

Modifying Order

114 F.T.C.

IN THE MATTER OF

UNION CARBIDE CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SECS. 3 AND 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-2902. Consent Order, Sept. 28, 1977—Modifying Order, March 15, 1991*

This order reopens the proceeding and modifies Paragraph I.A of the 1977 consent order [90 FTC 257] by allowing the respondent to enter into multi-year requirements contracts with several new industrial gas distribution companies ("NEWCOs").

ORDER MODIFYING CONSENT ORDER
ISSUED SEPTEMBER 28, 1977

On November 2, 1990, Union Carbide Corporation ("Carbide") filed a "Request to Reopen Proceeding and Modify Order" ("request") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) and Section 2.51 of the Federal Trade Commission's Procedures and Rules of Practice, 16 CFR 2.51. The request asks the Commission to reopen and modify the consent order in Docket No. C-2902 ("order"). Carbide seeks to have paragraph I.A. of the order modified to permit Carbide to enter into requirements contracts for terms longer than one year with several gas distribution companies, which are to be formed from packaged gas distribution businesses in which UCIG had, as of November 1, 1990, more than a 50% interest ("NEWCOs") and are to be owned jointly by the Union Carbide Industrial Gas division ("UCIG") and its employees. The employees and management together will own more than 50% interest in each NEWCO. The order presently requires that any requirements contracts with distributors in which Carbide does not own a "majority interest" have initial terms not longer than one year and be terminable annually on not more than 90-days notice.

The Commission has carefully considered Carbide's request and has concluded that the public interest warrants reopening and modifying paragraph I.A to allow Carbide to enter into requirements contracts with the NEWCOs for terms greater than one year. Carbide did not request, and the Commission has not considered, that the order be

reopened and modified on the grounds of changed conditions of fact or law. The request was put on the public record and no comments were received.

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 require such order to be altered, modified, or set aside in whole or in part."¹ The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make the satisfactory showing of changed conditions to obtain a reopening. See *Gautreaux v. Pierce*, 535 F.Supp. 423, 426 (N.D. Ill. 1982) (requester must show "exceptional circumstances, new, changed or unforeseen at the time the decree was entered"). The legislative history also makes clear that the requester has the burden of showing, by means other than conclusory statements, why an order should be modified.² If the Commission determines that the petitioner has made the necessary showing, it must reopen the order to consider whether modification is in fact required and the nature and extent of the modification.³ The Commission is not required to reopen the order, however, if the requester fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. This burden is not a light one in view of the public interest in repose and finality of the Commission's orders. See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest

¹ Section 5(b) provides, in part:

[T]he Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part.

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

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

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

³ The legislative history notes: "The Commission may employ whatever procedures it deems appropriate in aid" of the decision whether to modify an order. S. Rep. No. 96-500, 96th Cong., 2d Sess. 10 (1979).

considerations support repose and finality); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974) (“sound basis for . . . [not reopening] except in the most extraordinary circumstances”); *RSR Corp. v. FTC*, 656 F.2d 718, 721-22 (D.C. Cir. 1981) (applying *Bowman Transportation* standard to FTC order).

The Commission may also modify an order pursuant to Section 5(b) when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. Respondents are invited in requests to reopen to show how the public interest warrants the requested modification. 16 CFR 2.51(b). In the case of a request for modification based on this ground, 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 24, 1983) (unpublished) (“Damon Letter”) at 2. For example, it may be in the public interest to modify an order “to relieve any impediment to effective competition that may result from the order.” *Damon Corp.*, Docket No. 2916, 101 FTC 692 (1983). Once this showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. See *Damon Letter* at 2, see, e.g., *Chevron Corp.*, Docket No. C-3147, 105 FTC 228 (1985) (public interest warrants modification where potential harm to respondent’s ability to compete outweighs any further need for the order). The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm. *Damon Letter* at 4.

Requested Modification of Paragraph I.A of the Order

Carbide proposes to spin off a portion of UCIG to form approximately five new companies, the NEWCOs, that will sell packaged industrial gas in cylinders to retail distributors. The NEWCOs will take over UCIG’s filling plants, calcium carbide based acetylene production facilities and packaged gas retail outlets. They will also acquire UCIG’s cylinder inventory. UCIG will continue to sell industrial gas in bulk form to independent distributors and to the NEWCOs (which will become UCIG’s largest bulk gas customers) which will sell packaged gas to independent distributors.

The NEWCOs will be run by current UCIG management. At least 35% of each NEWCO’s voting securities will be owned by UCIG, and a majority of each NEWCO’s stock will be owned by NEWCO Employee

Stock Ownership Plan (“ESOP”). The small remaining amount of stock of each NEWCO would be sold to the NEWCO management.⁴ In addition, UCIG will have a warrant permitting it to purchase enough new issue stock to raise its common stock position in the NEWCO to over 50%. UCIG will not be required to exercise the warrant but may do so at any time with no constraint from the NEWCO. UCIG’s stock ownership will assure it of a seat on the NEWCO’s boards, and Carbide states that it is contemplated that UCIG will have the right to approve most major decisions by the NEWCOs. Request at 11.

UCIG proposes that it will enter into a multi-year supply contract with each NEWCO for industrial gas with (1) an “evergreen” provision—a provision that renews a contract from term to term in lieu of notice by one of the parties to the contrary; and (2) a right of UCIG to meet any lower price offered by a competitor.

The Order Should be Reopened and Modified

The Commission has determined that paragraph I.A of the order should be reopened and modified as requested by Carbide. Carbide’s currently planned restructuring is neither prohibited nor required by anything in the order. As a consequence, the Commission is not called upon to consider whether Carbide’s preference for a structure in which Carbide retains less than fifty percent ownership is a reasonable business decision. Carbide has shown, however, that its business judgment will be affected by the application of the order to Carbide’s relationships with the NEWCOs. The order may thus cause injury to Carbide, by causing Carbide to choose a less preferred structure for the NEWCOs. Carbide has therefore shown, as a threshold matter, the potential for competitive injury if it is unable to use multi-year requirements contracts with the new companies to be spun off from UCIG. The Commission also has determined that applying the order to Carbide’s relationship with the NEWCOs may deter these spin-offs, a result not intended by the order, and thus that the reasons for the modification outweigh any reasons against this modification.

