

Complaint

113 F.T.C.

IN THE MATTER OF

R.J. REYNOLDS TOBACCO COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9206. Complaint, June 16, 1986—Decision, May 8, 1990*

This consent order prohibits, among other things, a Winston-Salem, N.C. tobacco corporation from misrepresenting the results, design, purpose or content of any scientific test or study concerning any association between cigarette smoking and health effects.

*Appearances*For the Commission: *Judith D. Wilkenfeld.*For the respondent: *Judith Oldham, Collier, Shannon, Rill & Scott, Washington, D.C. Floyd Abrams, Cahill, Gordon & Reindel, New York, N.Y. and W.A. Copenhauer, Womble, Carlyle, Sandridge & Rice, Winston-Salem, N.C.*

COMPLAINT

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

PARAGRAPH 1. R.J. Reynolds is a New Jersey corporation, with its offices and principal place of business located at 401 North Main Street, Winston-Salem, North Carolina.

PAR. 2. Respondent manufactures, advertises, offers for sale, sells and distributes cigarettes and other tobacco products.

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

PAR. 4. In the course and conduct of its business, respondent has disseminated or caused the dissemination of an advertisement entitled "Of cigarettes and science," attached hereto as Exhibit A.

PAR. 5. In this advertisement respondent has represented, directly or by implication, that:

(a) The Multiple Risk Factor Intervention Trial (The MR FIT study) was designed and performed to test whether cigarette smoking causes coronary heart disease;

(b) A major government study about smoking and coronary heart disease (the MR FIT study) provides credible scientific evidence that smoking is not as hazardous as the public or the reader has been led to believe; and

(c) The MR FIT study, a major government study, tends to refute the theory that smoking causes coronary heart disease.

PAR. 6. The representations set forth in paragraph five are false or misleading.

PAR. 7. In light of the representations made in the advertisement, and because of the way in which the advertisement describes the MR FIT study and its results, respondent's failure to disclose:

(a) That men in the study who quit smoking had a significantly lower rate of coronary heart disease death than men who continued to smoke; or

(b) That the MR FIT study results are consistent with previous studies showing that those who quit smoking enjoy a substantial decrease in coronary heart disease mortality,

renders the advertisement deceptive.

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

EXHIBIT A

Of cigarettes and science.

This is the way science is supposed to work.

A scientist observes a certain set of facts. To explain these facts, the scientist comes up with a theory.

Then, to check the validity of the theory, the scientist performs an experiment. If the experiment yields positive results, and is duplicated by other scientists, then the theory is supported. If the experiment produces negative results, the theory is re-examined, modified or discarded.

But, to a scientist, both positive and negative results should be important. Because both produce valuable learning.

Now let's talk about cigarettes.

You probably know about research that links smoking to certain diseases. Coronary heart disease is one of them.

Much of this evidence consists of studies that show a statistical association between smoking and the disease.

But statistics themselves cannot explain *why* smoking and heart disease are associated. Thus, scientists have developed a theory: that heart disease is *caused* by smoking. Then they performed various experiments to check this theory.

We would like to tell you about one of the most important of these experiments.

A little-known study

It was called the Multiple Risk Factor Intervention Trial (MR FIT).

In the words of the *Wall Street Journal*, it was "one of the largest medical experiments ever attempted." Funded by the Federal government, it cost \$115,000,000 and took 10 years, ending in 1982.

The subjects were over 12,000 men who were thought to have a high risk of heart disease because of three risk factors

that are statistically associated with this disease: smoking, high blood pressure and high cholesterol levels.

Half of the men received no special medical intervention. The other half received medical treatment that consistently reduced all three risk factors, compared with the first group.

It was assumed that the group with lower risk factors would, over time, suffer significantly fewer deaths from heart disease than the higher risk factor group.

But that is not the way it turned out.

After 10 years, there was no statistically significant difference between the two groups in the number of heart disease deaths.

The theory persists

We at R.J. Reynolds do not claim this study proves that smoking doesn't cause heart disease. But we do wish to make a point.

Despite the results of MR FIT and other experiments like it, many scientists have not abandoned or modified their original theory, or re-examined its assumptions.

They continue to believe these factors cause heart disease. But it is important to label their belief accurately. It is an opinion. A judgment. But *not* scientific fact.

We believe in science. That is why we continue to provide funding for independent research into smoking and health.

But we do not believe there should be one set of scientific principles for the whole world, and a different set for experiments involving cigarettes. Science is science. Proof is proof. That is why the controversy over smoking and health remains an open one.

R.J. Reynolds Tobacco Company

DISSENTING STATEMENT BY CHAIRMAN DANIEL OLIVER

I respectfully dissent from the Commission's decision to issue a complaint challenging R.J. Reynolds' paid "editorial" titled "Of Cigarettes and Science." The challenged statement, as I read it, engages an issue that is a subject of public concern, and expresses a point of view that is unlikely to be articulated elsewhere. I believe that, as a matter of public policy, it is valuable for the public to hear all sides of an issue, and I am concerned about taking any action that may inhibit free expression of views that might not be popular to government regulators. Although, after reviewing the evidence presented to the Commission, I cannot conclude that issuance of this complaint is in the public interest, I, of course, express no view on the underlying legal and factual issues raised by this case.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent, R.J. Reynolds Tobacco Company, with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

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

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

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

1. Respondent R.J. Reynolds Tobacco Company is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of New Jersey, with its office and principal place of business located at 401 Nottingham Street, Winston-Salem, North Carolina.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of R.J. Reynolds Tobacco Company, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondent, R.J. Reynolds Tobacco 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 or promotion of cigarettes that constitutes commercial speech under the First Amendment of the U.S. Constitution, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing directly or by implication that the MR FIT study was designed and/or performed to test whether cigarette smoking causes coronary heart disease.

B. Representing directly or by implication that the MR FIT study is credible scientific evidence that cigarette smoking is not as hazardous as the public or the reader had been led to believe.

C. Representing directly or by implication that the MR FIT study tends to refute the theory that smoking causes coronary heart disease.

D. Failing to disclose, in any discussion of the MR FIT study that questions the relationship between smoking and smokers' risk of coronary heart disease, that: (a) men in the study who quit smoking had a significantly lower rate of coronary heart disease death than men who continued to smoke; or (b) that the MR FIT study results are consistent with previous studies showing that those who quit smoking enjoy a substantial decrease in coronary heart disease mortality.

E. Misrepresenting in any manner, directly or by implication, in any discussion of cigarette smoking and chronic or acute health effects, the results, design, purpose or content of any scientific test or study explicitly referred to concerning any claimed association between

cigarette smoking and chronic or acute health; *except that* this paragraph shall not apply to: (i) any scientific test or study concerning the amount of tar and nicotine in any cigarette; or (ii) claims phrased as opinions unless (a) they are not honestly held, (b) they misrepresent the qualifications of the holder or the basis of his opinion, or (c) reasonable consumers are likely to interpret them as implied statements of fact.

II.

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

III.

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

Commissioner Azcuenaga dissenting and Commissioner Owen not participating.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The consent order the Commission issues today against R.J. Reynolds Tobacco Company ("Reynolds") is unusually and conspicuously weak. It provides less protection for consumers than the Commission sought when it issued the complaint in this proceeding, less protection than the Commission ordinarily would seek in a deceptive advertising case, particularly one with serious public health implications, and less protection than is justified under the circumstances. The order to which the majority has acceded conveys to me the troubling message that when a major cigarette company boldly runs an advertisement that misrepresents important scientific evidence about the relationship between smoking and health, this Commission will do precious little in response. I dissent.

Beyond its weakness, a more serious peril lurks within this order. The order implicitly represents that the Commission is protecting consumers from deceptive cigarette advertising, even in the guise of a paid-for editorial. Consumers may be lulled by this message into a false sense of security that they can trust what they read in cigarette ads. In recent years, the federal government had displayed an increasingly high degree of care and concern about the relationship between smoking and health, and consumers reasonably may assume from this order that the Federal Trade Commission is guarding their interests with the same high degree of care. In fact, the public health protection this order affords is so illusory that consumers might very well be better off if the Commission issued no order at all.

Nothing in the record or the litigation posture to date suggests a need to accept a weak, compromise order. Yet the remarkable concessions that the majority is willing to make to settle this case suggest a certain squeamishness about the Commission's authority to regulate deceptive advertisements that look like editorials, which is the only defense that Reynolds has asserted. Reasonable people may disagree about whether the First Amendment protects a deceptive advertisement that looks like an editorial, such as the so-called "MR. FIT" ad that Reynolds ran, but we can do more to protect consumers if we take a firm position one way or the other. If we announce that the Commission will not challenge advertisements that are designed to masquerade as editorials, we will warn consumers to be on guard and to exercise any natural suspicion they may have regarding the truth of a paid-for editorial advertisement.

On the other hand, if we intend to regulate such ads, we should do so decisively and demand remedies that are as rigorous as in any other deceptive advertising matter. By accepting this pared-down order, the majority implicitly asserts that the order is adequate and signals to the public generally that the Commission is protecting consumers.¹ At the same time, however, it signals to cigarette companies and other advertisers, through the specifics of the order, which will be studied by their legal experts, that they may shade the truth, or even deceive consumers outright, if they choose to try the advertising "editorial" approach in the future. Although certainly the Commission does not intend this result, in a very real sense the Commission itself is

¹ One of my colleagues has ventured so far as to say this is a "strong" order and a "victory for consumers." Statement of Commissioner Andrew J. Strenio, Jr., Concurring in the Commission's Acceptance of the Order for Public Comment, September 20, 1989 ("Strenio Statement") at 1, and Concurring Statement of Commissioner Andrew J. Strenio, Jr. ("Strenio Concurrence") at 1.

practicing a deception on the American consumer, and a dangerous deception at that.

This case involves a Reynolds advertisement that the Commission found reason to believe deceptively represented that a major government study tends to refute the theory that smoking causes coronary heart disease. When it issued the complaint, the Commission attached a proposed order ("notice order"). It indicated that if the facts were established as alleged, the notice order "should issue" and that the Commission might order additional protection as necessary or appropriate.

The heart of the notice order, as I read it, is Paragraph I-E, which along with Paragraphs I-A through I-D, constitute what usually would be known in Commission parlance as "core relief." The notice order, like other Commission orders, contains both "core" and "fencing-in" provisions. Core relief, to the best of my knowledge, has not been formally defined, but it generally refers to the Commission's primary law enforcement remedy, which is to prohibit the unlawful conduct. Its message is basically, "Do not do this again." The Commission's authority to impose core relief stems from Section 5(b) of the FTC Act. All other relief in Commission orders is characterized as "fencing-in" relief designed to "close all roads to the prohibited goal, so that [the core relief in the] order may not be by-passed with impunity." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) (footnote omitted).

Reasonable minds sometimes differ over which provisions in a particular order constitute core or fencing-in relief, depending on how one views the scope of the misconduct at issue. From his earlier statement when the Commission accepted the proposed consent for public comment, it appears that Commissioner Strenio views Reynolds' misconduct narrowly, as consisting only of Reynolds' dissemination of a particular ad. He states that the core relief in the order includes only those provisions in Paragraphs I-A through I-D prohibiting Reynolds' further dissemination of that one ad. Strenio Statement at 1 n.2. He designates Paragraph I-E, which prohibits misrepresentations of tests or studies in discussing smoking and health, as fencing-in. *Id.* at 4. I believe that on this record, Reynolds has violated the law not just by disseminating a single deceptive ad but by the act of misrepresenting scientific tests or studies in advertising that discusses smoking and health, and, in my view, Commissioner Strenio's characterization of Reynolds' misconduct is unduly limited.

If the Commission had tried this case and had found liability, it doubtless would not hesitate to say that Reynolds had engaged in deceptive advertising by misrepresenting the nature or results of scientific tests or studies in discussing the relationship between smoking and health. It would then no doubt have imposed core relief, that is, relief that simply prohibits the unlawful conduct, with a provision much like Paragraph I-E of the notice order. The most obvious reading is that the Commission viewed Paragraph I-E of the notice order as core relief when it issued the complaint. That was certainly my understanding at that time and is so now.

Under Section 5(b) of the FTC Act, once the Commission finds liability, it automatically has authority to impose core relief. For fencing-in relief, the Commission also must show that the remedy is reasonably related to the violation and necessary to ensure the core relief. This is often easy to do, but it is nevertheless an additional step the Commission must take. My colleague's narrow and apparently solitary approach to defining core conduct, in my view, does not serve us well in this case and, if ever accepted by the Commission, could impose an undesirable and unnecessary burden on the Commission in future cases.

