

Complaint

116 F.T.C.

IN THE MATTER OF

COLLINS BUICK, INC., ET AL.

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

*Docket C-3426. Complaint, May 10, 1993--Decision, May 10, 1993*

This consent order prohibits, among other things, a Kentucky auto dealership and its principal operating officer from misrepresenting -- in advertising any extension of consumer credit or any consumer lease -- the financing or other terms of the advertised transaction, and from violating certain provisions of the Truth in Lending Act or the Consumer Leasing Act.

#### *Appearances*

For the Commission: *David Medine, Carole L. Reynolds and Beverly R. Childs.*

For the respondents: *Randall Gardner, Barowitz & Goldsmith, Louisville, KY.*

#### COMPLAINT

The Federal Trade Commission, having reason to believe that Collins Buick, Inc., a corporation, and William Kevin Collins, individually and as an officer of the corporation, hereinafter sometimes referred to as respondents, have violated the Truth in Lending Act ("TILA"), 15 U.S.C. 1601-1661, as amended, and its implementing Regulation Z, 12 CFR 226, the Consumer Leasing Act ("CLA"), 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, and the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45-58, as amended, 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:

PARAGRAPH 1. Collins Buick, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Kentucky, with its principal place of business located at 4120 Bardstown Road, Louisville, Kentucky.

PAR. 2. William Kevin Collins is an individual and an officer and director of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is 4120 Bardstown Road, Louisville, Kentucky.

PAR. 3. In the ordinary course and conduct of their business, and at least since January 1, 1991, respondents have been engaged in the dissemination of advertisements that promote, directly or indirectly, credit sales and other extensions of other than open end credit in consumer credit transactions, as the terms "advertisement," "credit sale," and "consumer credit," are defined in the TILA and Regulation Z. In the ordinary course and conduct of their business, and at least since January 1, 1991, respondents have been engaged in the dissemination of advertisements that promote, directly or indirectly, consumer leases, as the terms "advertisement," and "consumer lease," are defined in the CLA and Regulation M.

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

#### COUNT I

PAR. 5. Respondents, in the course and conduct of their business, in numerous instances including but not limited to Exhibits A and B, have disseminated or caused to be disseminated advertisements that state an initial, low monthly payment and an initial number of payments. Respondents' advertisements fail to disclose that the financing to be signed at purchase requires the consumer to make a substantial balloon payment, or a second series of installment payments, at the conclusion of the initial payments.

PAR. 6. Respondents' aforesaid practice constitutes a deceptive act or practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

## COUNT II

PAR. 7. Respondents, in the course and conduct of their business, on numerous occasions have disseminated, or caused to be disseminated, advertisements that state an initial number and amount of payments required to repay the indebtedness, but fail to state the terms of repayment, by failing to disclose the amount of the final, balloon payment, or the number and amount of the second series of installment payments, required at the end of the initial payments, based on the financing to be signed at purchase.

PAR. 8. Respondents' aforesaid practice violates Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

## COUNT III

PAR. 9. Respondents, in the course and conduct of their business, on numerous occasions have disseminated, or caused to be disseminated, advertisements that state the amount or percentage of any down payment, the number of payments or period of repayment, or the amount of any payment, but fail to state all of the terms required by Regulation Z, as follows: the amount or percentage of the down payment, the terms of repayment, and the annual percentage rate, using that term or the abbreviation "APR."

PAR. 10. Respondents' aforesaid practice violates Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

## COUNT IV

PAR. 11. Respondents, in the course and conduct of their business, on numerous occasions have disseminated, or caused to be

disseminated, advertisements that state the amount of any payment, the number of required payments, or that any or no down payment or other payment is required at consummation of the lease, but fail to state all of the terms required by Regulation M, as applicable and as follows: that the transaction advertised is a lease; the total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease or that no such payments are required; the number, amount, due dates or periods of scheduled payments and the total of such payments under the lease; and a statement of whether or not the lessee has the option to purchase the leased property and at what price and time (the method of determining the price may be substituted for disclosure of the price).

PAR. 12. Respondents' aforesaid practice violates Section 184 of the CLA, 15 U.S.C. 1667c, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c).



**MORE THAN YOU EXPECT! MORE THAN YOU EXPECT! MORE THAN YOU EXPECT!**

**CAR Show**

Kentucky Fairgrounds  
April 4-7

**1991 PARK AVE.**  
NOW WAS \$26,000.00  
**\$21,900**  
19 To Choose From

**BEST OF SHOW**

**Free \$14900** Per Month  
Any Used Car In Stock  
Over 200 Cars To Choose From  
1988-1991 Models  
Hurry For Best Selection

**JAMAICA VACATION**  
Enjoy a week on the beach in beautiful Jamaica. Airfare from Atlanta & accommodations included with any new car purchase.

**1990 REGAL LTD. Demo**  
**SAVE THOUSANDS**

**1990 SKYLARKS**  
Loaded **\$8995** 8 To Choose From

**Collins**

Open Daily 9AM to 8PM  
Saturday 9AM to 6PM  
Sunday Noon to 6PM

2 Miles from the Waterson on Bartstom Road and 5 miles from the Snyder Freeway

**499-7600**

**JUST 60 SECONDS FROM BILL COLLINS FORD**

**COLLINS BUICK**

**MORE THAN YOU EXPECT! MORE THAN YOU EXPECT! MORE THAN YOU EXPECT!**

## 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 complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge the respondents with violation of the Truth in Lending Act, 15 U.S.C. 1601 *et seq.* and its implementing Regulation Z, 12 CFR 226, the Consumer Leasing Act, 15 U.S.C. 1667 *et seq.* and its implementing Regulation M, 12 CFR 213 and the Federal Trade Commission Act, 15 U.S.C. 45 *et seq.*; 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, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts and Regulation, 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 Collins Buick, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Kentucky, with its principal office and place of business located at 4120 Bardstown Road, Louisville, Kentucky.