⁴ Only NEWCO employees, UCIG and the ESOP will be permitted to own NEWCO stock. The NEWCOs will also be allowed to use a Linde-derived name (Linde is the trade name for UCIG gas) as a company name, use the Linde logo, enter into a reciprocal free exchange of safety information, an applications technology license and an exchange of cylinder technology. These benefits will be contingent upon the NEWCOs’ continued use of UCIG gas, UCIG’s continuation of ownership in the NEWCO, and maintenance of safety standards acceptable to UCIG.

1. Carbide has shown a threshold injury

Initially, Carbide asserts that it is experiencing financial difficulties in the packaged gas business and hopes that restructuring with employee-owned businesses will revitalize an otherwise stagnant business sector. The creation of the NEWCOs is not constrained by the order. Carbide also has shown that if multi-year contracts with the NEWCOs are not permitted it may incur costs—by having to choose a less preferred structure for the NEWCOs—as a result of the order in a way not contemplated when the order was entered.

Carbide's decision to create the NEWCOs stems from what it claims is the generally poor performance of its packaged gas business and the hope that a new structure will increase the competitiveness of the business. Carbide attributes this poor performance to a number of factors: the lack of entrepreneurial spirit needed to compete in the retail packaged gas business; outmoded fill plants and acetylene plants; poor productivity; excess labor costs; higher salary and benefit structures than its competitors because UCIG's compensation and benefits are pegged to the chemical industry as opposed to competition in the retail packaged gas business; and high overhead costs attributable to the existing Carbide structure.

The proposed spin-offs will, Carbide hopes, revitalize its packaged industrial gas business. The NEWCOs will have lower salary and benefit schedules and lower overhead costs. According to Carbide, a key component to the creation of the NEWCOs is that an Employee Stock Ownership Plan will own over 50% of each NEWCO. First, Carbide believes that a business that is majority owned by its employees will be a more effective competitor. Request at 16. According to Carbide's ESOP expert, companies in which ESOPs own over 50 percent of the business have higher productivity and perform better than conventional firms in terms of sales growth, operating margin, return on equity, book value per share growth, long term debt as a percentage of capitalization, and return on investment in company stock. *See* Request at Exhibit 4, Affidavit of John S. Hoffmire, III, President of Hoffmire & Associates, Ltd. Second, it is important that lenders to the ESOP for the acquisition of company stock are granted special tax incentives if the ESOP lendee owns 50% or more of the company. This allows the lender frequently to offer the majority-owning ESOP reduced rates at which it may borrow money to invest in the company's stock; if the ESOP buys less than 50 percent of NEWCO, its cost of capital will be higher. Request at 17.

In Carbide's business judgment, it must invigorate its industrial gas business, and Carbide has chosen to spin off part of its business in an effort to gain efficiencies. This spin-off proposal is not prohibited by the order.

Although Carbide has not conditioned the spin-offs on the Commission's approval of the requested modification, it may change the form of the NEWCOs if the modification is not granted. Carbide states that it may increase its stock ownership in the NEWCOs to over 50%, thereby clearly retaining a "majority interest." Request at 17. By doing this, Carbide would be able to maintain long-term supply contracts but, in the process, the NEWCOs with minority ESOP ownership would likely forego some efficiency gains of the NEWCOs with majority ESOP ownership. Request at 17. Carbide has identified the potential efficiency losses from such a decision: the tax advantages Congress afforded to businesses that are more than 50% owned by ESOPs will be lost; the businesses' entrepreneurial incentives will be more limited; and "to the extent the NEWCOs are successful in expanding sales, this in turn would likely permit better loading of UCIG's plants and make UCIG a more effective competitor in gas production. If the ESOP's ability to acquire more than 50% of the NEWCO's stock harms NEWCO's cash flow and cost of capital—thus reducing its ability to compete—this will, in turn, adversely affect UCIG as the NEWCOs' supplier." Request at 17.⁵

The Commission has concluded that Carbide has met its threshold burden of establishing that it is suffering or may suffer some competitive injury as a result of the order and in a way not contemplated when the order was entered. Carbide has satisfactorily demonstrated a need for modification of the order to enable it to use requirements contracts with terms greater than one year with the NEWCOs. Carbide's proposal to spin off the packaged industrial gas business—as opposed to entering contracts or making acquisitions that increase concentration and vertical integration—was not a concern addressed by the complaint when the complaint and order were entered in 1977. The order's prohibition against requirements contracts with terms greater than one year may deter Carbide from making what may be cost-reducing changes in its industrial gas business. Accordingly, the order will likely impede Carbide's ability to compete vigorously and effectively in the industrial gas market.

⁵ Carbide's cost savings would not technically be efficiencies, but nonetheless could strengthen Carbide's ability to compete.

2. The Order should be modified

The Commission has determined that Carbide's showing of need for the modification outweighs any reasons not to modify the order. In this particular situation, the use of long-term contracts with the NEWCOs is consistent with the apparent general intent of the order and does not increase the specific problems that paragraph I.A.1 was designed to remedy.

The complaint addressed Carbide's acquisitions and plans to acquire many industrial gas distributors, which would have had the effect of foreclosing Carbide's competitors from a substantial segment of the sale and manufacture of industrial gas, impairing the ability of nonintegrated competitors and distributors to compete in the sale of industrial gases, raising barriers to entry in the sale of industrial gases to distributors, accelerating a trend towards vertical integration of suppliers and distributors of industrial gases, and eliminating Carbide as a potential entrant through internal expansion into the retail sales of industrial gases in areas where it acquired an interest in distributors. Paragraphs III and IV of the order required Carbide to obtain the prior approval of the Commission before making certain acquisitions of downstream distributors. Both paragraphs expired in 1987.

