, in the city of San Marcos, State of California.

3. Respondent Charles P. Donly is an individual doing business as Budget Renewal Service, with his office and principal place of business located at 101 W. Burnsville Parkway, Suite #225, in the City of Burnsville, State of Minnesota.

4. Respondent Roy Golden is an individual doing business as American Marketing Services, with his office and principal place of business located at 4513 72nd, in the City of Des Moines, State of Iowa.

5. Respondent Dave Keown is an individual who had done business as Publishers Marketing, who currently resides at 7340 West 74th Place, in the City of Arvada, State of Colorado.

6. Respondent Richard Prochnow is an individual doing business as Direct Sales International, with his office and principal place of business located at 2550 Heritage Ct. NW, Suite #106 in the City of Atlanta, State of Georgia.

7. Respondent John Harrison is an individual who has done business as a telemarketer of magazine subscriptions, who currently resides at 6505 Metcalf, Suite #106, in the City of Shawnee Mission, State of Kansas.

8. Respondent Dale Branson is an individual doing business as Leisure Day Marketing, with his office and principal place of business located at 12101 N. 56th Street, #3, in the City of Temple Terrace, State of Florida.

9. Respondent Steven Johnson is an individual who has done business as a telemarketer of magazine subscriptions, who currently resides at 1609 Twana Drive, in the City of Des Moines, State of Iowa.

10. Respondent William J. Stemple, Sr., is an individual business as Budget Marketing of Virginia, with his office and principal place of business located at 240 Mustang Trail, Suite #6, in the City of Virginia Beach, State of Virginia.

ORDER

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

(a) *"Consumer"* shall mean a purchaser, subscriber, customer, or person being solicited;

(b) *"Paid-During-Service Plan" ("PDS Plan")* shall mean the offering for sale or sale of a combination of two or more publications to a consumer, for a term of more than one year, payment for which is to be made in three or more installments;

(c) *"Subscription order"* shall mean an arrangement made over the telephone with a consumer for the purchase of publication subscriptions pursuant to a paid-during-service plan in which the seller does not require the purchaser's signature to obtain the publication subscriptions.

(d) *"Service Company"* shall mean an organization other than the seller of subscription orders to whom notices of cancellation may be sent.

(e) *"Telemarketing"* means a plan, program, or campaign which is conducted to induce purchases of goods or services by significant use of three or more telephones.

I.

It is ordered, That respondent Budget Marketing, Inc., a corporation, its successors and assigns, and its officers, and respondents Charles A. Eagle, individually; Dennis H. Gougion, individually; Dale T. Lenard, individually, and who has done business as Mega-Magazine Service, Colorado Dawn, and Key Concept; Charles P. Donly, individually, and doing business as Budget Renewal Service; Roy Golden, individually, and doing business as American Marketing Service; Dave Keown, individually, and who has done business as Publishers Marketing; Richard Prochnow, individually, and doing business as Direct Sales International; John Harrison, individually; Dale Branson, individually, and doing business as Leisure Day Marketing; and Steven Johnson, individually, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, licensee, dealer, independent contractor, or other device, in connection with, via telemarketing, the advertising, offering for sale, sale or distribution of magazines or any other publications or merchandise, or subscriptions to purchase any such products or services, or in the collection or attempted collection from any consumer of any delinquent contract or other account, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(a) Failing to comply, in connection with any pre-authorized Electronic Fund Transfer in payment of any subscription order or payment for other products or services, with Section 205.10(b) of Regulation E, 12 CFR 205, which states:

> Preauthorized electronic fund transfers from a consumer's account may be authorized by the consumer only in writing, and a copy of the authorization shall be provided to the consumer by the party that obtains the authorization from the consumer.

Respondents are also enjoined from failing to comply with the Official Commentary to 12 CFR 205.10, Question 10-18.6. If

Regulation E is in the future amended or officially interpreted either by a contested-case final decision binding on the government (all rights of appeal having expired) by a court of the United States, or by the Federal Reserve Board, or by amendment of relevant portions of the Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.*, defendants' compliance with such amendment or interpretation will not be deemed a violation of this order.

(b) Representing, directly or indirectly, that any representative or other person calling upon a customer or prospective customer for the purpose or with the result of inducing or securing a subscription to, order for, or the purchase or agreement to purchase any products or services:

(i) Is conducting or participating in any survey, quiz or contest, or is engaged in any activity other than soliciting business; or otherwise misrepresenting, in any manner, the purpose of the call or solicitation;

(ii) Represents, or otherwise claims to be performing services for any educational, charitable, social or other organization, or any individual or firm other than one engaged in soliciting business; or otherwise misrepresenting, in any manner, the identity of the solicitor or of his firm and of the business they are engaged in;

(iii) Will give any product or service free or as a gift or without cost or charge, or that any product or service can be obtained free or as a gift or without cost or charge, in connection with the purchase of, or agreement to purchase, any product or service, unless the stated price of the product or service required to be purchased in order to obtain such free product or gift is the same or less than the customary and usual price at which such product or service has been sold separately from such free or gift item, and in the same combination if more than one item is required to be purchased, for a substantial period of time in the recent and regular course of business in the trade area in which the representation is made;

(c) Failing, clearly, emphatically and unqualifiedly to reveal, at the outset of the initial and all subsequent contacts or solicitations of purchasers or prospective purchasers, whether directly or indirectly, or by telephone, by written or printed communication, or person-to-person, that the purpose of such contact or solicitation is to sell products or services as the case may be, which shall be identified with

particularity at the commencement of each such contact or solicitation;

(d) Representing, directly or indirectly, that any price for any product or service covers only the cost of mailing, handling, editing, printing, or any other element of cost, or is at or below cost; or that any price is a special or reduced price unless it constitutes a significant reduction from an established selling price at which such product or service has been sold in substantial quantities by the seller in the same combination of items in the recent and regular course of its business; or otherwise misrepresenting, in any manner, the savings which will be accorded or made available to purchasers;

(e) Representing, directly or indirectly, that any subscription contract or other purchase agreement can be cancelled at the purchaser's option, or that the right to cancel will be accorded to any purchasers, when there is no provision in such contract or agreement for cancellation on the terms and conditions represented, and unless cancellation is in fact granted on such terms and conditions;