The core relief contained in Paragraph I-E of the notice order would prohibit Reynolds from:

Misrepresenting in any manner, directly or by implication, the design, purpose, content, or results of any scientific test or study in any discussion of smoking and health.

This is a simple requirement that flows directly from the serious allegations in the complaint. Since the complaint issued, nothing has happened to suggest that its allegations are anything less than completely true. Yet the majority now accepts substantially less protection for consumers than it initially projected by adopting several notable limitations to the core prohibition quoted above. When combined, these limitations narrowly constrict the relief imposed and create a potential litigation quagmire should the Commission ever seek to enforce the order. No explanation for these major concessions on the part of the majority is readily apparent, and the resulting order is not more than a gesture in response to deceptive advertising claims that may cause grave consumer injury.²

² Although the order probably bars Reynolds from again disseminating the identical "MR. FIT" advertisement that gave rise to the complaint, even this is not entirely free from doubt.

The principal limitation to the substantive protections of the order narrows the core prohibition in Paragraph I-E to cover only those misrepresentations concerning scientific tests or studies "explicitly referred to" in a Reynolds advertising message. The usual language used to redress misrepresentations of tests or studies, as reflected in the notice order, extends to all references to such tests or studies, even if implicit³ or generic. Allowing a company under order this much leeway to misrepresent the safety of its product is rare, at best. Indeed, I am aware of no other Commission order that is so limited. *See, e.g., Removatron International Corp.*, D. 9200, slip op. at 3 (Nov. 4, 1988) ("cease and desist from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test or study"), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); *American Home Products Corp.*, 98 FTC 136, 425 (1981) ("cease and desist from . . . [m]isrepresenting in any manner any test, study or survey or any of the results thereof concerning. . ."), *aff'd*, 695 F.2d 681 (3d Cir. 1982); *Litton Industries, Inc.*, 97 FTC 1, 82 (1981) ("cease and desist from . . . [m]isrepresenting in any manner the purpose, sample, content, reliability, results, or conclusions of any survey or test"), *aff'd*, 676 F.2d 364 (9th Cir. 1982); *Sears, Roebuck & Co.*, 95 FTC 406, 526 (1980) ("cease and desist from . . . [m]isrepresenting. . . the purpose, content or conclusion of any test, experiment, demonstration, study, survey, report, or research"), *aff'd*, 676 F.2d 385 (9th Cir. 1982).

Already this provision has spawned questions. Since the agreement was signed, counsel supporting the complaint and counsel for Reynolds have exchanged letters concerning interpretation of Paragraph I-E of the order. *See* attached correspondence dated August 17, 1989, from Judith Wilkenfeld and Judith Oldham. This correspondence is interesting, but it is not part of the order.⁴ Perhaps the correspondence will help the Commission if it ever needs to enforce the order on this precise point. But other gaps in the coverage of Paragraph I-E have not been filled, even in this informal *post hoc* fashion. The purpose of the consent order is, after all, to reduce to

³ Prohibiting misrepresentation in implicit references to scientific tests need not discourage accurate descriptions of the makeup of a product or its performance characteristics.

⁴ The consent agreement signed by Reynolds and counsel supporting the complaint, consistent with the model order specification contained in the Commission's *Operating Manual* (Ch. 6.8 and Illustration 2), expressly states: "The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or in the agreement may be used to vary or to contradict the terms of the order." Consent Agreement at 2, ¶ 7.

writing any such "understandings" between the parties and to make those "understandings" binding.

It is entirely appropriate and desirable to bar Reynolds from making any deceptive statements that suggest the existence of scientific, empirical support or expert, scientific opinion for product claims in addition to those that explicitly mention a "test" or "study." What if, for instance, an advertisement deceptively uses phrases such as "experts agree," or "government agency reviews scientific evidence and concludes," or "empirical research shows," or "scientific data prove"? The number of other examples is limited only by the imagination of a good marketing department or advertising agency. Unlike the Commission's notice order, this order does not prohibit Reynolds from using these phrases deceptively.⁵

A comment filed with the Commission on behalf of the American Heart Association, the American Cancer Society, the American Lung Association and their umbrella group the Coalition on Smoking OR Health "agrees that it is essential" that the order should apply to references such as those I have just described.⁶ The only way the Commission could ensure that the order so applies would be to delete the order provisions that plainly was drafted to exclude those references from the coverage of the order. This the Commission has not done. No quantity of earnest side pronouncements can cure that flaw because the Commission will not be the final arbiter of what the order covers. That honor will go to the courts and, it has been my observation, courts generally conclude that orders cover what they say they cover and do not cover that which they specifically exclude.

Another limitation on the core provisions of the order arises from the deletion of the simple phrase "smoking and health," which appeared in Paragraph I-E of the notice order and its replacement with the more narrow phrase "smoking and chronic or acute health effects." Under the revised language, the Commission will be able to enforce the order against only a more limited range of deceptive claims and Reynolds can contest the Commission's interpretation of

⁵ One of my colleagues stoutly asserts that the order does bar such claims. Strenio Concurrence at 2. To support his point, he is reduced to citing another letter, thereby highlighting the unfortunate lack of coverage in the controlling document, the order itself. His assertion ignores the common sense flag that Reynolds negotiated this change in the order for a reason.

⁶ Like my colleagues, I acknowledge the substantial expertise of the Coalition on the relationship between smoking and health and their related concern about the accuracy of advertising in this area. Because this order does not seem to promote what I understand to be the Coalition's ultimate goal, I regret that they endorsed the order and did not see fit to employ their considerable persuasiveness to urge a different result.

the additional words "chronic," "acute" or "effects," none of which is defined in the order.⁷

Still another limitation of the core prohibition appears in the language approved by the majority that condones misrepresentations "concerning the amount of tar and nicotine" in cigarettes. Such misrepresentations relate directly to the issues of smoking and health that are at the heart of this proceeding, and therefore, are well within the scope of the Commission's authority to impose relief. *See, e.g., FTC v. Ruberoid Co.* 343 U.S. 470, 473 (1952); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946). The Commission previously has treated deceptive tar and nicotine claims as serious violations of Section 5. *FTC v. Brown and Williamson Tobacco Corp.*, 580 F. Supp. 981 (D.D.C. 1983), *aff'd in part and remanded in part*, 778 F.2d 35 (D.C. Cir. 1985), *modified*, No. 83-1940 (D.D.C. April 4, 1986).

The final ornament in the now heavy load of exceptions that decorates Paragraph I-E further limits and complicates the provision by expressly allowing claims that are phrased as opinions unless (i) they are "not honestly held" (a particularly interesting subject for proof), (ii) they misrepresent the qualifications of the holder or the basis of his opinion, or (iii) reasonable consumers are likely to interpret them as implied statements of fact.⁸ This provision serves no useful purpose for the Commission or the public, and it has not appeared in other Commission orders. The provision also substantially increases the likelihood that any enforcement of the order will be difficult and protracted.

In addition to the serious cuts it has approved in the core protections of the order, the majority also has departed from the Commission's routine practice by acquiescing in Reynolds' demand that the order expressly apply only to advertising or promotion of cigarettes "that constitutes commercial speech under the First Amendment of the United States Constitution." Because the Commission's jurisdiction necessarily is limited by the First Amendment, this language is

⁷ It has been suggested that the new phrase has been defined by the World Health Organization. Even assuming, and I do not, that we want that definition to control, the order does not so specify.

⁸ This provision derives from the Commission's Deception Statement, which is a statement of policy to which the Commission refers in exercising its prosecutorial discretion. Letters dated October 14, 1983, to The Honorable Bob Packwood, Chairman, Committee on Commerce, Science, and Transportation, United States Senate and The Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, United States House of Representatives (reprinted in Appendix to *Cliffdale Associates, Inc.*, 103 FTC 110, 174-83 (1984)). The fact that the Commission finds this language useful in a policy statement the interpretation of which is solely within its own discretion does not make it palatable in an order, every word and phrase of which Reynolds may challenge in an enforcement proceeding.

superfluous. The Commission does not reference in its orders the defenses proffered by respondents and making an exception here is unnecessary and undesirable.

Perhaps more important, when combined with the provision placing "claims phrased as opinions" outside the scope of the order, this language tells Reynolds and other advertisers that promotional material cloaked in the mantle of opinion are beyond the reach of the Federal Trade Commission. The Supreme Court, in considering the analogous question whether material containing discussions of public issues nonetheless could constitute "commercial speech," refused to encourage such sophistry:

We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech.

Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 63 (1983) (quoting *Central Hudson Gas & Elec. Corp. v. Public Utility Comm'n*, 447 U.S. 557, 563, n.5 (1980)).

Finally, the majority fails to disassociate itself from the staff's letter of May 12, 1989 (attached), to Reynolds that sets forth the staff's "intent" about the scope of the order.⁹ To be sure, the letter recites that Reynolds "predicates" its acceptance of the consent agreement simply on the "assurance that this letter will be forwarded to the Commission." It seems all too clear, however, that Reynolds hopes to achieve indirectly by this letter what the Commission has refused to grant it directly: a delineation of what the Commission will consider to be the limits of commercial speech developed without reference to a factual record.

It is well established that the staff has no authority to bind the Commission, but absent a direct and express disavowal of this letter, the Commission may be hard pressed to avoid arguments over the letter in an enforcement proceeding. The letter can serve only to undermine the force of the order it purports to construe. Another potential inconvenience might arise if, in an enforcement proceeding, the Commission asserts that this letter from complaint counsel interpreting one part of the order does not bind the Commission. The Commission might be hard-pressed to explain why the letter from

⁹ As a condition of the settlement imposed by Reynolds, complaint counsel sent a letter to Reynolds setting forth examples of forms of speech that they characterize as noncommercial and therefore, in their opinion, outside the scope of the order.

Reynolds counsel interpreting another part of the order, discussed earlier, nevertheless should be binding on Reynolds.

Such so-called "side letters" unfortunately are not unprecedented, but neither are they common. In all events, they are ill-advised. The Commission should make clear to the staff and to other potential respondents that they are unacceptable both here and in other cases.

Reynolds has argued that the Commission's enforcement action evidences a double standard that disfavors cigarette companies. *See, e.g., Reynolds' Answering Brief on Appeal at 16-17 and n.8.* The majority's issuance of this consent agreement and order does, indeed, suggest the existence of a double standard—but not one that is biased against the cigarette industry. Rather, the order the Commission issues today accords this cigarette company treatment that is far more lenient than that ordinarily given to respondents in deceptive advertising cases. It is a surprising abandonment of the public interest, and I cannot endorse it.

ATTACHMENTS

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION WASHINGTON, D.C. 20580

August 17, 1989

Judith Oldham, Esquire
Collier, Shannon & Scott
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007

Dear Ms. Oldham:

During Commission consideration of the consent agreement signed by R.J. Reynolds Tobacco Company, a question has been raised about the meaning of a phrase in Part I.E. of the order. Specifically, I have been asked to clarify the understanding of the negotiating parties of the phrase "any scientific test or study explicitly referred to." My understanding is that this language, as intended by the parties, would limit the order's coverage to advertising claims that expressly refer to a test or study; *i.e.*, a reference to a specifically named test or study, such as MR FIT, or a generic reference to a test or study, such as "tests prove...." Please confirm by return mail if this reflects your understanding.

Sincerely,

Judith P. Wilkenfeld
Counsel Supporting the Complaint

Dissenting Statement

113 F.T.C.

Collier, Shannon & Scott
Attorneys-at-Law
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007

August 17, 1989

Judith D. Wilkenfeld, Esquire
Program Director for Food and Drug Advertising
FEDERAL TRADE COMMISSION
601 Pennsylvania Avenue, N.W.
Room 4007
Washington, D.C. 20580

Re: MR FIT Settlement

Dear Ms. Wilkenfeld:

This is to confirm our understanding that the language in Paragraph E of the order in R.J. Reynolds Tobacco Company (Dkt. No. 9206), which prohibits misrepresentation of "the results, design, purpose or content of any specific test or study explicitly referred to concerning any claimed association between cigarette smoking and chronic or acute health . . ." was intended to limit the Order's coverage to advertising claims that expressly referred to a test or study, *i.e.*, a reference to a specifically named test or study such as MR FIT, or a generic reference to a test or study, *e.g.*, "tests prove."