The complaint also alleged that Carbide required independent distributors, pursuant to a contract, agreement or understanding, to purchase from Carbide their total requirements of each industrial gas. Complaint at paragraph 10(a). The effects of such acts were alleged to substantially lessen competition in the sale of industrial gas to independent distributors and consumers, increase entry barriers in the sales of industrial gases to distributors and deprive distributors of the opportunity of competing for sales of industrial gases to certain customers. Complaint at paragraph 11. Paragraphs I and II of the order curtail Carbide's non-acquisition behavior, such as multi-year contracts, that may have an effect similar to vertical acquisitions. These paragraphs are in effect until 1997.

Carbide's decision to change the structure of its industrial gas business—through the creation of the NEWCOs—does not run contrary to the concerns in the complaint. The complaint addressed the harmful effects of Carbide's further integration of the industrial gas business through acquisitions or other contractual activities with independent distributors. Although the NEWCOs will change from formerly 100% Carbide-owned businesses to less than wholly-owned

entities, Carbide will retain significant control over them. Using long-term requirements contracts with these entities, therefore, does not appear to vary significantly from Carbide's present relationship with its wholly-owned distributors. Because Carbide will not retain a majority interest in the NEWCOs, however, a modification is required to allow Carbide to pursue this particular restructuring.

Carbide's likely retention of a significant interest and effective control over many of the NEWCOs' operations does not outweigh the arguments favoring the requested order modification. Carbide already has complete control over its wholly-owned distributors, and the proposed spin-offs cannot enhance and may somewhat reduce that control. Although denying the use of multi-year contracts with the NEWCOs might force Carbide to break totally its ties with its formerly wholly-owned distributors, a denial also might stop or impede Carbide's preferred structuring plan for the NEWCOs. The Commission concludes, therefore, that the order's prohibition on long-term contracts should be modified in this instance.

The proposed modification narrowly outlines which entities will be allowed to have multi-year requirements contracts with Carbide. Carbide must own at least 35% of the distributor and have a warrant exercisable at its sole discretion permitting Carbide to cause the distributor to raise Carbide's stock interest to over 50%. In addition, the proposed language limits Carbide from entering into long-term contracts with distributors unless it is with a distributor that Carbide owned outright on November 1, 1990, or a distributor that was formed to conduct a packaged gas distribution business in which Carbide had a majority interest on November 1, 1990, and a majority of the stock is owned by an ESOP. This severely limits the number of entities with which Carbide can enter into long-term contracts; no current independent distributors could be included. The modification, therefore, allows Carbide to accomplish its spin-offs, but does not alter Carbide's obligations to its current independent distributors.

Even though Carbide will be able to enter into multi-year contracts with the NEWCOs, the NEWCOs will not be able to do the same with independent distributors or end users that acquire packaged gas from them, because the NEWCOs will be successors in interest to Carbide's cylinder gas business. Similarly, UCIG's bulk sales to independent distributors will also remain subject to the multi-year contract prohibition in the order. It is not inconsistent to treat the NEWCOs as separate entities, *i.e.*, not majority-owned subsidiaries of Carbide, for

purposes of UCIG contracts with the NEWCOs, but require the NEWCOs to adhere to the order in their contracts with independent distributors. Carbide has acknowledged that as a condition to the formation of the NEWCOs, the NEWCOs will agree to be bound by the terms of the order.

Accordingly, *it is ordered*, that this matter be reopened and that paragraph I.A of the Commission's order in Docket No. C-2902, issued on September 28, 1977, be modified, as of the date of service of this order, to add the following language to the end of paragraph I.A:

Provided, however, for the purpose of applying Part I.A.1 of this order, any distributor in which respondent owns not less than 35% of the distributor's common stock and in which respondent has a warrant exercisable at its sole discretion permitting respondent to cause the distributor to issue sufficient new stock to raise respondent's stock interest to more than 50% shall be treated in the same manner as a distributor in which respondent owns a majority interest, provided that (1) respondent owned more than 50% of the outstanding capital stock of such distributor on November 1, 1990, or (2) such distributor was formed to conduct a packaged gas distribution business in which respondent had a majority interest on November 1, 1990, and a majority of the stock of such distributor is owned by an employee stock ownership plan.

Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

A majority of the Commission today grants the petition of Union Carbide Corporation to reopen and modify the order in Docket C-2902, although Union Carbide failed to show public interest considerations that warrant reopening.¹ The decision of the majority is inconsistent with the Commission's standards for reopening a final order, and it is manifestly unfair to the respondents that have been held to those standards. The decision also is inconsistent with the Commission's ruling on a virtually identical petition in this same matter in 1988, and it is inconsistent with a decision in another matter

¹ Union Carbide in its petition to reopen relied solely on public interest considerations and did not allege changed conditions of law or fact. See § 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b).

that the Commission is now defending in federal court.² The decision is arbitrary and capricious. I dissent.

I.

Paragraph I.A of the order in Docket C-2902 bars Union Carbide from having supply contracts with an initial term of more than one year with industrial gas distributors “in which [Union Carbide] owns less than a majority interest.”³ The order does not restrict supply contracts between Union Carbide and distributors in which it owns a majority interest. These two alternatives would seem sufficient to address the universe of ownership interests that Union Carbide might have in distributors. But the modification granted today at Union Carbide’s request creates a third category of distributors— those in which Union Carbide recently has divested its majority interest but with whom, unlike other firms in which Union Carbide also does not own a majority interest, Union Carbide is permitted to have longterm supply contracts. The only justification identified for reopening and so modifying the order is Union Carbide’s preference for multi-year contracts with distributors that it formerly owned. Union Carbide’s preference not to comply with a constraint to which it agreed is insufficient for reopening a final order of the Commission.