(f) Refusing or failing upon request to cancel a contract when the representation has been made directly or indirectly that the contract will be cancelable;

(g) Making any reference or statement concerning "a few dollars per week," "60 months," or any other statement as to a sum of money or duration or period of time in connection with a subscription contract or other purchase agreement which does not in fact provide, at the option of the purchaser, for the payment of the stated sum, at the stated interval, and over the stated duration or period of time; or misrepresenting, in any manner, the terms, conditions, method, rate or time of payment actually made available to purchasers or prospective purchasers;

(h) Failing, in the case of PDS Plan sales, to clearly reveal orally prior to the time the subscription contract is agreed to by the customer and in writing on the subscription order from and the sales agreement (or separate schedule), with such conspicuousness and clarity as will likely to be read by the purchaser, the following terms of the subscription order:

(i) The name, the exact number of issues, and the exact number of months of service of each publication covered by the contract;

(ii) The total cost of each publication and all the publications covered by the contract; and

(iii) The downpayment or first payment required and the number, amount, and due dates of all subsequent installment payments, and the amount of any finance charges;

(iv) The method of payment (*e.g.*, coupon book, credit card, or electronic banking); and

(v) The purchasers right to rescind or cancel the subscription order or sale within three (3) business days after date of receipt of the sales agreement by mailing a notice of cancellation to the seller's address or, if the seller uses a service company, to the service company's address, before the expiration of the cancellation period. It is not a violation of the order if BMI adopts a cancellation policy giving the consumer a longer time to cancel than that set forth herein;

(i) Representing, directly or indirectly, that a subscription contract or other purchase agreement is a "preference list," "guarantee," "route slip" or any kind of document other than a contract or agreement; or otherwise misrepresenting, in any manner, the nature, kind or legal characteristics of any document;

(j) Failing, clearly, emphatically and unqualifiedly to reveal orally and in writing to each consumer before execution, the identity, nature and legal import of any document that he or she is requested or required to execute in connection with the purchase of any product or service;

(k) Engaging in any unfair or deceptive practices in order to effect payment of any account by any means, including but not limited to the following:

(i) Communicating with consumers in a harassing or abusive manner;

(ii) Making telephone calls to consumers before 8 a.m. or after 9 p.m. at the consumer's time zone;

(iii) Using forms or any other printed or written materials purporting to be simulated legal documents or process when in fact they are not;

(iv) Representing, directly or indirectly, that, in the event of non-payment or delinquency in any account or alleged debt arising from any subscription agreement, the credit rating of any consumer may be adversely affected unless the information concerning such delinquency is actually referred to a *bona fide* credit reporting agency;

(v) Threatening to take action that cannot legally be taken, or that is not intended to be taken;

(vi) Representing, directly or indirectly, that attorneys' fees or other amounts will be added to a consumer's debt if the consumer fails to pay the amount allegedly owed and legal action is taken, unless such amount is expressly authorized by the agreement creating the debt or permitted by law;

(vii) Misrepresenting in any manner the action to be taken or results of any action which may be taken to effect payment of any delinquent account or alleged debt;

(viii) Using any other practice which debt collectors are prohibited from using by the Fair Debt Collection Practices Act;

(l) In the case of PDS Plan sales, cancelling any subscription contract for any reason other than a breach by the subscriber or pursuant to a request from the consumer;

(m) Failing to furnish to each consumer a final copy of the consumer's subscription contract, showing either the date mailed to the consumer or the date the consumer signs the contract, and the name of the seller with the seller's address and telephone number or, if the seller uses a service company, the address and telephone number of the service company;

(n) Failing to provide on a sheet separable from the written sales agreement a clearly understandable from which the purchaser may use as a notice of cancellation;

(o) Failing to cancel the sales agreement where the purchaser's written cancellation request is received within fourteen (14) calendar days from the date of mailing or delivering the sales agreement from to the purchaser, and, in such event, refund within thirty (30) days after cancellation any payment received from the purchaser;

(p) In the case of PDS Plan sales, failing to include on the cover of each coupon book furnished to consumers electing to use payment coupons:

(i) A statement showing a total number of coupons in the book, the dollar amount of each such coupon, and the total dollar amount of all such coupons;

(ii) A legend stating: "Check the number of coupons in this book and their amounts against your original subscription contract," and

(iii) The seller's address and telephone number or, if the seller uses a service company, the service company's address and telephone number on the cover of the first separate inside page or on each coupon;

(q) In the case of PDS Plan sales, in the event of the discontinuance of publication, or other unavailability, of any magazines subscribed for, at any time during the life of the contract, failing to offer the subscriber the right to substitute one or more magazines or other publications of the subscriber's choice from respondents' current list of publications on a pro rata dollar-for-dollar basis, or the extension of subscription periods of magazines already selected;

(r) Failing or refusing to cancel, at the subscriber's sole option, all or any portion of a subscription contract entered into after entry of this order whenever any misrepresentation prohibited by this order has been made; and

(s) Furnishing or otherwise placing in the hands of others the means and instrumentalities by and through which the public may be misled or deceived in the manner or as to things prohibited by the order.

Provided, however, in the event the Commission promulgates a trade regulation rule prohibiting deceptive (including fraudulent) and other abusive telemarketing activities applicable to respondents' sale of magazine subscription contracts and other products and services to consumers and to their collection of delinquent accounts, which trade regulation rule contains provisions that contradict any provisions of this order, the Commission, upon a request from respondent(s), shall reopen this proceeding and modify this order to conform it to the Rule.

II.