2. Respondent William Kevin Collins is an individual and officer and director of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is 4120 Bardstown Road, Louisville, Kentucky.

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

#### ORDER

##### I.

*It is ordered,* That respondent Collins Buick, Inc., a corporation, its successors and assigns and its officers, and William Kevin Collins, individually and as an officer of the corporate respondent, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote directly or indirectly any extension of consumer credit, as "advertisement," and "consumer credit" are defined in the TILA and Regulation Z, do forthwith cease and desist from:

A. Misrepresenting in any manner, directly or by implication, the terms of financing the purchase of a vehicle, including but not limited to whether there may be a balloon payment or second series of installment payments, and the amount of any balloon payment or the number and amount of any second series of installment payments.

B. Stating any number or amount of payment(s) required to repay the debt, without stating accurately, clearly and conspicuously, all of the terms required by Regulation Z, as follows:

- (1) The amount or percentage of the down payment;

(2) The terms of repayment, including the amount of any balloon payment, or the number and amount of any second series of installment payments, and

(3) The annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

(Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c), as more fully set out in Section 226.24(c) of the Federal Reserve Board's Official Staff Commentary to Regulation Z, 12 CFR 226.24(c)).

C. Stating the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without stating, clearly and conspicuously, all of the terms required by Regulation Z, as follows:

(1) The amount or percentage of the down payment;

(2) The terms of repayment, and

(3) The annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

(Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c)).

D. Stating a rate of finance charge without stating the rate as an "annual percentage rate" using that term or the abbreviation "APR," as required by Regulation Z. If the annual percentage rate may be increased after consummation, the advertisement shall state that fact. The advertisement shall not state any other rate, except that a simple annual rate or periodic rate that is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the annual percentage rate.

(Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(b) of Regulation Z, 12 CFR 226.24(b)).

E. Failing to state only those terms that actually are or will be arranged or offered by the creditor, in any advertisement for credit that states specific credit terms, as required by Regulation Z.

(Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(a) of Regulation Z, 12 CFR 226.24(a)).

## II.

*It is ordered*, That respondent Collins Buick, Inc., a corporation, its successors and assigns and its officers, and William Kevin Collins, individually and as an officer of the corporate respondent, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote or assist directly or indirectly any consumer lease, as "advertisement," and "consumer lease" are defined in the CLA and Regulation M, do forthwith cease and desist from:

A. Stating the amount of any payment, the number of required payments, or that any or no down payment or other payment is required at consummation of the lease, unless all of the following items are disclosed, clearly and conspicuously, as applicable, as required by Regulation M:

- (1) That the transaction advertised is a lease;
- (2) The total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease, or that no such payments are required;
- (3) The number, amounts, due dates or periods of scheduled payments, and the total of such payments under the lease;
- (4) A statement of whether or not the lessee has the option to purchase the leased property and at what price and time (the method of determining the price may be substituted for disclosure of the price), and

(5) A statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term and a statement that the lessee shall be liable for the difference, if any, between the estimated value of the leased property and its realized value at the end of the lease term, if the lessee has such liability.

(Section 184 of the CLA, 15 U.S.C. 1667c, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c)).

B. Stating that a specific lease of any property at specific amounts or terms is available unless the lessor usually and customarily leases or will lease such property at those amounts or terms, as required by Regulation M.

(Section 184 of the CLA, 15 U.S.C. 1667c, and Section 213.5(a) of Regulation M, 12 CFR 213.5(a)).

### III.

*It is further ordered,* That respondents, their successors and assigns shall distribute a copy of this order to any present or future officers, agents, representatives, and employees having responsibility with respect to the subject matter of this order and that respondents, their successors and assigns shall secure from each such person a signed statement acknowledging receipt of said order.

### IV.

*It is further ordered,* That respondents, their successors and assigns shall promptly notify the Commission at least thirty (30) days prior to any proposed change in the corporate entity 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 for five years after the date of service of this order respondents, their successors and assigns shall maintain and upon request make available all records that will demonstrate compliance with the requirements of this order.

## VI.

*It is further ordered,* That respondents, their successors and assigns shall, within sixty days (60) days of 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 they have complied with this order.

## IN THE MATTER OF

## PROMODES, S.A., ET AL.

*Docket 9228. Show Cause Order, May 12, 1993*

## ORDER TO SHOW CAUSE

On May 17, 1990, the Federal Trade Commission issued an order against Promodes, S.A. and Red Food Stores, Inc. (collectively, "respondents") in Docket No. 9228. Paragraph II of the order, among other things, requires respondents to divest six specific supermarkets in the Chattanooga, Tennessee Metropolitan Statistical Area, by March 1, 1991, to an acquirer or acquirers that receives the prior approval of the Commission. Paragraph II of the order also requires respondents to maintain the viability and marketability of the supermarkets pending divestiture. Paragraph III of the order provides for the appointment of a trustee to divest the supermarkets in the event respondents have not accomplished the divestitures mandated by paragraph II of the order in a timely manner.

Respondents did not divest the supermarkets by March 1, 1991, as required by paragraph II of the order. On January 6, 1992, the Commission appointed Neill A. Thompson, III, as trustee pursuant to paragraph III of the order. Since his appointment, Mr. Thompson has divested one supermarket pursuant to the order and has filed an application for Commission approval to divest another. By letter dated May 12, 1993, the Commission extended the trustee's time to divest certain of the supermarkets covered by the order, but did not extend the time to divest the supermarkets described in paragraphs II(A)(1) ("the Lee Highway store") and II(A)(2) ("the Fort Oglethorpe store") of the order.