Reopening an order may be warranted in the public interest when the respondent shows as a threshold matter some affirmative need to modify the order, usually a competitive disadvantage resulting from the order that was not contemplated when the order was entered.⁴ Union Carbide has not made the requisite threshold showing. Instead, Union Carbide in its request asserts that the order’s one-year limit on contracts with distributors in which Union Carbide owns less than a majority interest impedes its ability to achieve efficient distribution. Request To Reopen Proceeding and Modify Order, November 2, 1990 (“request”), at 21. This alleged burden is the same burden Union Carbide agreed to assume in 1977 in settlement of alleged violations of law, and Union Carbide makes no showing that the competitive context of the order now is any different in nature or degree from when it agreed to the terms of the order.

² Louisiana-Pacific Corp., Docket C-2956, *appeal filed*, No. 90-35733 (9th Cir. Aug. 16, 1990).

³ Paragraph I.A will expire in 1997.

⁴ Once such a showing is made, the Commission will consider the reasons for and against modification and whether the particular modification requested is appropriate to remedy the identified harm. *See, e.g.*, Damon Corp., Docket C-2916, 101 FTC 689, 692 (1983).

Union Carbide's argument for multi-year supply contracts also is the identical argument that it made in its 1988 petition to reopen the order and that the Commission considered and rejected in 1988. Letter to Glen S. Howard, Esq., November 10, 1988. The majority does not even acknowledge the 1988 decision, much less explain why it should be overruled. This reveals a troubling inattention to the principles of law that should underlie our decisions. Like its twin in 1988, the request should be denied.

II.

Union Carbide proposes to create several new companies ("NEWCOs") by divesting its majority interest in several gas distribution companies that are wholly owned by Union Carbide Industrial Gases, Inc. ("UCIG"), a wholly-owned subsidiary of Union Carbide, to employee stock ownership plans ("ESOP"). UCIG will retain a substantial interest in each NEWCO and the right to buy enough NEWCO shares to reacquire a majority interest.⁵ The NEWCOs will acquire UCIG's cylinder gas business, and UCIG anticipates that the NEWCOs will be UCIG's largest bulk gas customers. Request at 9-12. Union Carbide hopes to achieve a number of benefits from the ESOP-owned NEWCOs, including improved entrepreneurial spirit and the ability to cut costs. Request at 8-9 & 16-17.

Union Carbide insists that multi-year supply contracts with the NEWCOs are essential because the order's one-year limit on contracts with distributors in which Union Carbide owns less than a majority interest "impedes UCIG's ability to achieve efficient distribution." Request at 21. This is the argument that the Commission rejected in 1988. Union Carbide also warns that if the requested modification is not granted, UCIG may choose to keep its majority interest in the NEWCOs. Request at 16-17.⁶ Why this should be objectionable to the Commission is unexplained.

⁵ The majority by its silence implicitly rejects Union Carbide's suggestion that its "*de facto* control" of the NEWCOs might be deemed a "majority interest" for purposes of paragraph I.A of the order. Request at 3 n.4. This seems correct according to the terms of the order.

⁶ In a variation of this argument, Union Carbide asserts that it should "not be compelled" by its proposed divestiture "to forfeit its multi-year relationships" with its current subsidiaries. Request at 3. Although this argument has a certain facile appeal, it does not withstand examination. First, it is Union Carbide's 1988 argument in new clothes and, like the earlier petition, incorrectly assumes that the order's limit on contracts impedes Union Carbide's ability to compete in some way that was not contemplated when the order was entered. Second, the argument ignores the simple fact that the restriction to which Union Carbide objects does not and would not apply to its current subsidiaries but rather to newly organized non-subsidiaries. Third, and conversely, Union Carbide is not compelled under any scenario from forfeiting multi-year relationships with its actual subsidiaries. Finally, the word "forfeit" implies some new right to multi-year contracts with distributors in which Union Carbide owns less than a majority interest, but any such "right" was resolved by the order to which Union Carbide consented.

III.

I agree with the majority of the Commission that nothing in the order prohibits or requires Union Carbide's proposed divestiture to the NEWCOs. The order does not contemplate any particular structure for Union Carbide.⁷ Paragraph I.A of the order accords different treatment to distributors that are majority-owned by Union Carbide and those that are not, but it is indifferent to the identity of owners other than Union Carbide. I also agree with the majority that the Commission need not decide "whether Carbide's preference" to divest its majority interest in its wholly-owned distributors "is a reasonable business decision." Order Modifying Consent Order at 5. The proposed divestitures clearly are matters with which the order is not concerned.⁸

I disagree with the conclusion of the majority that Union Carbide has made a threshold showing of competitive injury resulting from the order. The majority infers injury from Union Carbide's claim that "its business judgment will be affected by the application of the order to Carbide's relationships with the NEWCOs," *i.e.*, that the order may "caus[e] Carbide to choose a less preferred structure for the NEWCOs."⁹ Order Modifying Consent Order at 5. In other words, the majority finds that the order creates an impediment to competition if the order affects Union Carbide's preference or "business judgment." This extraordinary conclusion relegates the decision whether to reopen final orders of the Commission to the business preferences of the respondent. If this is the standard, can there be a point to writing orders in the first place?

A final order of the Commission necessarily affects the business judgment of a respondent. The order is part of the legal landscape in which the respondent does business. For example, an order requiring divestiture surely affects the business judgment of a respondent. The

⁷ Paragraphs III and IV of the order required Union Carbide for ten years to obtain the prior approval of the Commission before making certain acquisitions. They expired in 1987.

⁸ Despite its disclaimer, the majority appears to attribute some efficiencies (or cost savings) to Union Carbide's restructuring plan. See Order Modifying Order at 6-7 & n.5. It is worth noting that it is a departure from the Commission's usual practice to accept assertions of efficiencies at face value. Further, it is not the Commission's primary concern to maximize the profitability of individual companies. If that were the case, the Commission would stand aside and allow anticompetitive mergers and, indeed, blatant price fixing to proceed unchallenged. The mode of thinking that underlies competition policy and the antitrust laws is that companies like Union Carbide generally can be expected to take care of their own interests, which leaves the Commission free to constrain any abuse of their methods and to maintain a level playing field among competitors.