It is further ordered:

(A) That respondents shall deliver, by registered mail, or in person, a copy of this order to each of their present and future dealers, franchisees, licensees, employees, salespersons, agents, solicitors, independent contractors, and other representatives who are not

themselves respondents and who sell or promote the products or services included in this order, or who make or attempt to make collections for the accounts of any of the respondents hereto;

(B) That respondents shall provide each person described in paragraph (A) above with a form, returnable to respondents clearly stating each person's intention to be bound by and to conform his or her business practices to the requirements of this order;

(C) That respondents shall inform all such present and future dealers or franchisees, licensees, employees, salespersons, agents, solicitors, independent contractors, or other representatives who are not themselves respondents and who sell or promote the products or services included in this order, or who make or attempt to make collections for the account of any of the respondents hereto, that respondents shall not use any third party, or the services of any third party, unless such third party agrees to, and does, file notice with respondents that he or she will be bound by and conform his or her business practices to the requirements contained in this order;

(D) That respondents shall not use any such person described in paragraph (A) above to sell or promote the products or services in this order or to make or attempt to make collections for the account of respondents, if such person will not agree to so file notice with the respondents and be bound by the provisions contained in this order;

(E) That the obligations of respondents as set forth in paragraphs (A) through (D) above and in paragraphs (F) and (G) hereafter of this order shall, with respect to persons engaged solely to make, or attempt to make, collections for the account of the respondents, apply only to compliance with those provisions of this order relating to said activity and said persons solely so engaged shall be required under this order only to conform their practices to the provisions of paragraph (k) of this order;

(F) That respondents shall institute and continue for any period they are engaged in practices covered by this order a program of continuing surveillance adequate to reveal whether the business operations of each of said persons so engaged conform to the requirements of this order; and

(G) That respondents shall discontinue dealing with any persons (including dealers, independents, and outside collection agents or other third-parties) who, as revealed by the aforesaid program of surveillance, continue the deceptive acts or practices prohibited by this order.

III.

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

IV.

It is further ordered, That the individually named respondents shall notify the Commission at least thirty (30) days prior to sale or discontinuance of the entities through which they have been engaging in the sale of magazine subscription contracts or of the creation of any additional business entities (doing business as or trading as firms), or any decision to enter or entry into any new business engaged in the telemarketing of any product or service in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

V.

It is further ordered, That this order shall hereafter govern the conduct of the respondents, and, to that end, the Decision and Order in Docket No. 8831, issued on August 3, 1972, is hereby vacated insofar as it applies to respondents in this matter.

IN THE MATTER OF

TELEBRANDS CORP., ET AL.

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

Docket C-3699. Complaint, Dec. 13, 1996--Decision, Dec. 13, 1996

This consent order prohibits, among other things, a Virginia-based mail order company and its officer from representing that their antenna improves television and radio reception, provides the best, crispest, clearest or most focused television reception achievable without cable installation, and requires any claim concerning the relative or absolute performance, attributes, or effectiveness of any product intended to improve a television's or radio's reception, sound, or image to be truthful and substantiated by competent and reliable evidence.

Appearances

For the Commission: *Donald D'Amato* and *Michael Bloom.*

For the respondents: *Robert Ullman, Bass & Ullman,* New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Telebrands Corp., a corporation; and Ajit Khubani, individually and as an officer and director of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Telebrands Corp., also doing business as Uncle Bernie's and U.S. Buyers Network, and previously having been known as Telebrands Direct Response Corp. and Telebrands Wholesale Corp., is a Virginia corporation with its office and principal place of business located at 2428 Patterson Avenue, Roanoke, Virginia.

Respondent Ajit Khubani is an officer and director of the corporate respondent. Individually or in concert with others, he has formulated, directed, or controlled the acts and practices of the

corporate respondent, including the various acts and practices alleged in this complaint. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents have advertised, labelled, offered for sale, sold, and distributed to consumers the Sweda Power Antenna, a device intended to capture television and radio signals; the WhisperXL, a sound amplification device intended to be worn by the user; and other products.

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

SWEDA POWER ANTENNA

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for the Sweda Power Antenna, including but not necessarily limited to the attached Exhibit A. These advertisements contain the following statements:

A. "Amazing New Product Gives Crisp, Clear TV Reception WITHOUT Cable!";

B. "Until recently, the only convenient way to guarantee great TV reception was to get cable installed. But who wants to pay those irritating monthly cable fees just to get clear reception? Now . . . a new device has been developed . . . [i]t's called the SWEDA Power Antenna and is without a doubt 'the single most important thing you should own if you have a TV!'";

C. "Just imagine watching TV and seeing a picture so brilliantly clear that you'd almost swear you were there live! Just plug this tiny 2" x 4" Power Antenna into any ordinary AC outlet, connect your TV and get ready for the best reception you've ever had without cable.";

D. "You'll watch in amazement as YOUR TV set suddenly displays a sharp, focused picture. You literally 'won't believe your eyes!' Even older TV sets suddenly come to life.";

E. ". . . Power Antenna takes that signal and electronically boosts it before it gets to your TV set. The results are amazing!";

F. "WHAT ABOUT MY TV 'DISH' ANTENNA? Return it!.... The truth is that they're no more effective than rabbit-ears, a loop, or rod antenna . . . . The incredible SWEDA Power Antenna makes everything else seem obsolete. Just plug it in and watch it work."; and

G. "[Sweda Power Antenna] Works just as good for radio reception too!".

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not

necessarily limited to the attached Exhibit A, respondents have represented, directly or by implication, that:

A. The Sweda Power Antenna provides the best, crispest, clearest, or most focused television reception achievable without cable installation;

B. The Sweda Power Antenna takes a television or radio signal and electronically boosts it before it gets to a television or radio; and

C. The installation of a Sweda Power Antenna will more effectively improve a television's or radio's reception, sound, or image than the installation of a television or radio dish antenna.

PAR. 6. In truth and in fact:

A. The Sweda Power Antenna does not provide the best, crispest, clearest, or most focused television reception achievable without cable installation;

B. The Sweda Power Antenna does not take a television or radio signal and electronically boost it before it gets to a television or radio; and

C. The installation of a Sweda Power Antenna will not more effectively improve a television's or radio's reception, sound, or image than the installation of a television or radio dish antenna.

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

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibit A, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five, respondents possessed and relied upon a reasonable basis that substantiated such representations.