The trustee made all reasonable efforts to obtain offers for the Lee Highway and Fort Oglethorpe stores. Despite these efforts, he was unable to divest the supermarkets. It now appears to the Commission that it is extremely unlikely that the Lee Highway and

Fort Oglethorpe stores can be divested within a reasonable time. Certain structural problems with the building housing the Lee Highway store make it unattractive to potential acquirers. These problems arose subsequent to the order and are beyond the control of the respondents to correct. Although the trustee's compliance reports indicate that at one time there was some interest in purchasing this store, that interest has dissolved in large part due to the structural problems of the building that arose subsequent to the order.

Also subsequent to the order, new supermarkets have opened in the immediate vicinity of the Fort Oglethorpe store, resulting in a substantial decrease in its sales and creating considerable doubt about its future viability as a supermarket. In addition, no potential acquirer has shown a specific interest in this supermarket.

The order does not expressly provide for the termination of the respondents' obligation under paragraph II to divest in the event that the trustee appointed pursuant to paragraph III is not able to divest all the supermarkets. Accordingly, respondents continue to be obligated to divest the supermarkets and to maintain the supermarkets pending divestiture. However, the record in this case establishes that it is extremely unlikely that the required divestiture of the Lee Highway and Fort Oglethorpe stores can be accomplished within a reasonable time, notwithstanding the trustee's good faith efforts to divest the stores. The costs to respondents of further divestiture efforts therefore are an inequitable and unbargained-for element of the consent order.<sup>1</sup>

In view of the foregoing, the Commission has determined in its discretion that it is in the public interest to reopen the proceeding in Docket No. 9228 and modify the order in this case by setting aside paragraphs II(A)(1) and II(A)(2).

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<sup>1</sup> We distinguish the costs imposed on a respondent by continued attempts to comply with an order requirement made ineffectual by subsequent events from the kinds of costs ordinarily imposed by an order. For example, certain definable and predictable costs are always associated with a respondent's compliance obligations under a consent order. These costs are accepted by the respondent as part of the settlement of the case.

Accordingly, the Commission hereby issues this Order to Show Cause why the proceeding in Docket No. 9228 should not be reopened to modify the order as described above.

In accordance with Section 3.72 of the Commission's Rules of Practice and Procedure, 16 CFR 3.72, respondents have thirty (30) days from the date of service of this order to file an answer to this Order to Show Cause or be deemed to have accepted the action proposed herein.

## IN THE MATTER OF

## KKR ASSOCIATES, L.P., 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-3253. Consent Order, June 13, 1989--Modifying Order, May 13, 1993*

This order denies in part and grants in part a petition to reopen the proceeding and to modify the Commission's consent order issued June 13, 1989 (111 FTC 670) by requiring only notification to the Commission, instead of prior approval, for acquisitions of relevant products, if respondents are not at that time engaged in that relevant product market. The Commission concluded that changed conditions of fact warranted reopening and modifying the order. However, the respondents' request to eliminate entirely the prior approval clause was denied.

ORDER GRANTING IN PART AND DENYING IN PART  
REQUEST TO REOPEN AND MODIFY ORDER ISSUED JUNE 13, 1989

On January 13, 1993, respondents KKR Associates, L.P., et al., ("KKR")<sup>1</sup> filed a Petition to Reopen Proceedings and Modify Consent Order ("Petition") 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. Respondents request that the Commission delete paragraph V of the order in Docket No. C-3253 ("order") that became final on June 22, 1989. Paragraph V prohibits respondents, for a ten-year period, from acquiring without prior Commission approval, firms that produce or hold branded trademarks related to the relevant products. Alternatively, respondents request that paragraph V of the order be

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<sup>1</sup> The Petition was filed by all the named respondents to the order in Docket No. C-3253: KKR Associates, L.P., a limited partnership; Kohlberg Kravis Roberts & Co., L.P., a limited partnership; RJR Nabisco, Inc. (successor by merger to RJR Acquisition Corporation), a corporation; Whitehall Associates, L.P. (formerly known as RJR Associates, L.P.), a limited partnership; RJR Nabisco Holdings Group, Inc. (formerly known as RJR Holdings Corp.), a corporation; Henry R. Kravis, a natural person; Robert I. MacDonnell, a natural person; Michael W. Michelson, a natural person; Paul E. Raether, a natural person; and George R. Roberts, a natural person.

modified to include only packaged nuts as a relevant product. In conjunction with that alternative, respondents request that a "poison pill" provision be added that would allow them to acquire, without the Commission's prior approval, an interest in or assets of a company not involved in the production or marketing of packaged nuts at the time of respondents' acquisition announcement, even if subsequently the acquisition candidate acquires an interest in another company involved in the production or marketing of packaged nuts. If such a situation occurred, respondents' proposed modification would, require them to hold separate and then divest the packaged nut-related assets of the subsequently acquired company. Respondents also request such other lesser relief as appears just and proper to the Commission.

For the reasons discussed below, the Commission has determined that respondents have shown that changed conditions of fact require reopening and modifying the order. The Commission has determined to grant a modification of the order more limited than that requested by respondents. Specifically, we will require only notification, instead of prior approval, for acquisitions of relevant products if respondents are not at that time engaged in that relevant product market. The Commission has also determined that respondents have not at this time demonstrated that it is in the public interest to modify the order to include a poison pill provision.