⁹ The majority presumably means a structure that is "less preferred" by Union Carbide, consistent with its statement that the Commission need not consider whether the proposed divestiture to the NEWCOs "is a reasonable business decision." The Commission is ill-equipped to assess the reasonableness of ESOP ownership versus other possible ownership structures.

respondent made a business judgment to acquire the assets required by the order to be divested and surely would prefer, in its business judgment, to keep them. But this is not a recognized or acceptable public interest reason for reopening and modifying the order. See *Louisiana-Pacific Corp.*, Docket C-2956, slip op. at 26 (November 15, 1989), *appeal filed*, No. 90-35733 (9th Cir. Aug. 16, 1990). Respondents subject to prior approval provisions no doubt would prefer to make acquisitions without first obtaining the Commission's approval, but we have consistently declined to substitute their business judgment for our independent review under the order. Carried to its logical extreme, the "business judgment" rule would obviate the need for orders in the first place: a respondent's business decisions to make certain acquisitions or to disseminate its preferred advertising or, indeed, to ignore the technical requirements of the Truth in Lending Act all would carry the day over the Commission's independent review under the law.

Union Carbide's arguments for reopening the order all are restatements of the argument, previously rejected by the Commission, that the one-year limit on supply contracts impedes its ability to compete. The argument has no greater credibility in the 1990 request in application to distributors previously owned by Union Carbide than it had in 1988 to distributors that were not previously owned by Union Carbide. In this request, as in the 1988 petition, Union Carbide fails to show, indeed, even to assert, that the limit on supply contracts impedes its ability to compete in any way that was not foreseeable when the order was entered.

The majority implicitly concludes that longterm contracts between Union Carbide and the NEWCOs will not be anticompetitive. This conclusion, of course, revisits the premises of the order and, correspondingly, revises the remedy according to our latter day perceptions of what is appropriate. This is precisely the avenue that is unavailable to us unless the standard for reopening is met. "Because a final order is presumptively valid, the continued need for the remedy imposed by the order is relevant if a need for modifying the order is demonstrated in the first instance, but the burden is on the petitioner to 'show that the . . . restraint [under the order] can no longer be justified, and that they are suffering injury, without countervailing advantage to the public interest.'" *Louisiana-Pacific Corp.*, Docket C-2956 (Nov. 15, 1989), slip op. at 9, *quoting United States v. Swift & Co.*, 189 F. Supp. 885, 906 (N.D. Ill. 1960), *aff'd per curiam*, 367 U.S. 909 (1961).

The gravamen of the argument in Union Carbide's request is that the order impedes its ability to have multi-year contracts with independent distributors, *i.e.*, that the order does what it does, and Union Carbide would like to deal with some new independent distributors without that constraint. This is a classic attempt to have the cake and eat it too. It is not an argument for reopening but rather a complaint that Union Carbide does not like paragraph I.A. of the order. Regret over having consented to an order provision is not, nor should it be, a sufficient reason for the Commission to reopen a proceeding to consider modifying that provision.

IV.

The standards under Section 5(b) of the Federal Trade Commission Act for reopening an order are stringent, and the petitioner carries a heavy burden of proof in light of the public interest in repose and the finality of orders. See *United States v. Swift & Co.*, 286 U.S. 106 (1932); *United States v. Swift & Co.*, 276 U.S. 311 (1928); *United States v. Swift & Co.*, 189 F. Supp. 885 (N.D. Ill. 1960), *aff'd per curiam*, 367 U.S. 909 (1961); *Louisiana-Pacific Corp.*, Docket C-2956 (Nov. 15, 1989), *appeal filed*, No. 90-35733 (Aug. 16, 1990). These interests are threatened when the Commission reopens and modifies orders absent a satisfactory showing of changed conditions or public interest considerations that eliminate the need for the order or make continued application of the order inequitable or harmful to competition. Insubstantial or frivolous petitions may be encouraged, wasting our resources. Decisions based on inadequate showings may tend to be arbitrary, resulting in inequitable treatment and lessening respect for the Commission's enforcement program. We can avoid these dangers by adhering to the standards for reopening set forth in Section 5(b) of the Federal Trade Commission Act.

Although I believe that this decision is arbitrary and capricious and would be so viewed by any court, because Union Carbide has achieved what it sought, the decision will never be tested. In that respect, this is an easy throwaway. The implications of the decision, however, betray the seriousness with which the Commission undertakes to issue orders in the first place. Both this institution and the public interest deserve better. I dissent.

IN THE MATTER OF

ASICS TIGER CORPORATION

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

Docket C-3328. Complaint, Apr. 17, 1991—Decision, Apr. 17, 1991

This consent order prohibits, among other things, a California manufacturer of athletic shoes from making performance and injury-reduction claims about its athletic shoes unless it possesses competent and reliable evidence to substantiate those claims.

Appearances

For the Commission: *Janet M. Evans and Joel Winston.*

For the respondent: *George Miron, Wyman, Bautzer, Kuchel & Silbert, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Asics Tiger Corporation, a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent Asics Tiger Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California. Respondent's office and principal place of business is located at 10540 Talbert Avenue, Fountain Valley, California.

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

PAR. 3. Respondent advertises, offers for sale, sells and distributes athletic shoes, including Asics Gel shoes.

PAR. 4. In the course and conduct of its business, in order to induce the sale of Asics Gel athletic shoes, respondent has disseminated or caused the dissemination of advertisements and promotional materi-

als. Typical of respondent's advertisements and promotional materials for its Asics Gel athletic shoes, but not necessarily all-inclusive thereof, are the advertisements attached hereto as Exhibits A-E. The aforesaid advertisements and promotional materials contain the following statements and depictions:

1. A newly-developed silicone gel is being used to enhance shock absorption in athletic shoes ... The gel, called Asics' Gel, was engineered to dispel 28% more impact than shoes that use air as a shock absorber. That means runners can reduce strike force on the foot by 1.2 million pounds during the course of one 10K run. (Complaint Exhibit A).