Sincerely,

JUDITH L. OLDHAM

JLO:mdl

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

May 12, 1989

James F. Rill, Esquire
Collier, Shannon, Rill & Scott
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007

Re: In the Matter of R.J. Reynolds
Tobacco Company, Dkt. 9206

Dear Mr. Rill:

During recent discussions concerning a proposed settlement of the above matter, you requested on behalf of R.J. Reynolds Tobacco Company, clarification of our understanding of the scope of the meaning of the terms "advertising or promotion of cigarettes that constitute commercial speech under the First Amendment of the U.S. Constitution" as those terms are used in Section I of the proposed order.

The purpose of this letter, which will be forwarded to the Commission with the signed proposed consent agreement, is to provide some examples of speech we do not intend to come within the definition of "advertising or promotion of cigarettes that constitutes commercial speech" as those terms are used in the proposed order. We understand that the company's acceptance of the consent agreement is predicated on the contents of this letter and the assurance that this letter will be forwarded to the Commission in connection with its consideration of the signed consent agreement. In addition, it is our intention in writing this letter and providing these examples neither to vary nor contradict the terms of the order, but merely to explain and clarify our intent as to its coverage. Finally, our listing is not intended to be exhaustive or exclusive, but merely to provide examples of speech that we do not intend to be covered by the proposed order.

The following are examples of speech that we believe do not constitute advertising or promotion of cigarettes that constitutes commercial speech:

testimony or statements before government bodies,
communications, including press conferences, with independent news media,
presentations at scientific, legal and professional conferences,
op-ed pieces and letters to the editor published by independent news media in the
exercise of their editorial judgment,
articles published in professional, legal or scientific journals, and
statements made on independent broadcast news or talk shows. This category
excludes statements made in advertisements that take the form of news or talk
shows.

Concurring Statement

113 F.T.C.

Sincerely,

Judith P. Wilkenfeld
Counsel Supporting the Complaint

William C. MacLeod
Director
Bureau of Consumer Protection

CONCURRING STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

The Commission's initial review indicated that the consent agreement negotiated by complaint counsel and the R.J. Reynolds Tobacco Company, Inc. ("Reynolds") was both justified and commensurately strong. The Commission now has reexamined this issue following the receipt of public comments, and appropriately has decided to give final approval to the proposed settlement.

The comments filed by the Coalition on Smoking OR Health (which consists of the American Heart Association, the American Cancer Society, and the American Lung Association) in support of the proposed settlement were particularly insightful. Naturally, that came as no surprise since the Coalition has paid long-standing and serious attention to the matter. This interest dates back to the Coalition's petition requesting that the Commission initiate an investigation into the "Of Cigarettes and Science" advertisement, and also was evident at many other stages of the proceeding (such as the Coalition's participation in the appeal of the Administrative Law Judge's dismissal of the case in 1987).

After thoughtful discussion of various issues raised regarding the proposed agreement, the Coalition's comments to the Commission concluded:

[O]n balance the proposed Consent Order and Settlement Agreement represent a major achievement which will benefit consumers and which will reduce the type of misrepresentations found in "Of Cigarettes and Science." The Commission, and particularly the Commission's staff, should be commended for pursuing this litigation vigorously, for establishing the Commission's jurisdiction over "Of Cigarettes and Science," and for working out a settlement and consent order which will substantially further the public interest.

I, too, have concluded that the proposed settlement represents a victory for the public interest as well as a vindication of the

Commission's authority to challenge false or deceptive advertising in any guise.

Simply put, having found reason to believe that "Of Cigarettes and Science" constituted a deceptive advertisement, the consent order affirms that the Commission has jurisdiction over so-called "advertorials." This is the format where advertising wolves attempt to dress up in the sheep's clothing of editorials. The consent order prohibits Reynolds from using any form of commercial speech to misrepresent either the health risks associated with cigarettes or the results of scientific studies concerning those health risks. Thus, the consent order prevents Reynolds from engaging in the same or similar acts or practices that led to this litigation. Failure to comply with the order would make Reynolds liable for civil penalties of up to \$10,000 per day per violation.

These are noteworthy accomplishments for a case with more than its share of complex and novel elements. To be sure, this settlement is not written exactly as I would have preferred. By that standard, the settlement contains imperfections. However, based upon close scrutiny, I am convinced that under the circumstances these are relatively minor imperfections. My attached earlier statement explains in detail why these imperfections have no appreciable negative effect.

Rather than repeat this analysis here, I simply would like to reemphasize two basic points. First, it is implausible that Part I.E of the order would be taken out of context and misconstrued to exclude from the order's coverage generic references to tests or studies (such as "tests show" claims). The Commission majority voted to accept this settlement based upon the express understanding that Part I.E of the order refers both to specifically identified or named tests as well as to generic references to tests or studies. For elaboration upon this point, see the Commission response to the public comment from the Coalition on Smoking OR Health.

Second, the Commission views with disfavor side letters from FTC staff in general, and has made no exception for complaint counsel's guidance letter of May 12, 1989 in particular. Further, such side letters are not binding upon the Commission as a matter of law. Moreover, the Commission consistently, frequently, and pointedly has refrained from taking any action whatsoever to endorse the letter of May 12th or to otherwise accord it binding effect in any regard.

Renouncing the major accomplishments embodied in this consent because of its minor imperfections would be akin to rejecting a

doughnut because of the hole. Indeed, in accepting this consent, the Commission is putting all advertisers on notice that they cannot escape their legal responsibilities either by camouflaging an advertisement so that it resembles an editorial or by superficially linking a product to a current debate.

Any cigarette company, or other advertiser, who misreads the settlement as somehow symbolizing a lax Commission attitude toward false or deceptive advertising is in for an abrupt and rude awakening. In other words, the consent means that an advertiser who blows this kind of smoke is going to get burned.

In sum, the consent provides proportionate disincentives for recurrence of the allegedly unfair and deceptive advertising claims by Reynolds involving important public health concerns that are the essence of this case. The settlement also should help deter unfair or deceptive conduct by those few advertisers who may be tempted in the future to stray from the straight and narrow. Through careful balancing, the settlement advances both of these desirable goals without impeding the dissemination of truthful and non-deceptive information. This is important because the vast preponderance of advertisers utilize practices that are above reproach in supplying accurate and valued information to consumers. Accordingly, consistent with the Commission's mandate to protect consumers from unfair or deceptive advertising in any industry, acceptance of this consent is in the public interest.

ATTACHMENT A

CONCURRING STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

The Commission has chosen to accept, subject to final approval, the consent agreement negotiated by complaint counsel and the R. J. Reynolds Tobacco Company, Inc. ("respondent"). This action appears both justified and commensurately strong.¹

The action appears justified because the Commission continues to have reason to believe that respondent's advertisement, entitled "Of Cigarettes and Science," made false and misleading claims about the health effects of cigarette smoking. Respondent's advertisement led to the issuance of an FTC administrative complaint on June 16, 1986.

The action appears commensurately strong because the consent

¹ Of course, I will review with great care this assessment and all other preliminary conclusions and issues after completion of the comment period.

agreement secures virtually all of the relief sought in the notice order that accompanied the complaint. The settlement contains 100 percent of the remedies specified in the notice order for the core conduct at the heart of this proceeding.² In addition, the settlement provides the lion's share of the fencing-in relief specified in the notice order.³

To be sure, the settlement does not precisely track the notice order in all regards. But, these differences as a practical matter have no significant negative effect. Dismissing the public health value of this settlement by focusing disproportionately upon those relatively minor differences from the notice order would seem anomalous. Accordingly, the substantial public interest benefits that would flow from the core conduct and fencing-in relief included in the settlement tip the scales in favor of acceptance.

Should the Commission, then, reject this strong order and return to litigation in pursuit of a substance order that—if everything goes right—might be slightly stronger? I think not. To begin with, assuming such litigation were pursued vigorously and concluded successfully, it is improbable that the Commission would garner an appreciably stronger order than the one before us now. Further, the quest for a “perfect” settlement surely would divert agency resources that could be put to more productive use. Moreover, the public in the meantime would be harmed by the lingering uncertainty about the outcome of this case that easily could extend for many more years.

Reasonable people can differ over the importance of these individual factors and the overall balance to be struck. The impassioned and articulate dissent from my colleague proves as much. Nonetheless, the dissent's conclusion that continued litigation (with its attendant risks) necessarily is preferable to any settlement that does not adhere to the notice order in each and every particular exalts form over substance. Turning to the proposed settlement, I question whether it would serve the public interest to gamble so much tangible relief in hand, for so little theoretical reward that might—or might not—be lurking in the bush.

Comparison of the notice order and the proposed consent order reveals that the differences between them largely are superficial. One such difference is a change in the boilerplate language typically used in Commission orders. All things being equal, I would prefer not to

² The core provisions of the proposed consent order are identical to those of the notice order. Compare Parts I.A through I.D of both orders.

³ Both orders would prohibit respondent from making deceptive statements about tests or studies that discuss smoking and health. Compare Part I.E of both orders.

alter boilerplate. However, this change does not narrow the coverage or undercut the enforceability of the order. The boilerplate language in the proposed consent says that the order covers advertising or promotion of cigarettes "that constitutes commercial speech under the First Amendment of the Constitution." This provision merely states the obvious: the Commission has neither the desire nor the authority to obtain an order that would restrict fully protected, noncommercial speech.

Similarly, the added language in Part I.E.ii regarding opinion claims merely makes explicit that the order does not extend to such claims where the net impression is unlikely to mislead consumers. The order still would cover any opinion claim where the net impression has the potential to mislead consumers.

Part I.E. of the order, the fencing-in section, has another language modification. The notice order would have prohibited respondent from misrepresenting any scientific test or study in any discussion concerning "cigarette smoking and health." The proposed consent order changes that phrase to "cigarette smoking and chronic or acute health effects." This semantic change does not narrow the order's coverage, since the revised phrase encompasses all adverse health conditions associated with smoking. In fact, the Office on Smoking and Health, the federal office responsible for preparing the Surgeon General's annual report on the health consequences of smoking, has indicated that the revised phrase—"cigarette smoking and chronic or acute health effects"—simply is a more precise way to say "cigarette smoking and health."

Also in the fencing-in section, Part I.E of the proposed consent order excludes any scientific test or study regarding the amount of tar or nicotine in cigarettes. Unlike the other differences reviewed above, this change does amount to a narrowing of the scope of the fencing-in relief specified in the notice order. Thus, if respondent in the future were to misrepresent the quantity of tar or nicotine in its cigarettes, the Commission would not be able to file a lawsuit seeking civil penalties for violation of this order.

While I would rather not narrow the order in this fashion, the exclusion is limited and does not create a barrier to effective FTC action against misrepresentation of tar or nicotine quantity. Should respondent perpetrate an abuse of this nature, the Commission would retain—and, I trust, exercise—its full power to bring a new lawsuit, either as an administrative matter or as an injunction proceeding such

as the Barclay case.⁴ Further, the proposed consent order would cover claims made about tests or studies that discuss health risks associated with any level of tar or nicotine contained in cigarettes. In sum, this exclusion is not cause for rejecting the settlement.

Moving along to the remaining difference found within the fencing-in section, Part I.E of the proposed consent order includes the phrase, "explicitly referred to." If there were more than a hypothetical chance that this phrase could be taken out of context and misconstrued to exclude from the order's coverage generic references to tests or studies (such as "tests show" claims), I would not support the settlement. However, such a cramped construction of the order coverage would be an unreasonable and most unlikely reading of Part I.E. In my view, on the four corners of the order itself, Part I.E does cover claims such as "tests show" and other references to generic tests or studies in addition to claims concerning specifically-named tests or studies (such as the MR FIT study).⁵

Finally, there is the question of the complaint counsel guidance letter of May 12, 1989. I do not favor side letters such as this one in principle, and would prefer that complaint counsel not agree to send such letters during settlement discussions. However, side letters from complaint counsel are not binding upon the Commission as a matter of law. The Commission has taken no action to endorse this side letter or otherwise accord it binding effect. Accordingly, rejecting the settlement due to the mere existence of complaint counsel's letter would give undue weight to the missive.

In conclusion, although I like some aspects of the proposed settlement more than others, the net result looks to be that the benefits exceed the costs by a goodly margin. The proposed settlement appears to provide appropriate disincentives for recurrence of the allegedly unfair and deceptive claims involving important public health concerns that gave rise to this complaint. The proposed settlement also should help deter unfair or deceptive conduct by other advertisers—cigarette and non-cigarette companies alike—without impeding the dissemination of truthful and non-deceptive information. Accordingly, consistent with the Commission's mandate to protect consumers

⁴ *FTC v. Brown & Williamson Corp.*, 778 F.2d 35 (D.C. Cir. 1985).