#### The Complaint And Order

The complaint alleged that KKR's acquisition of RJR Nabisco would substantially lessen competition in the United States in three branded food product markets -- packaged nuts, shelf-stable oriental foods (including shelf-stable oriental entrees, noodles, vegetables and soy sauce) ("shelf-stable oriental foods"), and catsup -- in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45. The order settled those charges by requiring KKR to divest assets and businesses, of either RJR or Beatrice/Hunt-Wesson, associated with the development, production, distribution and sale, of branded packaged nuts, shelf-stable

oriental foods and catsup.<sup>2</sup> On October 3, 1989, the Commission approved the divestiture of the Chun King business of Nabisco to a joint venture between Yeo Hiap Seng Ltd. and Fullerton (Overseas) Holdings Private Ltd. On October 5, 1989, the Commission approved the divestiture of the Fisher Nut division of Beatrice/Hunt-Wesson to The Procter & Gamble Co. On December 28, 1989, the Commission approved the divestiture of RJR Nabisco's Del Monte Corporation processed food divisions (including catsup) to DMPF Holdings Corp. The divestitures were made in a timely manner.

For a period of ten years until June 22, 1999, paragraph V of the order prohibits each respondent from acquiring, without prior Commission approval, any interest in any company that is engaged in the production of any relevant product, or that owns or licenses a branded trademark used in connection with the sale of any relevant product. Paragraph V provides that prior Commission approval is not required for (1) acquisitions by the corporate respondents of used equipment for not more than \$500,000 and (2) acquisitions by the individual and partnership respondents, for investment purposes only, of an interest of not more than 5 percent in any concern.

### Respondents' Petition

Respondents assert in their Petition that reopening and modification are required by changed conditions of fact and public interest considerations.<sup>3</sup> The change of fact alleged by respondents is KKR's sale of the Beatrice Company to ConAgra, Inc. Thus, respondents assert, when the Order was entered, KKR controlled both RJR Nabisco and Beatrice/Hunt Wesson, which created an overlap in each of the relevant product markets. As required by the order, respondents divested certain assets defined in the order used in manufacturing relevant products. Subsequently, respondents

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<sup>2</sup> Paragraph I.p. of the order defines "relevant products" as "branded: catsup/ketsup, shelf-stable oriental entrees, shelf-stable oriental noodles, shelf-stable oriental vegetables, soy sauce and packaged nuts."

<sup>3</sup> Respondents do not assert any changed conditions of law.

divested absolutely and completely any continuing interest in Beatrice/Hunt Wesson. Petition at 5-6. Because they no longer have an interest in Beatrice/Hunt Wesson, respondents claim that there has been a change in circumstances requiring a reopening and modification of the order.

Respondents also assert that reopening and modification are warranted by public interest considerations. According to the respondents, the prior approval requirement of paragraph V of the order unfairly burdens KKR's merchant banking activities and burdens competition in financial markets. Petition at 9-11. Respondents assert that public interest concerns dictate that the prior approval provision be removed because it is a barrier to the free flow of capital. *Id.* at 11. Respondents claim that the public disclosure and delay inherent in the prior approval process effectively prevent KKR from acquiring any interest in any company that has any involvement in manufacturing a relevant product or is a licensor or licensee of a trademark used in connection with a relevant product. *Id.* at 10.

#### Standards For Reopening And Modification

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. 4C-2956, Letter to John C. Hart (June 5, 1986) ("L-P Letter") at 4.<sup>4</sup>

The Commission may modify an order when, although changed circumstances would not require reopening, the Commission

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<sup>4</sup> 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.*

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) ("Damon Letter") 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 should be modified.<sup>5</sup> 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.<sup>6</sup>

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<sup>5</sup> 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* Section 2.51(b) of the Commission's Rules of Practice (requiring affidavits in support of petitions to reopen and modify).

<sup>6</sup> *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support finality of orders).

Respondents Have Demonstrated Changed  
Conditions Of Fact that Require Reopening  
And Modifying The Order

Respondents assert that KKR's divestiture of its interest in Beatrice/Hunt-Wesson constitutes a change in circumstances that requires reopening and modifying the order. Today, having completed the divestiture requirements of the order and having sold Beatrice/Hunt-Wesson, KKR no longer exercises control over any firm engaged in the manufacture and sale of two of the relevant products under the order: branded catsup and branded shelf-stable oriental foods. KKR currently competes in only one relevant product market, branded packaged nuts. Respondents have demonstrated that KKR's exit from the branded catsup and shelf-stable oriental foods markets eliminates the need for the prior approval provision as it is currently written, because an acquisition in either of these markets could not give rise to a competitive overlap.

KKR no longer owns interests or assets in the shelf-stable oriental foods or catsup markets. There appears, therefore, to be little need for the Commission to review KKR's first acquisition back into either of these relevant product markets, because at time of that acquisition respondents would not be competing in that market. KKR's first acquisition back into a relevant product market from which it had exited would simply substitute one seller for another without affecting market concentration or otherwise affecting competition. Although at the time the order was entered the remedial purpose of the prior approval provision for future acquisitions in the relevant markets was clear, respondents' subsequent exit from two of these markets eliminates the need to review their re-entry. Accordingly, respondents have shown a change of fact that requires reopening the order as it is currently written.