2. Welcome to an amazing advancement in high-tech shock absorption for sport shoes Welcome to ASICS' GEL Greater shock absorption protects you from painful shinsplints, stress fractures, knee and hip aches and bone bruises. Studies using our GT II running shoe prove ASICS' GEL dispels 28% more injury-causing impact than the leading "air" shoes ASICS' GEL significantly reduces painful injuries caused by inadequate shock absorption. (Complaint Exhibit B).

3. Introducing ASICS' GEL. The best shock absorption ever put in a sport shoe ASICS' GEL gives you greater shock absorption and stability than other protective systems, including conventional foams or air cushioning. Studies using our GT II running shoes indicate ASICS' GEL dispels up to 28% more injury-reducing impact than the leading "air" shoes. (Complaint Exhibit C).

4. ASICS' GEL SYSTEM RANKS #1 IN BIOMECHANICAL TESTS. In recent tests for stability and shock absorption performed by Dr. Barry Bates of the University of Oregon's Biomechanics Sports Medicine Laboratory, ASICS' GEL cushioning system combined with today's more conventional materials proved to be the most stable and best shock absorbing system used in this comparison of athletic shoes. [Followed by chart comparing ASICS GT II, ASICS Gel-Lyte, New Balance 995, Brooks Nexus, and Nike Air Max.] (Complaint Exhibit D) (Emphasis added).

5. Shinsplints. Stress fractures. Bone bruises. Knee and hip aches. They're the price too many women are paying for wearing aerobic shoes that don't absorb all the shock they should....Asics Tiger now protects you with ASICS' GEL—a shock absorption breakthrough that's more effective than the air or foam cushioning you're wearing now Biochemical tests indicate our Ensemble aerobics shoe with ASICS' GEL absorbs more forefoot impact than shoes many are calling "state of the art"— 15% more than Reebok Instructor, 17% more than Avia 440, and 23% more than Nike Air Conditioner. (Complaint Exhibit E).

PAR. 5. Through the statements referred to in paragraph four, and others not specifically set forth herein, respondent has represented, directly or by implication, that:

1. Asics' GT II running shoes absorb 28% more shock than athletic shoes relying on air as a shock absorber, including the leading "air" shoe.

2. Asics' GT II and Gel-Lyte shoes absorb more shock than New Balance 995, Brooks Nexus, and Nike Air Max.

3. Asics' Ensemble aerobic shoes absorb 15% more shock than Reebok Instructor, 17% more shock than Avia 440, and 23% more shock than Nike Air Conditioner.

4. Persons using Asics' athletic shoes will suffer fewer impact-related injuries than persons using other athletic shoes, including "air" shoes.

PAR. 6. Through the use of the statements and representations referred to in paragraphs four and five, and others not specifically set forth herein, respondent has represented, directly or by implication, that at the time it made said representations, respondent possessed and relied upon a reasonable basis, consisting of competent and reliable evidence, for such representations.

PAR. 7. In truth and in fact, at the time respondent made said representations, respondent did not possess and rely upon a reasonable basis, consisting of competent and reliable evidence, for such representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. Through the use of the statements referred to in paragraph four, and others not specifically set forth herein, respondent has represented directly or by implication, that scientific tests prove the accuracy of the claims set forth in paragraph five.

PAR. 9. In truth and in fact, scientific tests do not prove the accuracy of the claims set forth in paragraph five. Therefore, the representation set forth in paragraph eight, was, and is, false and misleading.

PAR. 10. The dissemination by respondent of the aforesaid false and misleading representations, as herein alleged, constituted, and now constitutes, unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Commissioner Starek not participating.

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Complaint

EXHIBIT A

COMPLAINT EXHIBIT A**SMITH & MYERS**
ADVERTISING, INC.# 9
000016NEWS FOR IMMEDIATE RELEASECONTACT:Melissa Field
Public Relations
(714) 547-7600NEWLY-DEVELOPED SILICONE GEL DESIGNED TO ENHANCE
SHOCK ABSORPTION IN ATHLETIC SHOES

(SANTA ANA, CA) April 24, 1986 -- A newly-developed silicone gel is being used to enhance shock absorption in athletic shoes. The gel* is marketed in America exclusively by Asics Tiger Corporation in the new GT-II running shoe, and is scheduled to appear in new models of Tiger fitness, basketball, tennis and track shoes by late 1986.

For the runner, Tiger's biomechanical tests show that 25% of injuries stem from insufficient shock absorption. The gel, called Asics' Gel, was engineered to dispel 28% more impact than shoes that use air as a shock absorber. That means runners can reduce strike force on the foot by 1.2 million pounds during the course of one 10K run.

Asics' Gel disperses shock from a vertical to a horizontal angle. In the new GT-II, Tiger utilizes 3mm of gel in a pad located at the forefoot reflex point and 5mm of gel in a pad positioned at the rearfoot reflex point. Midsole deterioration is delayed because the gel pads rest above the compression-molded EVA midsole.

-more-

TIGER - NEWLY-DEVELOPED SILICONE GEL DESIGNED
ADD ONE

000017

The damages of overpronation also are reduced because the GT-II features a 10mm heel pillar, sculpted orthotic insole, vertical midsole extension collar and stabilizing upper straps. Designed for high performance mileage runners, the shoe incorporates escaine reinforcements which gives the upper a longer life, and a tri-density outsole with black carbon gum rubber to extend overall wear. A breathable nylon mesh forefoot with nylon mesh vamp provides stability and comfort while a nylon mesh saddle delivers arch support.

The new Tiger GT-II Asics' Gel running shoe is available in white and royal colors, in men's sizes 4-13. Suggested retail price is \$85.95.

Contact: Pete Cappelli, National Promotions And Advertising Manager, Asics Tiger Corporation, 3030 South Susan Street, Santa Ana, California 92704, (714) 754-0451.

-30-

* The gel was developed by Geltec Co. Ltd. of Japan.

ASICS' GEL

Greater shock absorption protects you from painful aches, sprains, stress fractures, knee and hip aches and bone bruises. Studies using our GEL II running shoe prove ASICS' GEL disperses 28% more injury-causing impact than the leading athletic shoe.