⁵ The category of "test or studies" includes all references to any research performed according to methods recognized by the scientific community. There is no requirement for the literal presence of the words "test" or "study" before the order applies. Thus, the use of phrases such as "government agency reviews scientific evidence and concludes," or "empirical research shows," or "scientific data prove," or the like, would be covered.

from unfair or deceptive advertising in any industry, acceptance of the settlement for comment appears to be in the public interest.

IN THE MATTER OF
CULLIGAN, INC.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE
CLAYTON AND THE FEDERAL TRADE COMMISSION ACTS

Docket 6673. Consent Order, May 23, 1957—Set Aside Order, May 14, 1990

The Federal Trade Commission has set aside a 1957 consent order with Culligan, Inc., (53 FTC 1072), thus deleting a provision prohibiting respondent from using exclusive dealing to foreclose competition in the water softener industry. The Commission concluded that changed factual circumstances merit setting aside the order.

ORDER REOPENING AND SETTING ASIDE FINAL ORDER

On December 15, 1989, Culligan International Company ("Culligan") filed a request to reopen and set aside the consent order that was entered in this proceeding on May 23, 1957, in settlement of allegations that Culligan's exclusive dealing contracts violated Section 3 of the Clayton Act, 15 U.S.C. 14.¹ 53 FTC 1072 (1957). Culligan's petition was placed on the public record for 30 days. No comments were received. For the reasons described below, the Commission reopens and sets aside this order pursuant to Section 11(b) of the Clayton Act. 15 U.S.C. 21(b).

Culligan argues that its request is supported by changes of law and of fact as well as the public interest. The Commission has considered Culligan's request and has concluded that the company has made a sufficient showing of changed conditions of fact to require reopening the order and that on further consideration, these changes of fact justify setting the order aside.

I. BACKGROUND

A. *Culligan's Business At Time of Complaint*

Culligan's petition states that "from 1957-1962 Culligan probably enjoyed as high as a 30% share of the water-softener market based on factory exit shipments." Affidavit of Donald A. Mahlstedt ("Aff.") at 31. Culligan's water softening products were marketed in 1955 to

¹ The order that Culligan seeks to have set aside, Docket No. 6673, was based on a consent agreement between Culligan, Inc., and the Commission. Culligan is the successor to Culligan Inc., the respondent against which the order was entered.

customers as a service, rather than as the sale of a product. Pet. at 15; Aff. ¶17. The filters that "softened" water had to be changed regularly and were "regenerated" by the Culligan dealers. Aff. ¶17. To provide their service the dealers "often kept keys to the home of customers, had brine pits [for regeneration] and a trucking fleet." Aff. ¶19. Most of Culligan's equipment sales are made through franchised dealers, which, for many years before 1957, were required to sign contracts committing themselves to deal exclusively with Culligan. Aff. ¶¶11-16.

B. *The Complaint*

The complaint alleged that Culligan "sells more water conditioning products for domestic use in the United States than any other manufacturer or distributor of such equipment," and that "it occupies a dominant position in the manufacture, distribution and sale of such products in the United States." The complaint also alleged that Culligan engaged in exclusive dealing by including in its contracts with its retail dealers a condition that they "not use or deal in the products or . . . other commodities of a competitor . . ." According to the complaint, these exclusive dealing contracts extended for periods of twenty-five years and were renewable on agreement of the parties. Finally, the complaint alleged that under Section 3 of the Clayton Act, the effect of Culligan's exclusive dealing contracts "may be to substantially lessen competition in the line of commerce in which the respondent is engaged and in the line of commerce in which the customers and purchasers of respondent's products are engaged; and tend to create a monopoly in respondent . . ."

C. *The 1957 Order*

The Commission's order prohibits Culligan from "selling" or "continuing in operation or effect, any . . . understanding" that its dealers "shall not use or deal in similar or related products supplied by any competitor of competitors of respondent." It also contained language stating "nothing in this order shall prohibit respondent from entering into an agreement . . . prohibiting [dealers] from using . . . parts . . . which would adversely affect [Culligan's] water conditioning service units." 53 FTC at 1073-4.

II. STANDARD FOR REOPENING AND MODIFYING A FINAL ORDER OF THE COMMISSION

The Commission has authority to reopen and modify its orders

issued pursuant to Section 3 of the Clayton Act under Section 11(b) of that statute. Section 11(b) states that:

[T]he Commission . . . may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission . . . conditions of fact or of law have so changed as to require such action or if the public interest shall so require

The Commission has not previously addressed its authority to reopen and modify under this provision. When Congress amended the Clayton Act in 1959,² however, to give the Commission this authority, it chose the same wording it had enacted in 1938 when it authorized the Commission to reopen and modify orders issued under the Federal Trade Commission Act.³ Therefore, the Commission's decisions under Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provide authoritative guidance on the application of Section 11 of the Clayton Act.⁴

Section 5(b) of the Federal Trade Commission Act states that the Commission "shall reopen" an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986) at 4. *See*, S. Rep. No. 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *see Phillips Petroleum Co.*, Docket No. C-1088, 78 FTC 1573, 1575 (1971) (no modification for changes reasonably foreseeable at time of consent negotiations); *Pay Less Drugstores Northwest, Inc.*, Docket

² Finality Act of 1959, Pub. L. No. 86-107, 73 Stat. 243 (1959).

³ Wheeler-Lea Act of 1938, 52 Stat. 111 (1938). Although § 5(b) was amended in 1980, the new language did not change the standard for ordering 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. Although there is no statutory requirement that the Commission act within 120 days on petitions to modify an order issued pursuant to the Clayton Act, the Commission's Rule 2.51 states that the Commission will act on all petitions to modify orders within 120 days.

⁴ *See Kennecott Copper Corp. v. FTC*, 542 F.2d 801, 803 (1976) (characterizing related portions of § 5(b) and (c) of the Federal Trade Commission Act and § 11(b) and (c) of the Clayton Act as "substantially the same"); *see generally, United States v. American Building Maintenance Industries*, 422 U.S. 271, 277 (1975) (stating that interpretations of one of these acts is "particularly relevant to a proper interpretation of the [other] . . . since both were designed to deal with closely related aspects of the same problem").

No. C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers order sought to remedy) (unpublished); *see also United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) (modification warranted by "clear showing" of changes that have eliminated reasons for order or are such that the order causes unanticipated hardship).⁵

The language of section 5(b) plainly anticipates that the burden is on the petitioner to make "a satisfactory showing" of changed conditions of fact or law to obtain reopening of the order. *See also Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982) (petitioner must show "exceptional circumstances, new, changed or unforeseen at the time the decree was entered"). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of the modification. Even, however, where it has concluded that changes of fact or law require (or that the public interest warrants) reopening an order, the Commission need not modify or vacate that order. *See, Louisiana Pacific Corp.*, Docket No. C-2956, Order and Opinion, Nov. 15, 1989, Slip op. at 6-7.

The legislative history makes clear that the petitioner has the burden of showing, by means other than conclusory statements, why an order should be modified.⁶ The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality); *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");

⁵ Section 5(b) also provides that the Commission may reopen and modify an order, when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Commission Rule 2.51 therefore invites respondents to show in petitions to reopen how the public interest warrants the requested action. 16 CFR 2.51. In such a case, the respondent normally must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 24, 1983), at 2 (hereafter "Damon Letter") (unpublished).

⁶ 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.

RSR Corp. v. FTC, 656 F.2d 718, 721-22 (D.C. Cir. 1981) (applying *Bowman Transportation* standard to FTC order).

III. CHANGED CONDITIONS OF FACT IN THIS MATTER WARRANT
REOPENING AND VACATION OF THE ORDER

Culligan has based its request that the Commission reopen the order on changed conditions of law and of fact and on public interest considerations. For the reasons described below, the Commission concludes that the changes of fact described in the Petition require reopening of the order.⁷

Culligan's Petition shows that changes of fact merit setting aside the order. The water-softener industry is not highly concentrated. See Aff., Exhibit 3. Culligan, which "from 1957-62 . . . probably enjoyed as high as a 30% share of the water-softener market based on factory exit shipments" (Aff. ¶ 31), now has a share of less than 15.6 percent, and its share has been declining in recent years. Aff. ¶ 31. In addition, new entry appears to be easy and not dependent on access to Culligan's distributors. Aff. ¶¶ 37-38. The percentage of water-softener dealers controlled by Culligan has dropped from an estimated 22% in 1972 based on a total of 4,500 outlets to less than 10% today based on a total of over 8,000 outlets. Aff. ¶ 38. So-called "assemblers" now account for more than 58% of the market. Aff. ¶ 33. Culligan, therefore, appears to lack market power.

The Commission concludes that the order is no longer necessary to prevent Culligan from using exclusive dealing to foreclose competition. Having duly considered Culligan's petition, the Commission concludes that changed factual circumstances not foreseeable when the order was issued warrant setting aside that order.

Accordingly, for the reasons above, *it is ordered*, that this matter be, and it hereby is, reopened and that the Commission's order in Docket No. 6673 issued on May 23, 1957, be, and it hereby is, set aside as to Culligan, Inc. as of the date of this order.

Commissioner Strenio not participating.

⁷ Having decided to reopen the order on the basis of changes of fact, the Commission does not reach the issue whether reopening is required by changes of law, or is warranted in the public interest. See e.g. *Goodyear Tire & Rubber Co.*, Docket No. 6486, Order Reopening and Setting Aside Final Order Issued on March 9, 1961 (June 2, 1989) at 5 (Commission may limit decision to a single ground that is clear and well established, rather than discuss all issues raised by a petition).

Complaint

113 F.T.C.

IN THE MATTER OF

PROMODES, S.A., ET AL.

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

Docket 9228. Complaint, Apr. 20, 1989—Decision, May 17, 1990

This consent order requires, among other things, Red Food Stores, Inc., a subsidiary of Promodes S.A., a French grocery company, to divest six supermarkets; requires the divestiture to be made to a Commission-approved acquirer or acquirers within nine months after the order becomes final; and if the respondents do not divest in that time, requires that the respondents shall consent to the appointment by the Commission of a trustee to divest the properties.

Appearances

For the Commission: *Marimichael O. Skubel* and *Ronald B. Rowe*.

For the respondents: *Elaine M. Russo, Sherman & Sterling*, New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the respondents, Promodes, S.A., a foreign corporation, Red Food Stores, Inc. (collectively "Red Food"), a wholly-owned subsidiary of Promodes, S.A., and The Kroger Company ("Kroger"), corporations subject to the jurisdiction of the Commission, have entered into an agreement pursuant to which Red Food will purchase the supermarket assets of Kroger in Chattanooga, Tennessee, that, if completed, would violate the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; that said offer, and the actions of the respondents to implement that offer, constitute violations of Section 5 of the FTC Act; and that a proceeding by the Commission in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section

5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

DEFINITIONS

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

a. "*Supermarkets*" means any full-line retail food stores of 10,000 or more square feet, and which sell primarily a wide variety of canned or frozen foods; dry groceries; non-edible grocery items; fresh meat, poultry and produce (vegetables and fruits), and which often sell delicatessen items, bakery items, fresh fish or other specialty items.

b. "*Red Food*" means Red Food Stores, Inc., its parent Promodes, S.A., and its subsidiaries, divisions and groups controlled by Red Food and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

c. "*Kroger*" means The Kroger Company, its subsidiaries, divisions, and groups controlled by Kroger and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

THE PARTIES

2. Respondent Promodes, S.A., is an alien corporation organized and existing under the laws of France, which is engaged in, among other things, owning and operating supermarkets, hypermarkets and other types of retail grocery operations in the United States, France and Italy.

3. Respondent Red Food Stores, Inc. ("*Red Food*"), a wholly-owned subsidiary of Promodes, S.A., an alien corporation organized and existing under the laws of France, is a Delaware corporation with its principal place of business at 5901 Shallowford Road, Chattanooga, Tennessee, which owns and operates 52 supermarkets located in Georgia and Tennessee.

4. Respondent The Kroger Company ("*Kroger*") is an Ohio corporation, with its principal place of business at 1014 Vine Street, Cincinnati, Ohio.