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

PAR. 9. Respondents have disseminated or have caused to be disseminated advertisements for the Sweda Power Antenna, including but not necessarily limited to the attached Exhibit A, that make

satisfaction or money-back guarantees for the Sweda Power Antenna. These advertisements make the following statement: "Experience the best reception you've ever had or simply return it [Sweda Power Antenna] within 30 days for a prompt and courteous refund."

PAR. 10. Through the use of the statement contained in the advertisements referred to in paragraph nine, including but not necessarily limited to the attached Exhibit A, respondents have represented, directly or by implication, that the purchaser of a Sweda Power Antenna would readily obtain a prompt refund of the full purchase price upon timely demand and return of the Sweda Power Antenna.

PAR. 11. In truth and in fact, in numerous instances, purchasers could not readily obtain a prompt refund of the full purchase price of the Sweda Power Antenna upon timely demand and return of the Sweda Power Antenna. Respondents provided refunds only after delays of several months or only after requiring the purchaser to satisfy other conditions not previously disclosed. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

WHISPERXL

PAR. 12. Respondents have disseminated or have caused to be disseminated advertisements for the WhisperXL, including but not necessarily limited to the attached Exhibits B and C. These advertisements contain the following statements:

A. "HEAR A WHISPER UP TO 100 FEET AWAY! Incredible WhisperXL Gives You Super Hearing" (Exhibits B and C);

B. "The WhisperXL may look like a simple device designed to hide right behind your ear, but is actually a major breakthrough in sound enhancement technology." (Exhibit B);

C. "The WhisperXL . . . is actually a major breakthrough in sound interception and amplification technology." (Exhibit C);

D. "State-of-the-art electronic engineering actually allows you to hear a whisper up to 100 feet away." (Exhibits B and C);

E. "Incredibly, you'll be able to hear people talking in the next room loudly and clearly, or a pin drop from 50 feet away!" (Exhibit C);

F. "Take a walk outdoors and you'll hear . . . deer coming before they hear you!" (Exhibit C); and

G. "Don't Miss A Word! WhisperXL has dozens of practical uses! Take it to the movies, theater, or lecture hall and you'll never miss a word." (Exhibits B).

PAR. 13. Through the use of the statements contained in the advertisements referred to in paragraph twelve, including but not necessarily limited to the attached Exhibits B and C, respondents have represented, directly or by implication, that:

A. The WhisperXL is a major breakthrough in sound enhancement technology;

B. The WhisperXL is an effective hearing aid;

C. The WhisperXL is designed to produce and produces clear amplification of whispered or normal speech, television, radio, and other mid- to high-frequency sounds at a distance of more than a few feet;

D. The WhisperXL allows the user to hear a whisper from as far as 100 feet away; and

E. The WhisperXL allows the user to hear a pin drop from 50 feet away.

PAR. 14. In truth and in fact:

A. The WhisperXL is not a major breakthrough in sound enhancement technology;

B. The WhisperXL is not an effective hearing aid;

C. The WhisperXL is not designed to produce and does not produce clear amplification of whispered or normal speech, television, radio, and other mid- to high-frequency sounds at a distance of more than a few feet;

D. The WhisperXL does not allow the user to hear a whisper from as far as 100 feet away; and

E. The WhisperXL does not allow the user to hear a pin drop from 50 feet away.

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

PAR. 15. Through the use of the statements contained in the advertisements referred to in paragraph twelve, including but not necessarily limited to the attached Exhibits B and C, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph thirteen, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 16. In truth and in fact, at the time they made the representations set forth in paragraph thirteen, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph fifteen was, and is, false and misleading.

PAR. 17. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT B

EXHIBIT C

DECISION AND ORDER

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

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft 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 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, 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 Telebrands Corp., also doing business as Uncle Bernie's and U.S. Buyers Network, and previously having been known as Telebrands Direct Response Corp. and Telebrands Wholesale Corp., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Virginia, with its principal place of business located at 2428 Patterson Avenue, Roanoke, Virginia.

Respondent Ajit Khubani is an officer and director of Telebrands Corp. Mr. Khubani, individually or in concert with others, formulates, directs, and controls the policies, acts, and practices of said corporation, and his business address is the same as that of said corporation.

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

ORDER

I.

It is ordered, That Telebrands Corp., its successors and assigns, and its officers, and Ajit Khubani, individually and as an officer and director of said corporation, and respondents' agents, servants, representatives, employees, and attorneys, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of the "Sweda Power Antenna" or any substantially similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in any manner, directly or by implication, that such product:

A. Provides the best, crispest, clearest, or most focused television reception achievable without cable installation; or

B. Will more effectively improve a television's or radio's reception, sound, or image than the installation of a television or radio satellite or external dish antenna.

For purposes of this paragraph "substantially similar product" shall mean any product or device that relies or purports to rely on house wiring to serve as the antenna to capture television or radio signals.

II.

It is further ordered, That Telebrands Corp., its successors and assigns, and its officers, and Ajit Khubani, individually and as an officer and director of said corporation, and respondents' agents, servants, representatives, employees, and attorneys, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of the "Sweda Power Antenna" or any substantially similar product in or affecting commerce, as

"commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in any manner, directly or by implication, that such product takes a television or radio signal and electronically boosts it before it gets to a television or radio unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

For purposes of this paragraph "substantially similar product" shall mean any product or device that relies or purports to rely on house wiring to serve as the antenna to capture television or radio signals.

III.

It is further ordered, That Telebrands Corp., its successors and assigns, and its officers, and Ajit Khubani, individually and as an officer and director of said corporation, and respondents' agents, servants, representatives, employees, and attorneys, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any product or device intended to improve a television's or radio's reception, sound, or image in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in any manner, directly or by implication, the relative or absolute performance, attributes, or effectiveness of such product or device, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area,

that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

IV.

It is further ordered, That Telebrands Corp., its successors and assigns, and its officers, and Ajit Khubani, individually and as an officer and director of said corporation, and respondents' agents, servants, representatives, employees, and attorneys, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, by act or omission, any guarantee of satisfaction or refund offer in connection with the promotion, advertising, offering for sale, sale or distribution of any product. Any such guarantee of satisfaction or refund offer shall be deemed to require the full refund of the purchase price of a product, as well as any shipping, insurance, handling charges, or any other fee or charge paid by the consumer, within seven (7) business days of the respondents' receipt of the consumer's request for a refund pursuant to any guarantee of satisfaction or refund offer made by respondents; provided, however, that respondents may exclude shipping, insurance, handling charges, or any other fee or charge paid by the consumer from the terms of any guarantee of satisfaction or refund offer if such exclusion is clear, conspicuous, and in close proximity to the guarantee of satisfaction or refund offer.