Why play around with obsolete equipment? Protect yourself with sports shoes that deliver superior stability and shock absorption: ASICS' GEL with ASICS' GEL.

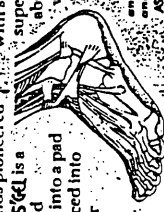

Encapsulated in pads and strategically located in ASICS' GEL II, ASICS' GEL II significantly reduces painful injuries caused by inadequate shock absorption.

000060

Welcome to an amazing advancement in high tech shock absorption for sports shoes. The leading edge in comfort, performance, stability and injury prevention. The first shock absorber of its kind ever designed into an athletic shoe available in America.

Developed from a new class of engineering compounds pioneered by Geltec, Ltd., ASICS' GEL is a viscous, silicone-based formulation. Molded into a pad and anatomically placed into each shoe, it offers far greater stability and shock absorption properties than conventional foam or air cushioning.

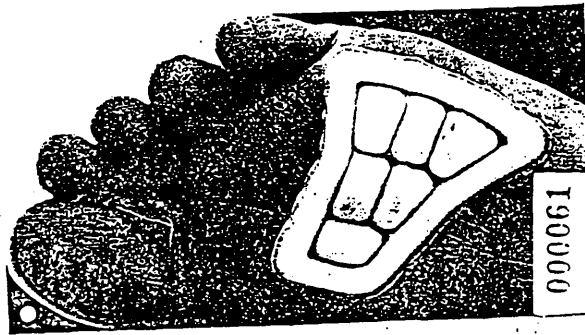
Greater stability means reduced arch pain, ankle sprains and tendonitis.


ASICS is truly a technological breakthrough in high-performance athletic shoes. Originally designed for use in tennis, protective wear, carpenters and industrial areas, ASICS is now the proven art in sports shoe absorbents.

ASICS' unique properties disperse incoming vertical shock into a horizontal direction. result is unsurpassed protection against the stress of repeated impact from above or below. Also ASICS' lightweight, ASICS' all-around performance other material can match.

ASICS TIGER CORP. 1-800-451-0700
 ASICS TIGER OZAKA PVT. LTD.
 ASICS Corporation Ltd. Ltd.



Complaint

114 F.T.C.

EXHIBIT C

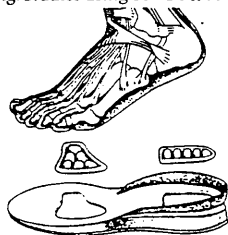
COMPLAINT EXHIBIT C

Producing
ASICS' GEL. The
best shock absorption
ever put in a sports shoe.

You're serious about fitness, so your feet take a pounding. A pounding that can cause painful injuries and keep you on the sidelines.

Now ASICS' GEL is changing all that.

ASICS' GEL gives you greater shock absorption and stability than other protective systems, including conventional foams or air cushioning. Studies using our GT II running



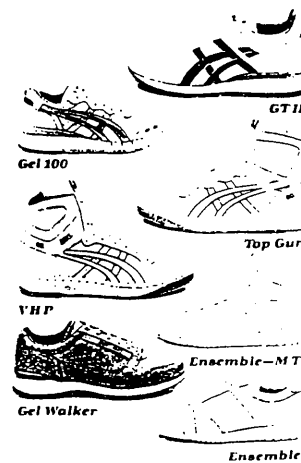
Encapsulated in pads and anatomically located at fore and/or rear foot reflex points, ASICS' GEL significantly reduces painful injuries caused by inadequate

shoes indicate ASICS' GEL dispels up to 28% more injury-inducing impact than the leading "air" shoes.

What makes ASICS' GEL so superior? Its unique, silicone formula disperses incoming vertical shock into a horizontal direction, giving unsurpassed protection against the effects of repeated impact from above or below. Greater shock absorption protects against painful shinsplints, stress fractures, knee and hip aches and bone bruises. In addition, you gain greater stability that reduces arch pain, ankle sprains and tendinitis.

ASICS' GEL is so effective, we've added it to 13 shoe models for seven sports—from aerobics and running, to basketball and walking—with others now under development.

Insist on the sport shoes that deliver superior stability and shock absorption. Asics Tiger, with ASICS' GEL. The only shock absorption of its kind available in America. Try a pair by calling 1-800-447-4700 for your nearest ASICS Dealer.

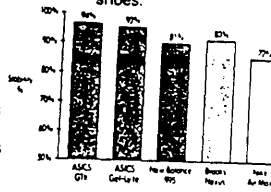


ASICS TIGER CORP.

Don't Be Shocked By Your Athletic Shoe's Performance.

When athletes jump, they land with a force that can equal up to ten times their body weight. For a 160-pound basketball player making a rebound, that means more than three quarters of a ton of force sending shock waves back through the bones, muscles, cartilage, tendons and ligaments. And every participant in a 10K run must endure about 2.4 million pounds of punishment. Each year, there are thousands of sports injuries stemming directly from inferior athletic shoe design. From shoes that fail to provide adequate shock absorption or proper stability.

absorbing system used in this comparison of athletic shoes.



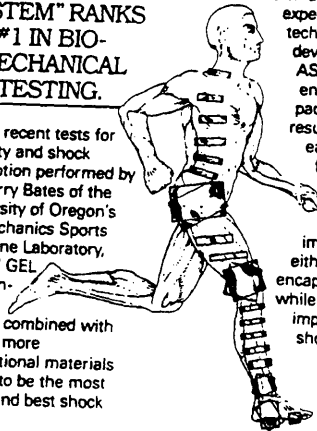
"ASICS' GEL SYSTEM" IS A TRUE ORIGINAL.

Combining the shock absorption breakthroughs of the most advanced gel technology with our own athletic shoe expertise, ASICS' technologists developed the ASICS' GEL encapsulated pads. As a result, these pads, each designed for a specific purpose and location, absorb more impact than either foam or encapsulated air while greatly improving the shoe's stability.