5. In 1988, Red Food had sales of \$537 million in Tennessee and Georgia.

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

affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

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

THE ACQUISITION

8. On or about March 24, 1989, Red Food and Kroger entered into an agreement pursuant to which Red Food intends to purchase the Chattanooga, Tennessee, supermarket assets and operations of Kroger. Red Food and Kroger both operate supermarkets in the Chattanooga, Tennessee Metropolitan Statistical Area ("MSA"). If the acquisition is consummated as currently proposed by Red Food, the total value of the acquisition will be approximately \$6.5 million. Through this proposed asset acquisition, Red Food will acquire all the supermarket assets of Kroger in Chattanooga, Tennessee.

TRADE AND COMMERCE

Relevant Line of Commerce

9. A relevant line of commerce in which to analyze Red Food's acquisition of Kroger is the retail sale of food and grocery items in supermarkets.

Relevant Section of the Country

10. The relevant section of the country is the Chattanooga MSA, which consists of Hamilton, Sequatchie, and Marion counties in Tennessee, and Catoosa, Walker, and Dade counties in Georgia.

MARKET STRUCTURE

11. Retail sale of food and grocery items in supermarkets in the relevant section of the country is highly concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI") or by two-firm and four-firm concentration ratios.

ENTRY CONDITIONS

12. Entry into the retail sale of food and grocery items in supermarkets in the relevant section of the country is difficult or unlikely.

ACTUAL COMPETITION

13. Red Food and Kroger are actual competitors in the relevant section of the country located in the Chattanooga MSA.

EFFECTS

14. The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant line of commerce in the relevant section of the country in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

- a. By eliminating direct competition between Red Food and Kroger;
- b. By increasing the likelihood that Red Food will unilaterally exercise market power; or
- c. By increasing the likelihood of, or facilitating, collusion where the acquisition would significantly increase already high levels of concentration;

all of which increases the likelihood that firms will increase prices and restrict output of food and groceries both in the near future and for a longer period of time.

VIOLATIONS CHARGED

15. The proposed acquisition of Kroger by Red Food violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 and would, if consummated, violate Section 7 of the Clayton Act, 15 U.S.C. 18 and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

Chairman Oliver and Commissioner Machol dissenting.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents 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 complaint, a statement that the signing of said agreement is for

settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

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

1. Respondent Promodes, S.A., is a corporation organized and existing under the laws of France. Its principal executive offices have the following mailing address: B.P. 17, 14127 Mondeville Cedex, France.
2. Respondent Red Food Stores, Inc., is a Delaware corporation with its principal place of business at 5901 Shallowford Road, Chattanooga, Tennessee.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

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

- a. "*Commission*" means the Federal Trade Commission.
- b. "*Promodes*" means Promodes, S.A., its parents, predecessors, subsidiaries, divisions, groups and affiliates controlled by Promodes and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.
- c. "*Red Food*" means Red Food Stores, Inc., its parents, predecessors, subsidiaries, divisions, groups and affiliates controlled by Red Food and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.
- d. "*Kroger*" means The Kroger Company, its parents, predecessors,

subsidiaries, divisions, groups and affiliates controlled by Kroger and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

e. "*Respondents*" means Promodes and Red Food.

f. "*Chattanooga, Tennessee MSA*" means the metropolitan statistical area comprised of the following counties: Hamilton, Marion, and Sequatchie in Tennessee, and Catoosa, Walker, and Dade in Georgia.

g. "*Acquisition*" means respondents' acquisition of the seven grocery stores owned by Kroger located in the Chattanooga, Tennessee MSA.

h. "*Supermarket*" means any retail food store of 10,000 or more square feet and which sells primarily a variety of canned or frozen foods; dry groceries; non-edible grocery items; fresh meat, poultry and produce (vegetables and fruits) and which often sells delicatessen items, bakery items, fresh fish or other specialty items.

i. "*Assets to be divested*" means the assets described in Paragraph II(A), also known as "II(A) Properties."

II.

It is ordered, That:

(A) Within nine (9) months after this order becomes final, respondents shall divest, absolutely and in good faith,

(1) The Red Food supermarket, currently operating under the trade name "Festival," which was formerly a Kroger store, located at 6901 Lee Highway, Chattanooga, Tennessee;

(2) The Red Food supermarket, currently operating under the trade name "Festival," which was formerly a Kroger store, located at 114 Battlefield Parkway, Fort Oglethorpe, Georgia;

(3) The Red Food supermarket, currently operating under the trade name "Festival," which was formerly a Kroger store, located at 4803 Highway 58, Chattanooga, Tennessee;

(4) The Red Food supermarket, which was formerly a Kroger Store, located at 5080 South Terrace, East Ridge, Tennessee;

(5) The Red Food supermarket located at 401 West Martin Luther King Boulevard, Chattanooga, Tennessee; and

(6) The Red Food supermarket located at 2278 Elm Avenue, South Pittsburg, Tennessee.

The assets to be divested shall include the grocery business

operated, all assets, leases, properties, business and goodwill, tangible and intangible, utilized in the distribution or sale of groceries at the listed locations.

(B) Divestiture of the II(A) Properties shall be made only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the II(A) Properties is to ensure the continuation of the assets as ongoing, viable supermarkets engaged in the same businesses in which the Properties are presently employed and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

(C) Respondents shall take such action as is necessary to maintain the viability and marketability of the II(A) Properties and shall not cause or permit the destruction, removal or impairment of any assets or businesses to be divested except in the ordinary course of business and except for ordinary wear and tear.

III.

It is further ordered, That:

(A) If respondents have not divested, absolutely and in good faith and with the Commission's approval, the II(A) Properties within nine (9) months after this order becomes final, respondents shall consent to the appointment by the Commission of a trustee to divest the II(A) Properties. In the event that the Commission brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45 (l), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. The appointment of a trustee shall not preclude the Commission from seeking civil penalties or any other relief available to it for any failure by respondents to comply with this order.

(B) If a trustee is appointed by the Commission or court pursuant to Part III(A) of this order, respondents shall consent to the following terms and conditions regarding the trustee's duties and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall have the power and authority to divest the II(A) Properties that have not been divested by respondents within the time period for divestiture in Part II. The trustee shall have twelve (12) months from the date of appointment to accomplish the divestiture of the II(A) Properties, which shall be subject to the prior approval of the Commission and, if the trustee is appointed by a court, subject also to the prior approval of the court. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture for the Commission's approval or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission or by the court for a court-appointed trustee; *provided, however*, that the Commission or court may only extend the divestiture period two (2) times.

3. The trustee shall have full and complete access to the personnel, books, records, and facilities related to those assets that the trustee has the duty to divest. Respondents shall develop such financial or other information as the trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

4. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest at no minimum price and the purposes of the divestiture as stated in Part II.

5. The trustee shall serve without bond or other security at the cost and expense of respondents on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to retain at the cost and expense of respondents such consultants, accountants, attorneys, business brokers, appraisers and other representatives and assistants as are reasonably necessary to assist in the divestiture. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission or the court of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to respondents and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee divesting the II(A) Properties. Nothing herein shall be construed to limit the trustee's compensation to an amount not in excess of monies derived from the sale.

6. Within fifteen (15) days after appointment of the trustee and subject to the prior approval of the Commission and, if the trustee was appointed by a court, subject also to the prior approval of the court, respondents shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture of the II(A) Properties.

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

8. The trustee shall report in writing to respondents and the Commission every sixty (60) days from the date the trust agreement is executed concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of Paragraph II of this order, Red Food shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, or have complied with those provisions. Red Food shall include in its compliance report, among other things that are required from time to time, a full description of substantive contacts or negotiations for the divestiture of assets or businesses specified in Paragraph II of this order, including the identity of all parties contacted. Red Food shall include in its compliance report, copies of all written communications to and from such parties, all internal memoranda, reports, and recommendations concerning divestiture.

V.

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for ten (10) years, respondents shall cease and desist from acquiring without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, any supermarket or leasehold interest in any supermarket located in the Chattanooga, Tennessee MSA, including any facility that has operated as a supermarket within six (6) months of the date of the offer of purchase, or any interest in or the stock or

share capital of any entity that owns any interest in or operates any supermarkets located in the Chattanooga, Tennessee MSA, or any interest in or the stock or share capital of any entity that owned any interest in or operated any supermarket located in the Chattanooga, Tennessee MSA within six (6) months of the date of the offer of purchase. *Provided, however,* that these prohibitions shall not relate to the construction of new facilities or the leasing of facilities that have not operated as supermarkets within six months of the date of the offer to lease. One (1) year from the date this order becomes final and annually for nine (9) years thereafter respondents shall file with the Federal Trade Commission a verified written report of their compliance with this paragraph.

VI.

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

Complaint

113 F.T.C.

IN THE MATTER OF

ARCHER-DANIELS-MIDLAND COMPANY, ET AL.

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

Docket C-3289. Complaint, May. 22, 1990—Decision, May 22, 1990

This consent order requires, among other things, Archer-Daniels-Midland Company and its subsidiary, ADM Milling Co., to divest certain wheat flour mills within twelve months of the date this order becomes final and to comply with all the terms of the Agreement to Hold Separate. If respondents do not divest the properties within twelve months of the order, the order requires that they shall consent to the appointment by the Commission of a trustee to divest the properties. Respondents are also required to obtain FTC approval, for a period of 10 years, before acquiring any assets located in the southeast portion of the U.S. used for the production, distribution or sale of bulk bakery wheat flour.

Appearances

For the Commission: *Barbara K. Shapiro* and *Marc G. Schildkraut*.

For the respondents: *Owen Johnson, Akin, Gump, Strauss, Hauer & Feld*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents Archer-Daniels-Midland Company and ADM Milling Co., a wholly-owned subsidiary of Archer-Daniels-Midland Company (hereinafter collectively referred to as "ADM"), both corporations subject to the jurisdiction of the Commission, have acquired certain assets of Dixie Portland Flour Mills, Inc., Dixie Portland of Georgia, Inc., The White Lily Foods Company ("hereinafter collectively referred to as Dixie Portland") in violation of the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21 and

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

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

(A) "*ADM*" means Archer-Daniels-Midland Company and ADM Milling Co., their predecessors, subsidiaries, divisions, groups and affiliates controlled by Archer-Daniels-Midland Company or ADM Milling Co., and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

(B) "*Dixie Portland*" means Dixie Portland Flour Mills, Inc., Dixie Portland of Georgia, Inc., and The White Lily Foods Company, their predecessors, subsidiaries, divisions, groups and affiliates controlled by Dixie Portland Flour Mills, Inc., Dixie Portland of Georgia, Inc., or The White Lily Foods Company and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

(C) "*Bulk bakery wheat flour*" means wheat flour primarily sold to bakeries, manufacturers, or institutional users and delivered in unpackaged form.

II. THE RESPONDENTS

2. Respondent Archer-Daniels-Midland Company is a corporation organized under the laws of Delaware, with its principal office and place of business located at 4666 Faries Parkway, Decatur, Illinois.

3. Respondent ADM Milling Co. is a corporation organized and existing under the laws of Minnesota with its principal place of business at Suite 300, 4501 College Blvd., Leawood, Kansas.

4. Archer-Daniels-Midland Company and ADM Milling Co., at all times relevant herein, have been and are now engaged in commerce as the term "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

III. THE ACQUIRED COMPANY

5. Dixie Portland Flour Mills, Inc. is a corporation organized under the laws of Tennessee with its principal office and place of business located at 1755-D Lynnfield Road, Suite 107, Memphis, Tennessee.

6. Dixie Portland of Georgia, Inc., is a corporation organized and

existing under the laws of Georgia, with its principal office and place of business located at Old Milner Road, Milner Georgia.

7. The White Lily Foods Company is a corporation organized and existing under the laws of Delaware, with its principal office and place of business located at 218 Depot Avenue, Knoxville, Tennessee.

8. Dixie Portland Flour Mills, Inc., Dixie Portland of Georgia, Inc., and The White Lily Foods Company at all times relevant herein have been and are now engaged in commerce as the term "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

IV. THE ACQUISITION

9. On September 25, 1989, ADM entered into an Asset Purchase Agreement which contemplates the acquisition of all the assets and businesses of Dixie Portland other than Rustco Products Co. (hereinafter the "acquisition").

V. RELEVANT MARKETS

10. For purposes of this complaint, the relevant lines of commerce in which to assess the effects of ADM's acquisition of the assets of Dixie Portland is the production and sale of bulk bakery wheat flour.

11. For purposes of this complaint, the relevant sections of the country in which to assess the effects of ADM's acquisition of the assets of Dixie Portland is the southeastern United States, including eastern Tennessee, North Carolina, South Carolina, Georgia, Alabama, and Florida.