Having determined to reopen the order, the Commission next considers whether the order should be modified and, if so, how. In this matter, respondents' exit, and current absence, from the market

does not support setting aside the prior approval provision in its entirety. Rather, it is appropriate to modify the order only with respect to respondents' re-entry into a relevant market. Respondents' "exit" from two of the relevant markets may be temporary.<sup>7</sup> The Commission, therefore, has an interest in monitoring respondents' acquisitions in the relevant product markets from which they have exited so long as there is some likelihood that they will again be competitors in the relevant product markets. If respondents re-enter the branded catsup market or branded shelf-stable oriental foods market, they will return to the situation contemplated when the order was issued; the Commission will continue to have a significant enforcement interest in approving any subsequent acquisition of firms that produce, or have branded trademarks related to, these relevant products. Because the Commission has already concluded that there is a need to review increases in concentration in the order's relevant product markets, a prior approval for a second acquisition of such assets would be appropriate.<sup>8</sup>

A modification of the order allowing respondents to re-enter a market without the Commission's prior approval recognizes that the prior approval requirement is a limitation on KKR's investment

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<sup>7</sup> Respondents cite *In the Matter of Union Carbide Corporation*, Order Modifying Consent Order, September 28, 1977, 108 FTC 184 (1986), to support the requested modification on a the basis of changed conditions. In *Union Carbide*, respondent requested that the Commission modify the order to delete welding products and gas welding apparatus as products covered by the prior approval provision because respondents had divested all such assets and intended to stay out of the welding business. *Id.* at 188. The Commission modified the *Union Carbide* order because respondents had clearly exited a business covered by the order and had demonstrated that they had no intention of re-entering the business. KKR, in contrast, has not definitively stated an intention to remain out of these markets. Indeed, KKR's desire to be able to re-enter these markets unfettered by the order is the gravamen of its Petition.

<sup>8</sup> Prior approval provisions are included in orders to ensure prior Commission review of future acquisitions in markets where potential anticompetitive effects have been identified. In the instant case, once respondents have re-entered a relevant product market, the Commission's interest in reviewing future acquisitions in that market re-emerges. In view of these considerations, and in light of the modifications ordered herein, respondents' Petition fails to demonstrate that deletion of paragraph V of the order in its entirety would be in the public interest.

activities.<sup>9</sup> Although the costs imposed by the order were contemplated, it was not contemplated that these costs would apply to acquisitions of interests in a market in which respondents did not then compete. A prior approval provision in a Commission order contemplates that a respondent will continue to do business in the relevant market. A respondent's subsequent exit from the market eliminates the need for prior approval with respect to a re-entry acquisition. Under these circumstances, modifying the order is warranted to enable respondents to re-enter a relevant product market from which they have exited.<sup>10</sup> Consequently, the order shall be modified to permit such re-entry, with notice to the Commission but without the Commission's prior approval. The notice requirement is appropriate to ensure that the Commission has the information necessary to enforce the prior approval provision for acquisitions subsequent to the re-entry.

Respondents Have Not Demonstrated An Affirmative Need  
Under The Public Interest Standard That Would Justify  
Adding A "Poison Pill" Provision To The Order

Respondents' Petition requests the addition of a "poison pill" provision. Respondents argue that a target of a hostile tender offer by respondents could defeat that offer simply by acquiring an interest in an overlapping product, such as a small regional nut packager. Once such an overlap was established, KKR would need prior Commission approval in order to pursue the tender offer. The

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<sup>9</sup> Respondents have indicated, based on their experience in the merchant banking field, that KKR's investment activities as individuals and as a merchant bank are significantly limited because billions of dollars cannot be invested in the relevant products without the Commission's prior approval. Respondents argue that when they have exited a market, a prior approval requirement only hinders their ability as a merchant banking firm to invest money in financial markets without obstacles. The unmodified order, according to respondents, will not promote competition, but will only cause a burden, or inefficiency, on financial markets.

<sup>10</sup> Respondents have not exited the branded packaged nuts market. Therefore, the modification would not alter respondents' obligation to obtain the Commission's prior approval for an acquisition of packaged nuts assets unless and until respondents have exited that relevant product market.

public disclosure and delay inherent in the prior approval process, respondents argue, are likely to prevent KKR's tender offer from succeeding. In this manner, the Petition states, the order could have the unintended and undesirable effect of becoming a weapon for frustrating any possible investment by KKR. *See* Petition at 10.

Respondents' Petition, however, provides insufficient support for its assertion that KKR's future investment efforts' could be frustrated by such defensive acquisitions. Respondents have not expressly identified any actual KKR acquisitions that may have been frustrated by the poison pill strategy described. Nor have respondents offered any specific facts to demonstrate that the poison pill strategy is nonetheless a realistic basis of concern for the future. Indeed, respondents' supporting affidavit does not directly address the poison pill aspect of their Petition. Accordingly, respondents have failed to carry their burden of demonstrating an affirmative need under the public interest standard to warrant reopening the order and adding a poison pill provision.<sup>11</sup>

The Commission's denial of this portion of respondents' Petition is, of course, without prejudice to renewed consideration upon a more complete showing. Should respondents pursue this relief through a second petition, the analysis might be aided by a presentation of facts tending to show that the poison pill defensive strategy is not only hypothetically possible, but also a realistic basis for concern. Such a showing could include facts as to the time strictures applicable to KKR's investment undertakings; facts concerning defensive strategies adopted by acquisition targets in the past; and facts relating to the practical ability of acquisition targets

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<sup>11</sup> Respondents also provide insufficient support with respect to another proposed alternative--limitation of the order's prior approval requirement to permit acquisitions of firms deriving "*de minimis*" revenues from the manufacture of packaged nuts. *See* Petition at 3 n.1. The Petition provides no information demonstrating that (i) the applicability of the order's prior approval requirement to the acquisition of small packaged nut manufacturers results in any threshold injury to respondents or (ii) the reasons favoring establishment of *de minimis* exception at any particular level outweigh the reasons for continuing to impose the prior approval requirement.

to identify and acquire interests that would trigger a prior approval requirement under the order.<sup>12</sup>

### Conclusion

Accordingly, *it is ordered*, that this matter be reopened and that the order in Docket No. C-3253 be, and it hereby is, modified, as of the effective date of this order.