"ASICS' GEL SYSTEM" RANKS #1 IN BIO-MECHANICAL TESTING.

In recent tests for stability and shock absorption performed by Dr. Barry Bates of the University of Oregon's Biomechanics Sports Medicine Laboratory, ASICS' GEL cushioning system combined with today's more conventional materials proved to be the most stable and best shock

Shock attenuation results in less damaging force transmission to the body



ASICS' GEL



ASICS THE CHOICE OF FANATICS

ASICS TIGER CORP.
3030 South Susan • Santa Ana, CA 92704

EXHIBIT E

asics
 THE CHOICE OF
 FANATICS



COMPLAINT EXHIBIT E

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Introducing
ASICS' GEL™.
 The best shock
 absorption ever
 put in a women's
 fitness shoe.

Shinsplints. Stress fractures.
 Bone bruises. Knee and hip aches.
 They're the price too many women
 are paying for wearing aerobics
 shoes that don't absorb all the shock
 they should.

The truth can be painful, but it
 doesn't have to be. Because Asics
 Tiger now protects you with ASICS'
 GEL—a shock absorption break-
 through that's more effective than
 the air or foam cushioning in the
 shoes you're wearing now.

ASICS' GEL pads
 significantly reduce
 injury-related
 impact.



Already proven
 effective in our
 running shoes,
 ASICS' GEL is a
 semi-fluid silicone
 substance with amazing
 shock absorption
 qualities. It works
 by dispersing
 incoming vertical
 force into a horizontal
 direction, giving you
 greater stability and unbea-
 table protection against the
 dangerous effects of repeated impact
 from above or below.

Biomechanical tests indicate
 our Ensemble aerobics shoe with
 ASICS' GEL absorbs more forefoot
 impact than shoes many are calling
 "state-of-the-art"—15% more than
 Reebok Instructor,® 17% more than
 Avia 440® and 23% more than Nike
 Air Conditioner.®

Think about the hundreds of
 steps you take in just one aerobics
 class. Then try the shoe that takes
 steps to put something better
 between you and impact-related
 injuries. Ensemble with ASICS'

GEL. Call 1-800-447-4700 for
 the Asics Tiger Dealer
 near you.

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 respondents with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Asics Tiger Corporation 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 10540 Talbert Avenue, Fountain Valley, 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

PART I

It is ordered, That respondent Asics Tiger Corporation, a corporation, its successors and assigns, and its officers, agents, representa-

tives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labelling, packaging, offering for sale, sale or distribution of any athletic shoes in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, if contrary to fact, that tests prove:

A. That Asics' GT II running shoes absorb 28% more impact than athletic shoes relying on air as a shock absorber, including the leading "air" shoe.

B. That Asics' GT II and Gel-Lyte shoes absorb more shock than New Balance 995, Brooks Nexus, and Nike Air Max.

C. That Asics' Ensemble aerobic shoes absorb 15% more shock than Reebok Instructor, 17% more shock than Avia 440, and 23% more shock than Nike Air Conditioner including "air" shoes.

D. That persons using Asics' athletic shoes will suffer fewer impact-related injuries than persons using other athletic shoes including "air" shoes.

PART II

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary or division or other device, in connection with the advertising, offering for sale, sale or distribution of any athletic shoes, 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 contents, validity, results, conclusions, or interpretations of any test or study.

PART III

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any athletic shoes in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, any performance characteristic(s) of any such product unless at the time of making such representation respondent possesses and relies upon a reasonable basis consisting of competent and reliable evidence which substanti-

ates the representation. To the extent such evidence consists of tests, experiments, analysis, research, studies or other evidence based on the expertise of professionals in the relevant area, such evidence shall be "competent and reliable" only if those tests, experiments, analyses, research, studies or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

PART IV

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

A. All materials relied upon to substantiate any claim or representation covered by this order; and

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

PART V

It is further ordered, That respondent shall forthwith distribute a copy of this order to all operating divisions, subsidiaries, franchisees, officers, managerial employees, and all of its employees or agents engaged in the preparation and placement of advertisements or promotional materials covered by this order and shall obtain from each such employee a signed statement acknowledging receipt of the order.

PART VI

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 that may affect compliance obligations under this order.

PART VII

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order and at such other times as the

Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Starek not participating.

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Interlocutory Order

IN THE MATTER OF

R.R. DONNELLEY & SONS CO., ET AL.

Docket 9243. Interlocutory Order, April 19, 1991

ORDER

Based upon the Motion to Dismiss Meredith Corporation as a Respondent and Stipulation of All Parties With Respect Thereto ("Stipulation"), filed by counsel on April 19, 1991,

It is ordered, That Meredith Corporation be, and it hereby is, dismissed as a respondent in this proceeding.

It is further ordered, That the Stipulation is accepted, and it shall be binding upon the parties thereto.

IN THE MATTER OF
NOBODY BEATS THE WIZ, INC.

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

Docket C-3329. Complaint, May 7, 1991—Decision, May 7, 1991

This consent order prohibits, among other things, a New Jersey retailer of consumer electronic goods from violating the Pre-Sale Availability Rule, promulgated under the Magnuson-Moss Warranty Act, requiring warranty disclosures. Respondent also is required to instruct all current and future Wiz retail-store managers engaged in the sale of consumer products as to their obligations and duties under the Act.

Appearances

For the Commission: *Alice Au and Michael J. Bloom.*

For the respondent: *Robin J. Cass, Schekter, Rishty & Goldstein,*
New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Magnuson-Moss Warranty Act and Rule 702, 16 CFR 702, promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Nobody Beats the Wiz, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and Rule 702 promulgated under the Magnuson-Moss Warranty 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 charge in that respect as follows:

PARAGRAPH 1. The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act Pub. Law No. 93-637, 15 U.S.C. 2301 (Supp. 1975) and in Rule 702, 16 CFR 702.1 promulgated thereunder, shall apply to the terms used in this complaint.

PAR. 2. Respondent Nobody Beats the Wiz, Inc. is a corporation organized, existing and doing business under and by virtue of the laws