VI. MARKET STRUCTURE

12. The production and sale of bulk bakery wheat flour in the southeastern United States is concentrated, whether measured by the Herfindahl-Hirschmann Index or two-firm and four-firm concentration ratios.

VII. ENTRY CONDITIONS

13. Entry into production and sale of bulk bakery wheat flour in the southeastern United States is difficult.

VIII. COMPETITION

14. ADM and Dixie Portland are actual competitors in production and sale of bulk bakery wheat flour in the southeastern United States.

IX. EFFECTS

15. The effect of the acquisition may be substantially to lessen competition in production and sale of bulk bakery wheat flour in the southeastern United States in the following ways, among others:

(A) By eliminating direct and actual competition between ADM and Dixie Portland; and

(B) By significantly enhancing the likelihood of collusion or interdependent coordination among the firms that produce or sell bulk bakery wheat flour in the southeastern United States.

16. All of the above increase the likelihood that firms producing or selling bulk bakery wheat flour in the southeastern United States will increase prices and restrict output both in the near future and in the long term.

X. VIOLATION CHARGED

17. The asset purchase agreement and acquisition as set forth in paragraph 9 above violate Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

Commissioner Calvani recused, and Commissioner Azcuenaga dissenting on the ground that the order provides inadequate relief.

DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the proposed acquisition by ADM Milling Co., a wholly owned subsidiary of Archer-Daniels-Midland Company, (hereinafter collectively "ADM"), of certain of the assets and businesses of Dixie Portland Flour Mills, Inc., Dixie Portland of Georgia, Inc., and The White Lily Foods Company, (hereinafter collectively "Dixie Portland"), which acquisition is more fully described at paragraph 6 below, and ADM having been furnished with a copy of a draft complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge ADM with violations of Section 7 of the Clayton Act as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act as amended, 15 U.S.C. 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondents have violated Section 5 and Section 7, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Proposed respondent Archer-Daniels-Midland Company is a corporation organized under the laws of Delaware, with its principal office and place of business located at 4666 Faries Parkway, Decatur, Illinois.

2. Proposed respondent ADM Milling Co. is a corporation organized and existing under the laws of Minnesota with its principal place of business at Suite 300, 4501 College Blvd., Leawood, Kansas.

3. Dixie Portland Flour Mills, Inc., is a corporation organized under the laws of Tennessee with its principal office and place of business located at 1755-D Lynnfield Road, Suite 107, Memphis, Tennessee.

4. Dixie Portland of Georgia, Inc., is a corporation organized and existing under the laws of Georgia, with its principal office and place of business located at Old Milner Road, Milner, Georgia.

5. The White Lily Foods Company is a corporation organized and existing under the laws of Delaware, with its principal office and place of business located at 218 Depot Avenue, Knoxville, Tennessee.

6. On or about September 25, 1989, ADM Milling Co. and Dixie Portland entered into an agreement which contemplates the acquisition of certain assets and businesses of Dixie Portland by ADM Milling Co.

ORDER

I.

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

(A) "*Acquisition*" means the Asset Purchase Agreement entered into on September 25, 1989, in which ADM and Dixie Portland agreed that ADM will acquire certain of the assets and businesses of Dixie Portland.

(B) "*ADM*" means Archer-Daniels-Midland Company and ADM Milling Co., their predecessors, subsidiaries, divisions, groups and affiliates (including the assets and businesses of Dixie Portland as hereinafter defined) controlled by Archer-Daniels-Midland Company or ADM Milling Co., and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

(C) "*Properties to be divested*" means the assets and businesses of the wheat flour mills currently owned by Dixie Portland in Milner, Georgia, and in Knoxville, Tennessee.

(D) "*Assets and businesses*" include but are not limited to all assets, properties, business and goodwill, tangible and intangible, utilized in the transportation, production, distribution or sale of wheat flour or its raw materials that ADM will acquire from Dixie Portland, including, without limitation, the following:

1. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;
2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes and quality control data;
3. Inventory and storage capacity;
4. All right, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits;
5. All right, title and interest in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

6. All rights under warranties and guarantees, express or implied;
7. All books, records and files; and
8. All items of prepaid expense.

(E) "*Commission*" means the Federal Trade Commission.

(F) "*Dixie Portland*" means Dixie Portland Flour Mills, Inc., Dixie Portland of Georgia, Inc., and The White Lily Foods Company, their predecessors, subsidiaries, (other than Rustco Products, Co.) divisions, groups and affiliates controlled by Dixie Portland Flour Mills, Inc., Dixie Portland of Georgia, Inc., or The White Lily Foods Company and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

(G) "*Remaining properties to be divested*" means the properties to be divested. *Provided, however*, if ADM has divested, after receiving Commission approval, the assets and businesses of one of the wheat flour mills included in the properties to be divested, the remaining properties to be divested shall mean the assets and businesses of the remaining wheat flour mill within the properties to be divested. *Provided, further*, if ADM has divested, after receiving Commission approval, the assets and businesses of the wheat flour mill owned by Dixie Portland in Cleveland, Tennessee, the assets and businesses of the wheat flour mill owned by Dixie Portland in Knoxville, Tennessee shall be excluded from the Remaining Properties to be Divested.

(H) "*Southeast*" means North Carolina, South Carolina, Georgia, Alabama, Florida and that part of Tennessee east of Nashville.

(I) "*Viability and Competitiveness*" of the properties to be divested or the remaining properties to be divested means each such property has sufficient provision for transportation, wheat storage, cleaning, grinding, and milling; is capable of operating independently at the same output as currently (at competitive prices); and is capable of having the same competitive impact as it currently has in the bulk bakery wheat flour market.

II.

It is ordered, That:

(A) Within twelve (12) months of the date this order becomes final, ADM shall divest; absolutely and in good faith, the properties to be divested, along with any additional assets and businesses of Dixie Portland and other arrangements that may be necessary to assure the viability and competitiveness of the properties to be divested.

Provided, however, ADM may divest absolutely and in good faith, the assets and businesses of the wheat flour mills currently owned by Dixie Portland in Milner, Georgia, and in Cleveland, Tennessee, if the Commission, in its sole discretion, approves the substitute divestiture of the assets and businesses of such mills for the divestiture of the properties to be divested.

(B) ADM shall comply with all terms of the Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I. Said Agreement shall continue in effect until such time as ADM has divested the properties to be divested or until such other time as the Agreement to Hold Separate provides.

(C) ADM shall divest the properties to be divested only to an acquiring entity or entities that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. ADM shall demonstrate the viability and competitiveness of the properties to be divested in its application for approval of a proposed divestiture. The purpose of the divestiture of the properties to be divested is to ensure the continuation of the assets as ongoing, viable wheat flour mills engaged in the same businesses in which the properties to be divested are presently employed and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

(D) ADM shall take such action as is necessary to maintain the viability and marketability of the properties to be divested and shall not cause or permit the destruction, removal or impairment of any assets or businesses it may have to divest except in the ordinary course of business and except for ordinary wear and tear.

III.

It is further ordered, That:

(A) If ADM has not divested, absolutely and in good faith and with the Commission's approval, the properties to be divested within twelve (12) months of the date this order becomes final, ADM shall consent to the appointment by the Commission of a trustee to divest the remaining properties to be divested, along with any additional assets and businesses of Dixie Portland and other arrangements that may be necessary to assure the viability and competitiveness of the remaining properties to be divested. *Provided, however,* if the Commission has not approved or disapproved a proposed divestiture within 120 days of

the date the application for such divestiture has been put on the public record, the running of the twelve (12) month period shall be tolled until the Commission approves or disapproves the divestiture. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, ADM shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by ADM to comply with this order.

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

1. The Commission shall select the trustee, subject to the consent of ADM, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustees shall, subject to the prior approval of the Commission, have the exclusive power and authority to divest the remaining properties to be divested, along with any additional assets and businesses of Dixie Portland and other arrangements that may be necessary to assure the viability and competitiveness of the remaining properties to be divested.

3. The trustee shall have eighteen (18) months from the date of appointment to accomplish the divestiture. If, however, at the end of the eighteen-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission. *Provided, however*, the Commission may only extend the divestiture period two (2) times.

4. The trustee shall have full and complete access to the personnel, books, records and facilities related to the remaining properties to be divested, or any other relevant information, as the trustee may reasonably request. ADM shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. ADM shall take

no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by ADM shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or the court for a court-appointed trustee.

5. Subject to ADM's absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in Paragraph II.(C) of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each acquiring entity for the divestiture of the remaining properties to be divested. The divestiture shall be made in the manner set out in Paragraph II, *provided, however*, if the trustee receives bona fide offers from more than one acquiring entity or entities, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by ADM from among those approved by the Commission.

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

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

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

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

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

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

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

IV.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until ADM has fully complied with the provisions of Paragraphs II and III of this order, ADM shall submit to the Federal Trade Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying or has complied with those provisions. ADM shall include in its compliance reports, among other things that are required from time to time, a full description of substantive contacts or negotiations for the divestiture of assets or businesses specified in Paragraph II of this order, including the identity of all parties contacted. ADM also shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and reports and recommendations concerning divestiture.

V.

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for ten (10) years, ADM shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, assets located in the Southeast used for or previously used for (and still suitable for use for) the production, distribution or sale of bulk bakery wheat flour. ADM shall also cease and desist from acquiring, without the prior approval of the Federal Trade Commis-

sion, directly or indirectly, through subsidiaries or otherwise, any interest in, or the stock or share capital of any entity that owns or operates assets located in the Southeast engaged in the production, distribution or sale of bulk bakery wheat flour. *Provided, however,* these prohibitions shall not relate to the construction of new facilities. One year from the date this order becomes final and annually for nine years thereafter, ADM shall file with the Federal Trade Commission a verified written report of its compliance with this paragraph.

VI.

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

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

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

VII.

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

Commissioner Calvani recused, and Commissioner Azcuenaga dissenting on the ground that the order provides inadequate relief.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and

among Archer-Daniels-Midland Company, a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 4666 Faries Parkway, Decatur, Illinois; ADM Milling Co., a corporation organized and existing under the laws of Minnesota, with its principal place of business at Suite 300, 4501 College Blvd., Leawood, Kansas (collectively referred to as 'ADM'); and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "parties").

Premises

Whereas, on September 25, 1989, ADM entered into an asset purchase agreement which contemplates the acquisition of certain of the assets and businesses of Dixie Portland Flour Mills, Inc., Dixie Portland of Georgia, Inc., and The White Lily Foods Company (hereinafter the "acquisition"); and

Whereas, Dixie Portland Flour Mills, Inc. (with its principal executive address at 1755-D Lynnfield Road Suite 107, Memphis, Tennessee, Dixie Portland of Georgia, Inc., (with its principal office and place of business located at Old Milner Road, Milner, Georgia), and The White Lily Foods Company (with its principal office and place of business located at 218 Depot Avenue, Knoxville, Tennessee) (hereinafter "Dixie Portland") produce wheat flour; and

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

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

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

Whereas, the Commission is concerned that if the acquisition is

consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the properties to be divested as described in Paragraph I of the consent order and the Commission's right to seek to restore Dixie Portland's wheat flour milling businesses as a viable competitor; and

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

(i) Preserve Dixie Portland's wheat flour milling business as a viable independent business pending the divestiture of the properties to be divested as viable and ongoing enterprises,

(ii) Remedy any anticompetitive effects of the acquisition, and

(iii) Preserve Dixie Portland's wheat flour mills as ongoing, viable wheat flour mills engaged in the same business in which they are presently employed in the event that divestiture is not achieved; and

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

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

Now, therefore, the parties agree, upon understanding that the Commission has not yet determined whether the acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will not seek further relief from ADM with respect to the acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the consent order to which it is annexed and made a part thereof, and in the event the required divestitures are not accomplished, to seek divestiture of such assets as are held separate pursuant to this Agreement, as follows:

1. ADM agrees to execute and be bound by the attached consent order.

2. ADM agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 2.a—2.c, it will comply with the provisions of paragraph 3 of this Agreement:

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

b. 120 days after publication in the Federal Register of the consent

order, unless by that date the Commission has finally accepted such order,

c. the day after the divestitures required by the consent order have been completed.