Paragraph V of the order is rewritten and modified as follows:

*It is further ordered*, That:

A. For a ten (10) year period commencing on the date this order becomes final, each respondent (but in the case of an individual respondent, only so long as he remains a general partner, officer, director, or employee of a nonindividual respondent) shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly through subsidiaries, partnerships or otherwise, assets used or previously used in (and still suitable for use in), or any interest in, or the whole or any part of the stock or share capital of, any company that is engaged in the production of any relevant product, or that owns or licenses a branded trademark used in connection with the sale of any relevant product.

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<sup>12</sup> In support of their request, respondents cite *Atlantic Richfield Co.*, 55 Fed. Reg. 51,963 (1990), a Commission consent order that included a poison pill provision. The denial of respondents' request for a poison pill provision does not mean that such provisions should not be included in orders, but only that respondents have not shown that such a modification is warranted here. Unlike respondents' proposal, the Atlantic Richfield order (i) required that the poison pill assets be divested within a fixed period and to a purchaser approved by the Commission; (ii) authorized the Commission to appoint a trustee to effect the divestiture if Atlantic Richfield failed to do so; and (iii) imposed affirmative obligations on Atlantic Richfield to effect arrangements -- including the possible divestiture of ancillary assets and businesses -- necessary to assure the viability and competitiveness of the assets and businesses of the acquired entity. If respondents were to renew their request for a poison pill provision, respondents might wish either to include the features incorporated in prior consent order provisions of this nature, or to provide adequate justification for any variances.

1. *Provided, however*, that the corporate respondents may, in the ordinary course of business, make purchases of used equipment for not more than \$500,000.

2. *Provided further*, that the individual and partnership respondents, and each pension, benefit or welfare plan or trust controlled by the corporate respondents may acquire, for investment purposes only, an interest of not more than five (5)-percent of the stock or share capital of any concern. For the purposes of this proviso, any purchase by any such pension, benefit or welfare plan or trust made at the direction or suggestion of any individual or partnership respondent shall be included in the five ( 5 ) percent of the stock or share capital that the individual or partnership respondents may acquire.

B. The requirement of prior Commission approval set out in paragraph V.A. shall not apply to the acquisition of any asset used or previously used in (and still suitable for use in), or any interest in, or the whole or any part of the stock or share capital of, any company that is engaged in the production of a relevant product, or that owns or licenses a branded trademark used in connection with the sale of a relevant product if, at the time of such acquisition, no respondent owns, directly or indirectly, any asset used or previously used in (and still suitable for use in), or any interest in, or the whole or any part of the stock or share capital of, any company that is engaged in the production of that relevant product, or that owns or licenses a branded trademark used in connection with the sale of that relevant product, other than assets or interests already acquired without prior Commission approval pursuant to paragraphs V.A.1. or V.A.2. *Provided, however*, that for any such acquisition exempted from the requirements of paragraph V.A., by this paragraph V.B., each acquiring respondent shall provide notice to the Commission of such acquisition within ten (10) days of such acquisition.

Commissioner Azcuenaga concurring in the result.

Complaint

116 F.T.C.

IN THE MATTER OF

## THE CLOROX COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3427. Complaint, May 17, 1993--Decision, May 17, 1993*

This consent order prohibits, among other things, a California-based manufacturer of various household and food products from misrepresenting the total fat, saturated fat, cholesterol, or sodium content of any salad dressing.

*Appearances*

For the Commission: *Ann V. Maher and Marianne Watts.*

For the respondent: *Eugene L. Lambert, Covington & Burling,*  
Washington, D.C.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the Clorox Company, a corporation, hereinafter sometimes referred to as respondent, has violated provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it would be in the public interest, alleges:

PARAGRAPH 1. Respondent is a Delaware corporation with its office and principal place of business located at 1221 Broadway, Oakland, California.

PAR. 2. Respondent has advertised, offered for sale, sold, and distributed food products, including Hidden Valley Ranch Take Heart salad dressings (hereinafter, "Take Heart salad dressings").

PAR. 3. Respondent has disseminated or caused to be disseminated advertisements and promotional materials for Take Heart salad dressings, a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

PAR. 5. Respondent has disseminated or caused to be disseminated advertisements for Take Heart salad dressings, including but not necessarily limited to, the advertisements attached hereto as Exhibits A and B. Specifically, the aforesaid advertisements contain the following statements and depictions:

A. (Depiction of a continuous stream of salad dressing over lettuce). From Hidden Valley comes a delicious way to give up fat and cholesterol. Take Heart. [On screen large-print display: No fat. No cholesterol]. Take Heart fat-free salad dressings have all the delicious taste you’d expect from Hidden Valley. [On screen small-print display: Original Ranch Flavor is 91% fat free]. Original Ranch; sweet, lively French; [Depiction of stream of French dressing over onions] rich, creamy Blue Cheese [Depiction of stream of Blue Cheese dressing over broccoli]. Take Heart. The good for you dressings that taste great. From Hidden Valley [On screen small-print display: As part of a low fat, low cholesterol diet]. (Exhibit A)

B. (Depiction of a continuous stream of salad dressing over lettuce). Ah! From Hidden Valley comes a delicious way to give up fat [On screen large-print display: No fat] and cholesterol [On screen large-print display: No cholesterol]. Take Heart, Take Heart fat-free salad dressings. [On screen small-print display: Original Ranch Flavor is 91% fat free]. The good for you dressing that taste [sic] great from Hidden Valley. [On screen small print display: As part of a low fat, low cholesterol diet]. (Exhibit B)

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 in any amount that would be reasonably consumed, Take Heart salad dressings contain no fat.

PAR. 7. In truth and in fact, in any amount that would be reasonably consumed, Take Heart salad dressings do contain fat. For example, the dressings contain either .96 grams (Italian, Blue Cheese, French, and Thousand Island varieties) or 2 grams (Original Ranch variety) of fat per two tablespoons. Therefore, the

representation set forth in paragraph six was and is false and misleading.