V.

It is further ordered, That Telebrands Corp., its successors and assigns, and its officers, and Ajit Khubani, individually and as an officer and director of said corporation, and respondents' agents, servants, representatives, employees, and attorneys, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of the "WhisperXL" or any substantially similar product in or affecting commerce, as

"commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in any manner, directly or by implication, that such product:

A. Is a major breakthrough in sound enhancement technology;

B. Is an effective hearing aid;

C. Is designed to produce or produces clear amplification of whispered or normal speech, television, radio, or other mid- to high-frequency sounds at a distance of more than a few feet;

D. Allows the user to hear a whisper from as far as 100 feet away; or

E. Allows the user to hear a pin drop from 50 feet away.

For purposes of this paragraph "substantially similar product" shall not include any hearing aid that has received pre-market approval and/or pre-market clearance from the United States Food & Drug Administration, which approval and/or clearance remains in effect at the time of the making of any of the representations set forth as A through E above.

VI.

It is further ordered, That Telebrands Corp., its successors and assigns, and its officers, and Ajit Khubani, individually and as an officer and director of said corporation, and respondents' agents, servants, representatives, employees, and attorneys, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any hearing aid or other sound amplification device intended to be worn or carried by the user, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in any manner, directly or by implication, the relative or absolute performance, attributes, or effectiveness of any such aid or device, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other

evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

For purposes of this paragraph "other sound amplification device intended to be worn or carried by the user" shall not include any television, radio, tape player, compact disc player, or similar device, marketed solely for listening to broadcast, cablecast, or pre-recorded material.

VII.

It is further ordered, That respondents, their successors and assigns, and their officers, for three (3) years after the last date of dissemination of any representation covered by this order, shall maintain and, within ten (10) business days of their receipt of a written 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 their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

VIII.

It is further ordered, That respondents, their successors and assigns, and their officers, for three (3) years after service of this order, shall maintain and, within ten (10) business days of their receipt of a written request, make available to the Federal Trade Commission for inspection and copying records demonstrating compliance with the terms and provisions of this order.

IX.

It is further ordered, That respondents, their successors and assigns, and their officers, within thirty (30) days after service of this

order, shall provide a copy of this order to each of respondents' current principals, officers, and directors, and to all supervising employees, agents, and representatives having any sales, advertising, recordkeeping, fulfillment, customer service, or policy responsibility with respect to the subject matter of this order.

X.

It is further ordered, That respondents, their successors and assigns, and their officers, for a period of three (3) years from the date of service of this order, shall provide a copy of this order to each of respondents' principals, officers, and directors, and to each of respondents' supervising employees, agents, and representatives having any sales, advertising, recordkeeping, fulfillment, customer service, or policy responsibility, within three (3) days after such person assumes his or her position; provided, however, that a person who previously has been provided a copy of the order pursuant to paragraph IX need not be provided with another copy pursuant to this paragraph.

XI.

It is further ordered, That the corporate respondent, its successors and assigns, and its officers, shall notify the Federal Trade Commission at least thirty (30) days prior to any change in the corporate respondent's structure, including but not limited to, change of corporate name or address, place(s) of business, merger, incorporation, dissolution, assignment, or sale which results in the emergence of a successor corporation, the creation or dissolution of a subsidiary or parent, or any other change which may affect respondents' obligations arising out of this order.

XII.

It is further ordered, That the individual respondent, for a period of seven (7) years from the date of issuance of this order, shall notify the Federal Trade Commission within thirty (30) days of any change in his affiliation with, or change in his active participation in the management or direction of, any business which is engaged in the

sale or distribution of any merchandise covered by the terms and conditions of this order.

XIII.

It is further ordered, That this order will terminate on December 13, 2016, or twenty 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 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.

XIV.

It is further ordered, That respondents shall, within sixty (60) days after the service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission reports, in writing, setting forth in detail the manner and form in which respondents have complied with this order, including but not limited to the name and title of each person to whom a copy of the order has been provided pursuant to the requirements of paragraphs IX and X.

IN THE MATTER OF

CLASS RINGS, INC., 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-3701. Complaint, Dec. 20, 1996--Decision, Dec. 20, 1996

This consent order permits Class Rings, Inc. to acquire L.G. Balfour Company and prohibits, among other things, Class Rings, Inc. and Castle Harlan from acquiring or agreeing to acquire from Town & Country any stock, share capital, equity, or other interest in or assets of Gold Lance.

Appearances

For the Commission: *Joseph Krauss* and *William Baer*.

For the respondents: *Joseph Kattan, Morgan, Lewis & Bockius*, Washington, D.C. and *Keith Shugarman, Goodwin, Proctor & Hoar*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Class Rings, Inc., a corporation controlled by Castle Harlan Partners II L.P. ("Castle Harlan"), has entered into an Asset Purchase Agreement with Town & Country Corporation ("Town & Country") and CJC Holdings, Inc. ("CJC"), whereby Class Rings, Inc. has agreed to acquire the class ring assets of Town & Country and has agreed to acquire the class ring assets of CJC, and Town & Country has agreed to acquire stock of Class Rings, Inc., in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisitions, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 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:

A. THE RESPONDENTS

1. Respondent Class Rings, Inc., a corporation formed and controlled by Castle Harlan Partners II, L.P., 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 150 East 58th Street, New York, New York.

2. Respondent Castle Harlan Partners II, L.P. ("Castle Harlan") is a limited partnership 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 150 East 58th Street, New York, New York. Castle Harlan is a venture capital partnership organized by Castle Harlan Inc., a New York-based investment firm.

3. Respondent Town & Country Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with its office and principal place of business located at 25 Union Street, Chelsea, Massachusetts.