3. ADM will hold Dixie Portland's assets and businesses associated with the transportation, production, distribution and sale of wheat flour and the acquisition of wheat as they are presently constituted, *except* for those assets and businesses associated exclusively with the wheat flour mills currently owned by Dixie Portland in Arkansas City, Kansas and Chicago, Illinois ("Dixie") separate and apart on the following terms and conditions:

a. Dixie, as it is presently constituted, shall be held separate and apart and shall be operated independently of ADM (meaning here and hereinafter, ADM excluding Dixie) except to the extent that ADM must exercise direction and control over Dixie to assure compliance with this Agreement.

b. ADM shall not exercise direction or control over, or influence directly or indirectly, Dixie or any of its operations or businesses; *provided, however*, that ADM may exercise only such direction and control over Dixie as is necessary to assure compliance with this Agreement.

c. ADM shall maintain the viability and marketability of Dixie and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair its marketability or viability.

d. Except for the single ADM director, officer, employee, or agent serving on the "New Board" or "Management Committee" (as defined in subparagraph 3.h), ADM shall not permit any director, officer, employee, or agent of ADM to also be a director, officer or employee of Dixie.

e. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the acquisition, defending investigations or litigation, or negotiating agreements to dispose of assets, ADM shall not receive or have access to, or the use of, any of Dixie's "material confidential information" not in the public domain, except as such information would be available to ADM in the normal course of business if the acquisition had not taken place. Any such information that is obtained pursuant to this subparagraph shall only be used for the purpose set out in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not indepen-

dently known to ADM from sources other than Dixie, and includes but is not limited to customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets).

f. ADM shall not change the composition of the management of Dixie except that the Dixie directors or members serving on the New Board or Management Committee (as defined in subparagraph 3.h) shall have the power to remove employees for cause.

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

h. ADM shall either separately incorporate Dixie and adopt new Articles of Incorporation and By-laws that are not inconsistent with other provisions of this Agreement or shall establish a separate business venture with articles of agreement covering the conduct of Dixie in accordance with this Agreement. ADM shall also elect a new three person board of directors of Dixie ("New Board") or Management Committee of Dixie ("Management Committee") once it is a majority owner of Dixie. ADM may elect the directors to the New Board or select the members of the Management Committee; *provided, however*, that such New Board or Management Committee shall consist of at least two current Dixie Portland directors, officers, or employees and no more than one ADM director, officer, employee, or agent. Except as permitted by this Agreement, the director of Dixie or member of the Dixie Management Committee who is also an ADM director, officer, employee or agent, shall not receive in his or her capacity as a director or Management Committee member of Dixie material confidential information and shall not disclose any such information received under this Agreement to ADM or use it to obtain any advantage for ADM. Said director of Dixie or member of the Management Committee who is also an ADM director, officer, employee or agent, shall enter a confidentiality agreement prohibiting disclosure of confidential information. Such director or Management Committee member shall participate in matters which come before the New Board or Management Committee only for the limited purpose of considering a capital investment or other transactions exceeding \$1,000,000 and carrying out ADM's and Dixie's responsibility to assure that properties to be divested are maintained in such manner as will permit their divestiture as ongoing, viable assets. Except as permitted by this Agreement, such Director or Management Committee member shall not participate in any matter, or attempt to influence the votes of the other directors or Management Committee members

with respect to matters that would involve a conflict of interest if ADM and Dixie were separate and independent entities. Meetings of the New Board or Management Committee during the term of this Agreement shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Agreement.

i. All earnings and profits of Dixie shall be retained separately in Dixie. If necessary, ADM shall provide Dixie with sufficient working capital to operate at the current rate of operation.

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

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

a. Access during the office hours of ADM and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of ADM relating to compliance with this Agreement;

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

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

ARCHER-DANIELS-MIDLAND COMPANY

J. R. Randall

President

ADM MILLING CO. -

H. D. Dale

Chairman

FEDERAL TRADE COMMISSION

Jay C. Shaffer

Acting General Counsel

IN THE MATTER OF
ILLINOIS CEREAL MILLS, INC., ET AL.

Docket 9213. Complaint, June 30, 1988—Dismissal Order, May 31, 1990*

The Commission has dismissed the complaint in this matter as to respondent Elders Grain, Inc., by granting a motion to that effect filed by complaint counsel. In certifying the motion to the Commission, the Administrative Law Judge agreed that continued prosecution of the case, with respect to this respondent, is no longer in the public interest because respondent has exited the dry corn milling industry.

ORDER DISMISSING COMPLAINT

Pursuant to Section 3.22 of the Commission's Rules of Practice, complaint counsel have moved that the Commission dismiss the complaint in this matter as to the respondent Elders Grain, Inc., and the Administrative Law Judge has certified the motion to the Commission, with his recommendation that the motion be granted. The motion is granted.

It is ordered, That the complaint in this matter be, and it hereby is, dismissed as to the respondent Elders Grain, Inc.

Commissioner Calvani recused.

*Complaint previously published at 113 FTC 273 (1990).

IN THE MATTER OF
OLIN CORPORATION

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

Docket 9196. Complaint, July 18, 1985—Final Order, June 13, 1990

This final order requires the respondent, a Stamford, Ct., based corporation, to divest the swimming pool chemicals business it acquired from FMC Corporation to a Commission-approved acquirer within twelve months, or else have the Commission appoint a trustee to effect the divestiture. In addition, for ten years, respondent must obtain FTC approval before acquiring any interest in a company that produces and sells swimming pool chemicals.

Appearances

For the Commission: *Stephen W. Riddell* and *John V. Lacci*.

For the respondent: *Stuart N. Roth*, *Olin Corporation*, Stamford, Ct. *Brian C. Mohr*, *Skadden, Arps, Slate, Meagher & Flom*, Washington, D.C. *Jim Lynch*, *Morgan, Lewis & Bockius*, Washington, D.C. and *Neal R. Stoll*, *Skadden, Arps, Slate, Meagher & Flom*, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, Olin Corporation ("Olin"), a corporation subject to the jurisdiction of the Commission, has entered into an agreement with FMC Corporation ("FMC"), which agreement, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, that said agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

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

(a) "*Dry swimming pool sanitizers*" means dry chemical compounds, generally containing chlorine as the sanitizing or disinfecting agent, that are used to kill bacteria and inhibit the growth of algae in swimming pool water, including, but not limited to, chlorinated isocyanurates and calcium hypochlorite;

(b) "*Chlorinated isocyanurates*" means cyanuric acid's chlorinated derivatives, dichloroisocyanurates and trichloroisocyanuric acid, which, among other applications, are used as dry swimming pool sanitizers; and

(c) "*Calcium hypochlorite*" means a white crystalline solid produced from hydrated lime, chlorine and alkali, which is used primarily as a dry swimming pool sanitizer.

II. OLIN

2. Olin is a corporation organized under the laws of Virginia with its executive offices at 120 Long Ridge Road, Stamford, Connecticut.

3. Olin is a major worldwide manufacturer of chemicals, metal products and ammunition.

4. In 1984, Olin had sales of \$2.1 billion and assets of \$1.6 billion. [2]

5. Olin is a leading marketer of chlorinated isocyanurates in the United States and throughout the world, and has a major facility for the production of trichloroisocyanuric acid located at Lake Charles, Louisiana, which facility is not presently producing any trichloroisocyanuric acid.

6. Olin is the world's leading manufacturer and marketer of calcium hypochlorite, and operates a major facility for the production of calcium hypochlorite at Charleston, Tennessee.

III. FMC

7. FMC is a corporation organized under the laws of Delaware with its executive offices at 200 East Randolph Drive, Chicago, Illinois.

8. FMC is among the world's largest producers of machinery and chemicals for industrial, agricultural and governmental use.

9. In 1984, FMC has sales of approximately \$3.3 billion and assets of approximately \$2.4 billion.

10. FMC is a leading manufacturer and marketer of chlorinated isocyanurates, and operates a major facility for the production of chlorinated isocyanurates at South Charleston, West Virginia.

IV. JURISDICTION

11. At all times relevant herein, respondent, Olin, has been, and is now, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. THE ACQUISITION

12. On or about February 7, 1985, Olin and FMC entered into an agreement pursuant to which Olin intends to acquire FMC's chlorinated isocyanurate and cyanuric acid assets for \$49.5 million. Among the assets included in the agreement are FMC's chlorinated isocyanurate and cyanuric acid plant at South Charleston, West Virginia; FMC's repackaging facility at Livonia, Michigan; FMC's Sun brand name; FMC's technology for the production of cyanuric acid and chlorinated isocyanurates; and FMC's fifty percent (50%) interest in Chlor-Chem, Limited, a European manufacturer of chlorinated isocyanurates.

VI. TRADE AND COMMERCE

13. The relevant product markets in which to evaluate the effects of this acquisition are:

- (a) The manufacture and sale of chlorinated isocyanurate and calcium hypochlorite dry swimming pool sanitizers; and
- (b) The manufacture and sale of chlorinated isocyanurate dry swimming pool sanitizers. [3]

14. The relevant geographic market is the United States.

A. *Chlorinated Isocyanurate and Calcium Hypochlorite Dry Swimming Pool Sanitizer Market*

15. The total value, at the producer level, of chlorinated isocyanurate and calcium hypochlorite dry swimming pool sanitizers produced for consumption in the United States in 1984 was approximately \$320 million. In 1984, manufacturing facilities located in the United States had the capacity to produce approximately 350 million pounds of chlorinated isocyanurate and calcium hypochlorite dry swimming pool sanitizers annually.

16. The value of Olin's production of chlorinated isocyanurates and calcium hypochlorite accounted for 40.6% of the value (stated in

paragraph 15 hereof) of chlorinated isocyanurate and calcium hypochlorite dry swimming pool sanitizers produced for consumption in the United States in 1984.

17. The value of FMC's production of chlorinated isocyanurates accounted for 16.3% of the value (stated in paragraph 15 hereof) of chlorinated isocyanurate and calcium hypochlorite dry swimming pool sanitizers produced for consumption in the United States in 1984.

18. Olin, including its Lake Charles, Louisiana trichloroisocyanuric acid plant, presently accounts for approximately 50% of the United States capacity (stated in paragraph 15 hereof) for the production of chlorinated isocyanurate and calcium hypochlorite dry swimming pool sanitizers.

19. FMC presently accounts for approximately 12% of the United States capacity (stated in paragraph 15 hereof) for the production of chlorinated isocyanurate and calcium hypochlorite dry swimming pool sanitizers.

20. Barriers to entry into the manufacture of chlorinated isocyanurate and calcium hypochlorite dry swimming pool sanitizers are substantial.

21. Olin and FMC are actual, direct and substantial competitors in the manufacture and sale of chlorinated isocyanurates and calcium hypochlorite dry swimming pool sanitizers in the United States, and throughout the world.

*B. Chlorinated Isocyanurate Dry Swimming
Pool Sanitizer Market*

22. The total value, at the producer level, of chlorinated isocyanurate dry swimming pool sanitizers produced for consumption in the United States in 1984 was approximately \$121 million. In 1984, manufacturing facilities located in the United States had the capacity to produce approximately 162 million pounds of chlorinated isocyanurate dry swimming pool sanitizers annually.

23. In 1983 Olin produced 15.5 million pounds of chlorinated isocyanurates. In 1984 Olin produced 14.3 million pounds of chlorinated isocyanurates before entering an agreement to obtain chlorinated isocyanurates from another chlorinated isocyanurate producer and closing its own production facility. The chlorinated isocyanurates produced by and purchased for resale by Olin accounted for approximately 16% of the chlorinated isocyanurate dry swimming pool sanitizers produced for consumption in the United States in 1984. [4]

24. FMC's production of chlorinated isocyanurates accounted for 29.6% of the chlorinated isocyanurate dry swimming pool sanitizers produced for consumption in the United States in 1984.

25. Olin, including its Lake Charles, Louisiana trichloroisocyanuric acid plant, presently accounts for approximately 19.2% of the United States capacity (stated in paragraph 22 hereof) for the production of chlorinated isocyanurate dry swimming pool sanitizers.

26. FMC presently accounts for approximately 26.6% of the United States capacity (stated in paragraph 22 hereof) for the production of chlorinated isocyanurate dry swimming pool sanitizers.

27. Barriers to entry into the manufacture of chlorinated isocyanurate dry swimming pool sanitizers are substantial.

28. Olin and FMC are actual, direct and substantial competitors in the manufacture and/or sale of chlorinated isocyanurate dry swimming pool sanitizers in the United States, and throughout the world.

VII. EFFECTS OF THE ACQUISITION

29. The effects of the proposed acquisition of FMC's isocyanurate assets by Olin may be substantially to lessen competition or to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, because, *inter alia*:

(a) Substantial direct competition between Olin and FMC in the relevant lines of commerce will be eliminated;

(b) Already high concentration in the relevant lines of commerce will be increased, thereby increasing the likelihood of successful collusive behavior among the remaining firms in the relevant lines of commerce; and

(c) FMC will be eliminated as a significant independent competitive influence in the relevant lines of commerce.