PAR. 8. The acts or practices of respondent, as alleged in this complaint, constitute unfair or deceptive acts or practices in or affecting commerce and the making of false advertisements in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Commissioner Azcuenaga recused.

Complaint

EXHIBIT A

**RADIO TV REPORTS** CXY 1183  
 41 East 42nd Street New York, NY 10017 (212) 309-1400

PRODUCT: HIDDEN VALLEY TAKE HEART DRESSING  
 TITLE: "DELICIOUS TASTE"  
 PROGRAM: 48 HOURS  
 STATION: CBS  
 05/15/91  
 NEW YORK:



(MUSIC)



WOMAN ANNCR. From Hidden Valley



comes a delicious wa



to give up fat



and cholesterol.



Take Heart.



Take Heart fat-free salad dressings have all the delicious taste



you'd expect from Hidden Valley.



Original Ranch; swag French;



nch, creamy Blue Cheese.



Take Heart. The good for you dressings that taste great.



From Hidden Valley. OUT!

ALSO AVAILABLE IN COLOR VIDEO TAPE CASSETTE

Exhibit A

Complaint

116 F.T.C.

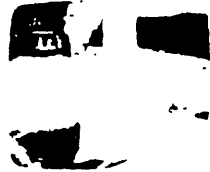
EXHIBIT B

**RADIO  
TV REPORTS**

41 East 42nd Street New York, NY 10017 (212) 309-1400

EXH 1205

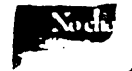
PRODUCT: HIDDEN VALLEY DRESSING  
TITLE: "DELICIOUS WAY"  
PROGRAM: WHEEL OF FORTUNE 5/14/91  
STATION: NBC (NEW YORK)



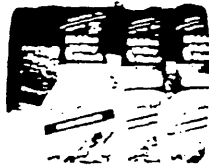
(MUSIC) WOMAN: Ah! From Hidden Valley comes a delicious way



to give up fat



and cholesterol! Take



Take Heart fat-free salad dressings.



The good for you dressing that taste great



from Hidden Valley. (M OUT)

Exhibit B

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

While Radio TV Reports endeavor to assure the accuracy of material received by its contributors, it is not responsible for the content of any material published in its reports. Radio TV Reports may be used for promotional purposes without the prior written consent of Radio TV Reports.

## 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 respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its 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 of facts, other than jurisdictional facts, or of violations of law as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent the Clorox Company 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 1221 Broadway, Oakland, California.

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

## ORDER

### I.

*It is ordered,* That respondent the Clorox Company, a corporation, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of any salad dressing 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:

A. The absolute or comparative amount of total fat, saturated fat, cholesterol, or sodium in any such product; or

B. The existence or the amount of total fat, saturated fat, cholesterol, or sodium in any such product relative to any amount or use being advertised or promoted.

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

## II.

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

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

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

## III.

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

## IV.

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

## V.

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

Commissioner Azcuenaga recused.

## IN THE MATTER OF

## FLEETWOOD MANUFACTURING, INC., ET AL.

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

*Docket C-3428. Complaint, May 18, 1993--Decision, May 18, 1993*

This consent order prohibits, among other things, an Arizona-based company and its officer from representing that use, in a manner requiring little or no effort, of their continuous passive motion ("CPM") exercise tables: reduces or helps to reduce body fat; results in or contributes to weight-loss or inch loss; tones or firms human tissue; removes or eliminates cellulite; or provides health or physical fitness benefits similar or superior to those provided by rigorous exercise. In addition, respondents are prohibited from making similar representations, with respect to any passive exercise machine, or fitness or diet program, unless they possess competent and reliable scientific evidence to substantiate such claims. Furthermore, the order also prohibits the respondents from representing that a consumer endorsement or testimonial represents the typical or ordinary experience of those who use the exercise program or CPM machines, unless that is the case.

*Appearances*

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

For the respondents: *Pro se*.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Fleetwood Manufacturing, Inc., a corporation, and Thomas A. Fleetwood, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated Sections 5(a) and 12 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 and alleges that:

PARAGRAPH 1. Respondent Fleetwood Manufacturing, Inc., is an Illinois corporation, with its principal office and place of business located at 1854 South McDonald, Mesa, Arizona.

Respondent Thomas A. Fleetwood, is an officer of the corporate respondent and is responsible for formulating, directing and controlling the acts and practices of respondent Fleetwood Manufacturing, Inc., including the acts and practices alleged in this complaint. His address is 3917 East June Street, Mesa, Arizona.

PAR. 2. Respondents have manufactured, advertised, offered for sale, sold and distributed to the public passive exercise machines, including such machines known or referred to as toning tables, vibrator tables, leg tables, situp tables, stretch tables, sandbag tables and waist, tummy and hip tables.

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

PAR. 4. In the course and conduct of their business respondents have prepared, or caused to be prepared, and have disseminated, or caused the dissemination of, advertisements and promotional materials for passive exercise machines by various means in or affecting commerce including, *inter alia*, placing advertisements for broadcast by radio and television, in magazines and newspapers distributed through the mail and across state lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of respondents' passive exercise machines and the use of said machines by consumers.

PAR. 5. Respondents have caused to be prepared and placed for publication and have caused the dissemination of advertising and promotional materials, including but not limited to, the advertising and promotional materials attached hereto as Exhibits 1 through 4, and have employed the use of various consumer testimonials and endorsements in said advertising and promotional materials to promote the sale of their passive exercise machines and the use of said machines by consumers.