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

B. THE PROPOSED ACQUISITIONS

5. On May 20, 1996, Class Rings, Inc., agreed to purchase all of the class ring assets of Town & Country and CJC, pursuant to an Asset Purchase Agreement by and between Class Rings, Inc. as buyer and CJC Holdings, Inc. and CJC North America, Inc. as seller, and an Asset Purchase Agreement by and between Class Rings, Inc. as buyer and Town & Country Corporation, Gold Lance, Inc. ("Gold Lance"), and L.G. Balfour Company, Inc. ("Balfour") as sellers. As consideration for the sale of the assets, Town & Country is to receive cash of approximately $55 million and approximately 8% of the voting securities of Class Rings, Inc. with rights to receive and additional 10% of the voting securities of Class Rings, Inc.

6. CJC, based in Austin, Texas, is one of the leading manufacturers of commemorative jewelry in the United States. Its

class ring division manufactures and markets class rings primarily under the ArtCarved and R. Johns brand names, and also under the Class Rings, Ltd., Keystone, and Master Class Rings brand names. CJC distributes its class rings primarily through retail jewelry stores, college bookstores, and certain mass merchandisers.

7. Town & Country, through its class ring divisions, Gold Lance and Balfour, is a leading producer of high school and college class rings. Town & Country's class rings are available through retail jewelry stores and mass merchandisers under the Gold Lance brand name, and through both independent sales representatives and direct sales in schools under the Balfour brand name. Gold Lance and Balfour rings are manufactured in separate plants (Gold Lance in Houston, Texas and Balfour in North Attleboro, Massachusetts), and the two divisions are operated independently. Balfour also produces a variety of other products, including graduation announcements, personalized jewelry, and sports and recognition products.

8. Town & Country and CJC are substantial, direct competitors in the United States market for the manufacture and sale of high school and college class rings.

C. RELEVANT OF COMMERCE

9. One relevant line of commerce within which to analyze the effects of the proposed acquisitions is the United States market for class rings. Class rings are rings manufactured and sold to high school, junior high school, undergraduate, graduate, trade school, and community college students, and students of any other post-high school institutions to commemorate their graduation. Class rings are generally made of gold, silver or of steel alloy metals and often include a precious or synthetic stone, the school name, student's interests or activities, date of graduation, and various other inscriptions.

10. Class rings are purchased by students to commemorate their graduation from high school or college. There are no substitutes for class rings and students would not switch to other types of commemorative jewelry, such as pins and medallions, even in response to a significant price increase in class rings. Students generally buy or receive as gifts other commemorative products in addition to, not instead of, class rings. Students do not view other products or graduation gifts as substitutes for a class ring.

Commemorative products are usually purchased close to the time of graduation, whereas class rings are typically ordered well before graduation, often one or two years in advance.

11. Students often have the option of purchasing a class ring at their schools or at a retail jewelry store. CJC distributes virtually all of its high school class rings through retail jewelry stores and accounts for a dominant share of the high school rings sold in retail stores. Town & Country's Gold Lance subsidiary is CJC's principal competitor; it sells only through retail jewelry stores, and the vast majority of its business is in high school rings. Jostens, Inc. has the leading share of in-school sales of high school class rings, and sells only small volumes of class rings in retail jewelry stores. Balfour sells only in schools or in college bookstores and has no sales through retail jewelry stores.

12. The relevant geographic market within which to analyze the effects of the proposed transactions is the United States. The sale of class rings is a uniquely American phenomenon.

13. Total sales of class rings in the United States are approximately $330 million. Approximately 40% of all class rings are sold through retail distribution in retail jewelry stores.

D. CONCENTRATION

14. The United States class ring market is highly concentrated. CJC and Town & Country are two of only four major manufacturers of class rings in the United States and have a combined market share of over 40% of all class rings sold in the United States. Jostens, Inc. (currently the largest manufacturer of class rings in the United States), CJC, Town & Country, and Herff Jones, Inc., together account for over 95% of all class ring sales. The proposed merger of CJC and Town & Country assets would increase the Herfindahl-Hirschmann Index ("HHI") over 900 points to approximately 3760.

15. The remaining 5% of the class ring market is composed of several smaller class ring manufacturers whose combined share historically has not exceeded 5%. These firms are limited in their ability to expand by their limited inventory of molds and limited distribution.

16. The combination of the CJC and Town & Country class ring assets would give the merged entity a combined market share of over 90% of class rings sold through the retail distribution channel.

E. CONDITIONS OF ENTRY

17. *De novo* entry or fringe expansion into the class rings market which would be sufficient to deter or offset reductions in competition resulting from the proposed acquisitions would not be timely or likely.

18. The four major class ring manufacturers each have hundreds of thousands of molds and produce a variety of styles, sizes, options and features for class rings sold across the United States. The small fringe producers each have inventories of only several thousand molds. The costs and time necessary to create a large inventory of molds are significant and the costs to build a mold inventory are sunk costs.

19. Distribution barriers are also substantial. Schools and jewelry store operators are reluctant to replace their existing class ring suppliers. Marketing impediments include the need to build a reputation and a specialized sales force. Class ring manufacturers must deliver highly customized products in a timely manner.

20. Manufacturers of recognition jewelry use the same manufacturing process as that used by manufacturers of class rings. However, recognition jewelry manufacturers do not have the necessary molds to produce class rings and are not organized to deliver customized products to customers in a timely manner.

F. FACTORS THAT INCREASE LIKELIHOOD OF COORDINATED INTERACTION

21. The class ring market already has several indicia of a market susceptible to coordinated interaction and the proposed acquisitions would increase competitors' ability to coordinate. Product lines, while adverse, are comparable across firms. Pricing and unit sales information is widely available among firms, and the major firms are moving toward more simple pricing structures which will make that information even more easily available. Transactions are numerous and small. Market shares have been relatively stable, with little or no shifting of share among the leading firms.

22. There already is substantial communication and interaction between the leading firms in the class ring market. Company documents reveal contacts between firms in the market and the exchange of pricing and promotional information.