PAR. 6. Typical of the statements made in such advertisements and promotional materials, but not necessarily all inclusive thereof, are the following:

1. "The Inch by Inch System has developed a successful program of passive exercise by using motorized tables that are designed to tone, firm and reduce in specific areas."
2. "Shape up with the Inch by Inch System. It's the perfect way to lose those unwanted inches and feel great at the same time."
3. "Well I came and I lost nine inches, and I didn't do any dieting. I ate candy and everything all those weeks and lost two to three pounds."
4. "Helping to tone and firm (not build) these muscles and break down unwanted cellulite."
5. "These motorized tables exercise one or more of the major muscle groups, helping to tone and firm these muscles and break down unwanted cellulite."
6. "Just two to three times a week (one hour per session) is equivalent to two hours of calisthenics per day."

PAR. 7. Through the use of the statements referred to in paragraph six and other statements contained in advertisements and promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that use of respondents' passive exercise machines in a manner requiring little or no effort by the user:

1. Reduces overall body fat as well as body fat in particular areas such as hips, thighs, buttocks, arms, or stomach.
2. Results in the loss of inches or girth from various parts of the body, including the stomach, hips, thighs and buttocks.
3. Reduces overall body weight.
4. Contributes to the breakdown or removal of cellulite.
5. Tones and firms muscles and breaks down cellulite.
6. Provides health or physical fitness benefits for normal healthy individuals comparable or superior to the health or physical fitness benefits provided by a program of rigorous physical exercise.

PAR. 8. In truth and in fact, use of respondents' passive exercise machines in a manner requiring little or no effort by the user:

1. Does not result in the loss of inches or girth from various parts of the body including the stomach, hips, thighs or buttocks.
2. Does not reduce overall body fat or fat from any particular area of the body such as the hips, thighs, buttocks, arms or stomach.
3. Does not reduce overall body weight.
4. Does not contribute to the breakdown or removal of cellulite.
5. Does not tone and firm muscles or break down cellulite.
6. Does not provide health or physical fitness benefits for normal healthy individuals comparable or superior to the health or physical fitness benefits provided by a program of rigorous physical exercise.

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

PAR. 9. Through the use of the statements referred to in paragraph six and others not specifically set forth herein, respondents have represented, directly or by implication, that at the time respondents made the representations set forth in paragraph seven respondents possessed and relied upon a reasonable basis for those representations.

PAR. 10. In truth and in fact, at the time respondents made the representations set forth in paragraph seven respondents did not possess and rely upon a reasonable basis for those representations. Therefore, the representation set forth in paragraph nine was and is false and misleading.

PAR. 11. Through the use of the advertisements and promotional materials referred to in paragraph six, and others not specifically set forth herein, respondents have represented, directly or by implication, that various testimonials and endorsements contained therein reflect the typical or ordinary experiences of consumers, in terms of weight loss and inch loss, after using respondents' passive exercise machines in a manner requiring little or no effort by the user.

PAR. 12. In truth and in fact, the various testimonials and endorsements contained in respondents' advertising and promotional materials, do not reflect the typical or ordinary experiences of

consumers, in terms of weight loss or inch loss, after using respondents' passive exercise machines in a manner requiring little or no effort by the user. Therefore, the representation set forth in paragraph eleven was and is false and misleading.

PAR. 13. The acts and practices of respondents as alleged in this complaint, and the placement in the hands of others of the means and instrumentalities by and through which others may have used said acts and practices, constitute unfair and deceptive acts or practices in or affecting commerce and the dissemination of false advertisements in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Commissioner Owen dissenting.







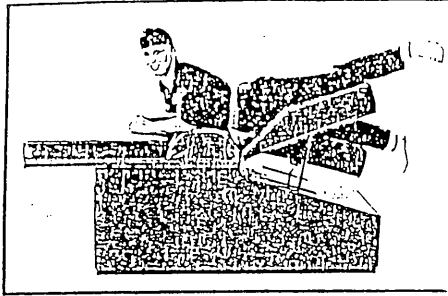
EXHIBIT 3

Shape Up's A Cinch  
With



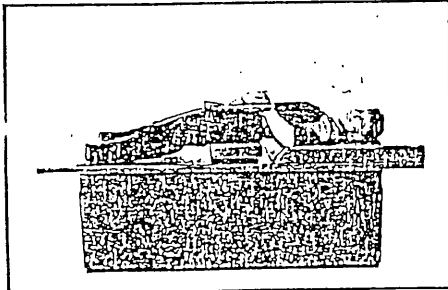
STAUFFER-TYPE  
MOTORIZED - ISOMETRIC  
EXERCISE EQUIPMENT

The No Stress/No Strain Program  
For Physical Fitness



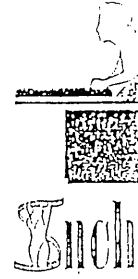
**WAIST-TUMMY-HIP TABLE (3 in 1)**

*This table exercises the waist, tummy, and hips, while also strengthening the lower back muscles. It combines waist twisting exercise along with leg lifting exercise movements. It also exercises both sides of the body at the same time, giving you the equivalent exercise you would receive from side-bends and sit-ups.*

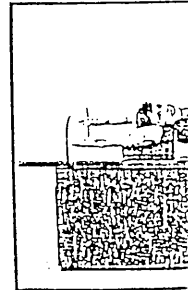


**SAND BAG TABLE**

*This table tones and firms tummy and the hips. The two moving pads simulate the hip walk exercise which some women are familiar with as a floor exercise to firm and tone the hips. This table is a combination of the two exercises mentioned above. The maximum amount of weight that can be used is 100 lbs.*



**The INCH BY INCH**  
 Isometric exercise tables designed to isolate and work 500 to 1000 (10 minutes). This is a utilized two times per week session, will give you excellent calisthenics per day!



**STRETCH TABLE**

*This table is gentle lifts the rib cage which tones the back and improves it also tones tendons.*