G. EFFECTS OF THE PROPOSED ACQUISITIONS

23. The proposed acquisition of the class ring assets of CJC and T&C by Class Rings, Inc., may substantially lessen competition in the United States market for class rings by, among other things:

a. Increasing concentration substantially in a highly concentrated market;

b. Eliminating substantial head-to-head competition between Gold Lance and CJC;

c. Substantially increasing the risk of coordinated interaction;

d. Substantially increasing the risk of unilateral effects in class rings sold through the retail distribution channel;

e. Increasing prices for class rings.

H. VIOLATIONS CHARGED

24. The agreements described in paragraph five violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

25. The proposed acquisition of the class ring assets of Town & Country and CJC by Class Rings, Inc., and the acquisition of stock in Class Rings, Inc., by Town & Country, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Class Rings, Inc., a corporation controlled by Castle Harlan partners II, L.P. ("Castle Harlan"), of the class ring assets of CJC Holdings, Inc. and CJC North America, Inc. (collectively "CJC") and the class ring assets of Town & Country Corporation ("Town & Country"), and the proposed acquisition by Town & Country of voting securities of Class Rings, Inc. (Class Rings, Inc., Castle Harlan and Town & Country hereinafter sometimes referred to as "respondents"), and respondents having been furnished with a copy of a complaint that the Bureau of Competition has presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents

with violations of the Clayton Act and the Federal Trade Commission Act; and

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

The 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 prescribed in Section 2.34 of its Rules, makes the following jurisdictional findings and enters the following order:

1. Respondents Class Rings, Inc., a corporation controlled by Castle Harlan Partners II, L.P., 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 150 East 58th Street, New York, New York.

2. Respondent Castle Harlan Partners II, L.P., is a limited partnership 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 150 East 58th Street, New York, New York.

3. Respondent Town & Country Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with its office and principal place of business located at 25 Union Street, Chelsea, Massachusetts.

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

ORDER

I.

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

A. *"Respondent Class Rings, Inc."* or *"Class Rings, Inc."* means Class Rings, Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by Class Rings, Inc.; and their respective directors, officers, employees, agents and representatives and the respective successors and assigns of each.

B. *"Respondent Castle Harlan"* or *"Castle Harlan*" means Castle Harlan Partners II, L.P., its predecessors, subsidiaries (including, but not limited to Class Rings, Inc. and Keepsake Jewelry, Inc.), divisions, groups and affiliates controlled by Castle Harlan; and their respective general partners, officers, employees, agents and representatives and the respective successors and assigns of each.

C. *"Respondent Town & Country"* or *"Town & Country"* means Town & Country Corporation, its predecessors, subsidiaries (including but not limited to, Gold Lance, Inc.), divisions, groups and affiliates controlled by Town & Country; and their respective directors, officers, employees, agents and representatives, and the respective successors and assigns of each. For purposes of this order, Town & Country shall not include L.G. Balfour Company, Inc., the assets of L.G. Balfour Company, Inc., and any assets related to the business of L. G. Balfour Company, Inc., to be purchased by Class Rings, Inc., referred to in the Asset Purchase Agreement dated May 20, 1996.

D. *"Gold Lance"* means Gold Lance, Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by Gold Lance, Inc.; and their respective directors, officers, employees, agents and representatives and the respective successors and assigns of each.

E. *"Respondents"* means Class Rings, Inc., Castle Harlan and Town & Country.

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

G. *"Class rings"* means rings manufactured and sold to high school, junior high school, college, undergraduate, graduate, trade school, and community college students, and students of any other post-high school institutions to commemorate their graduation. Class rings are generally made of gold, silver or steel alloy metals and often

include a precious or synthetic stone, the school name, student's interests or activities, date of graduation, and various other inscriptions.

II.

It is ordered, That, at or before the time respondent Class Rings, Inc., acquires L. G. Balfour Company, Inc., its assets and any other assets related to the business of L.G. Balfour Company, Inc., to be purchased by Class Rings, Inc., referred to in the Asset Purchase Agreement dated May 20, 1996, Castle Harlan and Class Rings, Inc., shall not acquire from or agree to acquire from Town & Country, and Town & Country shall not sell to or agree to sell to Castle Harlan or Class Rings, Inc., any stock, share capital, equity, debt, or other interest in or assets of Gold Lance or any stock, share capital, equity, debt, or other interest in or assets of Town & Country; and respondent Town & Country shall not acquire or agree to acquire from Castle Harlan or Class Rings, Inc., and Castle Harlan and Class Rings, Inc., shall not sell or agree to sell to respondent Town & Country any stock, share capital, equity, debt, or other interest in or assets of respondents Castle Harlan or Class Rings, Inc.

The purpose of this provision is to ensure the continuation of Gold Lance as an independent competitor in the design, manufacture and sale of Class Rings and to remedy the lessening of competition 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 Class Rings, Inc., and respondent Castle Harlan shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, debt, or other interest in Gold Lance or Town & Country, or;

B. Acquire any assets used in the design, manufacture, or sale of Class Rings from Gold Lance or Town & Country.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final respondent Town & Country shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, debt, or other interest in Class Rings, Inc., or Castle Harlan, or;

B. Acquire any assets used in the design, manufacture, or sale of Class Rings from Castle Harlan or Class Rings, Inc.;

Provided, however, Town & Country may purchase assets from Castle Harlan or Class Rings, Inc., totaling not more than $2 million in any twelve (12) month period, without prior approval of the Commission.

V.

It is furthered ordered, That:

Respondent Castle Harlan and respondent Class Rings, Inc., shall not, for a period of one (1) year from the date this order becomes final, employ or seek to employ any person who is or was employed at any time during calendar year 1996 by Gold Lance or by Town & Country in any position relating to the design, manufacture, or sale of Class Rings.

VI.

It is further ordered, That:

A. Within sixty (60) days after the order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of paragraph II of this order, each of the respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraph II of this order.

B. One year (1) from the date of this order becomes final, annually for the next nine (9) years on the anniversary of the date this

order becomes final, and at other times as the Commission may require, each of the respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraphs III, IV, and V of this order.

VII.

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

VIII.

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

A. Access, during office hours of respondents 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 (5) days' notice to respondents and without restraint or interference from them, to interview officers, directors, or employees of respondents.

IX.

It is further ordered, That this order shall expire ten (10) years from the date this order becomes final.

Commissioner Azcuenaga concurring in part and dissenting in part.

ATTACHMENT A

INTERIM AGREEMENT

This Interim Agreement is by and between Class Rings, Inc., a corporation organized and existing under the laws of the State of Delaware ("Class Rings, Inc."), Castle Harlan Partners II, L.P., a limited partnership organized and existing under the laws of the State of Delaware ("Castle Harlan"), Town & Country Corporation, a corporation organized and existing under the laws of the State of Massachusetts ("Town & Country"), 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, Class Rings, Inc. has proposed to acquire all of the class ring assets of Town & Country pursuant to the Asset Purchase Agreement dated May 20, 1996 ("the proposed Acquisition");

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 Agreement Containing Consent Order ("Consent Agreement"), 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 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 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, and divestiture or other relief resulting from a proceeding challenging the legality of the proposed Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the entering into this Interim Agreement by Class rings, Inc., Castle Harlan and Town & Country shall in no way be construed as an admission by Class Rings, Inc., Castle Harlan and Town &

Country that the proposed Acquisition constitutes a violation of any statute; and

Whereas, Class Rings, Inc., Castle Harlan and Town & Country understand 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, Class Rings, Inc., Castle Harlan and Town & Country agree, upon the understanding that the Commission has not yet determined whether the proposed Acquisition 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. Class Rings, Inc., Castle Harlan and Town & Country agree 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 Class Rings, Inc., Castle Harlan and Town & Country sign the Consent Agreement.

2. Class Rings, Inc., Castle Harlan and Town & Country agree to submit, within twenty (20) days of the date the Consent Agreement is signed by Class Rings, Inc., Castle Harlan and Town & Country, and every thirty (30) days thereafter until respondents have fully complied with the provisions of paragraph II of the Consent Agreement, written reports, pursuant to Section 2.33 of the Commission's Rules, signed by Class Rings, Inc., Castle Harlan and Town & Country setting forth in detail the manner in which Class Rings, Inc., Castle Harlan and Town & Country will comply or have complied with paragraph II of the Consent Agreement.

3. Class Rings, Inc., Castle Harlan and Town & Country agree that, from the date Class Rings, Inc., Castle Harlan and Town & Country sign the Consent Agreement until the first of the dates listed in subparagraphs 3.a. and 3.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.

4. Class Rings, Inc., Castle Harlan and Town & Country waive all rights to contest the validity of this Interim Agreement.

5. 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, Class Rings, Inc., Castle Harlan and Town & Country shall permit any duly authorized representative or representatives of the Commission:

a. Access, during the office hours of Class Rings, Inc., Castle Harlan and Town & Country 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 Class Rings, Inc., Castle Harlan and Town & Country relating to compliance with this Interim Agreement; and

b. Upon five (5) days' notice to Class Rings, Inc., Castle Harlan and Town & Country and without restraint or interference from it, to interview officers, directors, or employees of Class Rings, Inc., Castle Harlan and Town & Country who may have counsel present, regarding any such matters.

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

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

Today the Commission issues a consent order resolving allegations that the proposed acquisitions by Class Rings, Inc., a newly created subsidiary of Castle Harlan Partners II, L.P., of certain assets of Town & Country Corp. (two subsidiaries, Gold Lance, Inc., and L.G. Balfour, Inc.) and CJC Holdings, Inc., would be unlawful. The proposed order prohibits the acquisition of Gold Lance.

I concur, except with respect to the prior approval provisions in paragraphs III and IV of the proposed order, which are inconsistent with the "Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions" ("Prior Approval Policy Statement" or "Statement"). In its Statement, the Commission announced that it would "rely on" the Hart-Scott-Rodino premerger notification requirements in lieu of imposing prior approval or prior notice provisions in its orders. Although the Commission reserved its power to use prior approval or notice "in certain limited

circumstances," it cited only a single situation in which a prior approval clause might be appropriate, that is, "where there is a credible risk that a company" might attempt the same merger.

The complaint does not allege any facts showing a "credible risk" that the parties might attempt to acquire Gold Lance a second time. Nor am I aware of any reason to think that the parties have a concealed plan or intention to circumvent the order by dong so. Of course, as evidenced by their premerger notification report filed pursuant to the requirement of the Hart-Scott-Rodino Act, the parties wanted to acquire Gold Lance, but every merger case involves parties who want to combine firms or assets.

As I understand it, the primary reason for assuming that the parties will try again is that they seemed so much to want to consummate this transaction. The intensity of the parties' interest in a proposed transaction as perceived by the Commission (even assuming that we can distinguish between the vigor of their legal representation and the intensity of their own feelings) has no established predictive value of the likelihood that parties will again attempt a transaction now know to be viewed unfavorably by the FTC. In addition, the intensity of their feelings as perceived by the Commission is unlikely to result in an evenhanded selection of exceptions to our prior approval policy.

It also has been suggested that one reason for imposing a prior approval requirement is that the Commission is prohibiting the acquisition of Gold Lance, rather than allowing it subject to a divestiture requirement, under which the Commission supervises the divestiture. In fact, however, the choice of remedy is not predictive of the likelihood of recurrence. Once a divestiture has been accomplished, the Commission has no greater ability to deter a particular transaction than it will here.

I am most sympathetic to the concern that if the parties attempted to repeat the transaction in the future, the Commission might be faced with a significant duplicative expenditure of resources. That is one of the reasons I dissented from the Commission's Prior Approval Policy Statement. Dissenting Statement of Commissioner Mary L. Azcuenaga on Decision to Abandon Prior Approval Requirements in Merger Orders, 4 CCH Trade Reg. Rep. ¶ 13,241 at 20,992 (1995).

But given that we have the policy, it seems to me incumbent on the Commission either to live by it or to change it.[1]

[1] *See* Dissenting Statement of Commissioner Mary L. Azcuenaga in The Vons Companies, Inc., Docket No. C-3391 (May 24, 1996).