VIII. VIOLATIONS CHARGED

30. The proposed acquisition of the chlorinated isocyanurate and cyanuric acid assets of FMC by Olin would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

31. The purchase agreement described in paragraph 12 violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

AGREEMENT TO MAINTAIN ISOCYANURATE ASSETS
AND TO TERMINATE THE MONSANTO TOLLING AGREEMENT

Agreement, dated as of July 18, 1985, by and between Olin Corporation ("Olin"), a corporation organized and existing under and by virtue of the laws of the Commonwealth of Virginia with headquarters at 120 Long Ridge Road, Stamford, Connecticut, and the Federal Trade Commission ("Commission"), an independent agency of the United States Government established under the Federal Trade Commission Act of 1914 (Olin and the Commission are collectively, the "Parties").

On or about March 7, 1985, the Bureau of Competition of the Federal Trade Commission commenced an investigation of Olin's proposed acquisition ("Asset Acquisition") of certain assets ("Isocyanurate Assets") of FMC Corporation ("FMC") pursuant to an asset purchase agreement ("Asset Purchase Agreement").

During the course of this investigation, it has come to the attention of the Commission that in 1984 Olin entered into an agreement with Monsanto Company ("Monsanto") under which Monsanto provides Olin with chlorinated isocyanurates for resale ("Monsanto Tolling Agreement"). The Commission has raised questions concerning the competitive implications of the Monsanto Tolling Agreement in the context of the proposed Asset Acquisition.

Olin and FMC wish to avoid any delay which might result from an action brought by the Commission to enjoin Olin and FMC from consummating the Asset Acquisition. [2]

The Commission, subject to all of the terms and conditions stated herein, agrees to refrain from commencing an action to enjoin the consummation of the Asset Acquisition. The Commission, however, is concerned that Olin maintain the Isocyanurate Assets in a state equal to, or better than, their Current Condition pending further investigation of the Asset Acquisition and the Commission's consideration of any appropriate ultimate relief, which relief may include, without limitation, an order requiring Olin to divest all or part of the Isocyanurate Assets. To mitigate this concern, Olin agrees to maintain the acquired Isocyanurate Assets in a state equal to, or better than, their Current Condition. Also, in order to respond to the questions raised concerning the competitive implications of the Monsanto Tolling Agreement during the pendency of this investigation or any administrative proceeding challenging the Asset Acquisition, Olin

agrees, subject to the provisions of paragraph 5 hereof, to withdraw from that agreement in conjunction with the consummation of the Asset Acquisition.

Wherefore, in consideration of the mutual covenants set forth herein, the Parties agree as follows:

1. Definitions.

As used in this Agreement, the following terms shall have the following meanings:

(a) "*Olin*" means Olin Corporation, its successors and assigns, and all of its divisions and majority-owned subsidiaries, wherever located;

(b) "*FMC*" means FMC Corporation, a corporation organized and existing under the laws of the State of Delaware, its successors and assigns, and all of its subsidiaries, affiliates, divisions, joint ventures and partnerships, whether wholly or partly owned, and wherever located; [3]

(c) "*Agreement*" means this Agreement to Maintain Isocyanurate Assets and to Terminate the Monsanto Tolling Agreement;

(d) "*Isocyanurate Assets*" means the tangible and intangible assets of the isocyanurate business of FMC, and includes, without limitation, the South Charleston Isocyanurate Plant, the Livonia Repackaging Operations, the Sun brand name, any other brand names used to identify products manufactured or sold by the isocyanurate business of FMC, all technology, including the Sulfolane technology, used or intended to be used in the production of cyanuric acid and/or chlorinated isocyanurates, and the fifty percent (50%) interest currently held by FMC in Chlor-Chem, Limited ("*Chlor-Chem*"), together with all associated titles, properties, interests, rights and privileges, including without limitation, all buildings, machinery, equipment, Sun brand and bulk isocyanurate customer lists, patents, trade names, trademarks, and other property of whatever description, together with all additions and improvements thereto, whether made before or after the Asset Acquisition;

(e) "*Asset Acquisition*" means Olin's acquisition of the Isocyanurate Assets from FMC pursuant to the Asset Purchase Agreement;

(f) "*Asset Purchase Agreement*" means the agreement or agreements between Olin and FMC pursuant to which [4] Olin is to acquire, and does acquire, all or any part of the Isocyanurate Assets of FMC. The Asset Purchase Agreement includes, without limitation, the agreement set forth in the letter (attached as Exhibit A), dated

February 7, 1985, as subsequently modified by the parties in reaching a definitive agreement pursuant to which all or any part of the Isocyanurate Assets are transferred from FMC to Olin;

(g) "*Current Condition*" means the Production Capabilities and integrity of the Isocyanurate Assets at the time of the closing of the Asset Acquisition. For purposes of this definition, the "*Production Capabilities*" of the South Charleston Isocyanurate Plant means:

- (i) [] pounds annually for the Cyanuric Acid Line at the same or equivalent consumption rates of principal raw material inputs, including energy, achieved on this line at this volume in 1984.
- (ii) [] pounds annually for the Trichlor Line at the same or equivalent consumption rates of principal raw material inputs, including energy, achieved on this line at this volume in 1984.
- (iii) [] pounds annually for the Dichlor Line at the same or equivalent [5] consumption rates of principal raw material inputs, including energy, achieved on this line at this volume in 1984.
- (iv) [] pounds annually of Trichlor or [] pounds annually of Dichlor for the Swing Line at the same or equivalent consumption rates of principal raw material inputs, including energy, achieved on this line at this volume in 1984.

For purposes of this definition, the "*Production Capabilities*" of the Livonia Repackaging Operations means [] pounds of Trichlor packaged per month per shift and [] pounds of Dichlor packaged per month per shift.

Nothing in this Agreement shall prohibit Olin from improving the Production Capabilities of the South Charleston Isocyanurate Plant and/or the Livonia Repackaging Operations.

(h) "*South Charleston Isocyanurate Plant*" means the chlorinated dry bleach manufacturing facilities located at South Charleston, West Virginia, and includes, without limitation, the facilities and equipment for the manufacture, processing, storage and preparation for bulk shipment of trichlor, dichlor and cyanuric acid;

(i) "*Livonia Repackaging Operations*" means the [6] repackaging facility and swimming pool chemicals support operations to be acquired by Olin from FMC pursuant to the Asset Purchase

Agreement, including, without limitation, the assets and operations of Sun Pool Products and the repackaging facilities located in Livonia, Michigan, but excluding any sodium hypochlorite equipment or facilities so acquired;

(j) "*Trichlor*" means trichloroisocyanuric acid;

(k) "*Dichlor*" means any sodium dichloroisocyanurate;

(l) "*Cyanuric Acid Line*" means the set of equipment at the South Charleston Isocyanurate Plant historically used in, and dedicated to, the manufacture, processing, storage, packaging and preparation for bulk shipment of cyanuric acid;

(m) "*Trichlor Line*" means the set of equipment at the South Charleston Isocyanurate Plant historically used in, and dedicated to, the manufacture, processing, storage, packaging and preparation for bulk shipment of trichlor;

(n) "*Dichlor Line*" means the set of equipment at the South Charleston Isocyanurate Plant historically used in, and dedicated to, the manufacture, processing, storage, packaging and preparation for bulk shipment of dichlor;

(o) "*Swing Line*" means the set of equipment at the South Charleston Isocyanurate Plant historically used in the manufacture, processing, storage, packaging and preparation for bulk shipment of both trichlor and dichlor; [7]

(p) "*Material Confidential Information*" means competitively sensitive or proprietary information not independently known to Olin and includes, but is not limited to, supplier lists, Sun brand and bulk isocyanurate customer lists, present and forecasted production rates, price and cost information, patents, technologies, processes, trade secrets and other knowhow;

(q) "*Competitive Plant Operating Practice*" means the management and operation of the South Charleston Isocyanurate Plant and the Livonia Repackaging Operations in such a manner as to maintain, or improve their Current Condition, including, without limitation, the requirements that capital investment be made sufficient to maintain their Current Condition, that all improvements be made which are necessary to maintain their Current Condition, and that these facilities be maintained in accordance with Olin's usual standards of plant maintenance or with accepted industry practice, whichever standard is higher;

(r) "*Monsanto Tolling Agreement*" means the agreement (attached as Exhibit B), effective July 1, 1984, between Olin and Monsanto

Company relating to the tolling and sale of cyanuric acid, trichlor and dichlor, and any and all modifications thereto. [8]

2. Purpose

This Agreement is entered into for the purposes of allowing Olin to consummate the Asset Acquisition and to avoid litigating an action brought by the Commission to enjoin Olin from consummating the Asset Acquisition; of assuring that the Isocyanurate Assets will remain in a state equal to, or better than, their Current Condition; of allowing the Commission the opportunity to complete its investigation and deliberations while preserving the Commission's ability to obtain effective divestiture or other appropriate relief; and of terminating the Monsanto Tolling Agreement in a manner that will minimize any anticompetitive implications of that agreement in the context of the consummation of the Asset Acquisition. All questions arising under this Agreement are to be resolved in furtherance of these stated purposes.

3. Term of the Agreement

This Agreement shall remain in effect and be binding upon the Parties, their successors and assigns, until October 1, 1985; provided, however, that this Agreement shall terminate immediately upon receipt of notice by Olin from the Commission or any authorized representative thereof that the investigation has been closed; provided further, however, that notwithstanding any other provision of this paragraph, if the Commission, prior to the above-mentioned date, issues an administrative complaint challenging the Asset Acquisition, this Agreement shall remain in effect until the administrative complaint is dismissed by the Commission, or until the appellate review process is exhausted, or until the order of the Commission made thereon becomes final.

4. Maintenance of Current Condition of Isocyanurate Assets

Olin agrees that during the term of this Agreement it shall take all necessary steps to maintain the acquired Isocyanurate Assets in a state equal to, or better than, [9] their Current Condition, and that Olin shall not knowingly cause, or fail to take reasonable steps to prevent, any diminution of the Current Condition of said Isocyanurate Assets, except that Olin shall not be responsible for any diminution of the Current Condition of the Isocyanurate Assets which is the

proximate result of any circumstance beyond Olin's control such as an act of God, fire, flood, war, government action, or labor trouble. Without in any way limiting the foregoing:

(a) *Maintenance of South Charleston Isocyanurate Plant*

Olin agrees that it shall take all necessary steps to maintain the Current Condition of the South Charleston Isocyanurate Plant, and that Olin shall not knowingly cause, or fail to take reasonable steps to prevent, any change in the South Charleston Isocyanurate Plant or its manner of operation that would impair its Current Condition as an isocyanurate plant. Olin agrees to staff and manage this facility consistent with Competitive Plant Operating Practice, and to maintain all the equipment in the facility in good working order. In addition, Olin agrees not to make any permanent changes in the Swing Line that would preclude that line from being able to produce either dichlor or trichlor in the future, and will maintain the Swing Line in such a manner that, upon divestiture, this Line would be capable of producing either trichlor or dichlor. Provided, however, that if Olin determines not to operate all, or any part of, the South Charleston Isocyanurate Plant's Cyanuric Acid Line, Trichlor Line, Dichlor Line or Swing Line, Olin shall maintain said Line or Lines in such a condition that, at any given time, cyanuric acid, trichlor and dichlor production could be recommenced on said Cyanuric Acid, Trichlor, Dichlor, and Swing Lines, respectively, within 12 (twelve) months, and could be recommenced in a state equal to, or better than, the Current Condition. Moreover, in order to facilitate possible future divestiture of these assets, Olin agrees, at the time the Commission issues a divestiture order, to begin the steps necessary to restore the Current Condition of the Cyanuric Acid, Trichlor, Dichlor, or Swing Lines, or any part or parts thereof, that were not operated by Olin during the course of this Agreement. Olin [10] agrees that, within 12 (twelve) months of the time the Commission issues a divestiture order, these assets will have been restored to their Current Condition so that they could be immediately utilized by any purchaser of the divested assets as isocyanurate production lines.

(b) *The Livonia Repackaging Operations*

Olin agrees that, with the exception of the sodium hypochlorite assets located there, it shall take all necessary steps to maintain the Current Condition of the Livonia Repackaging Operations and that

Olin shall not knowingly cause, or fail to take reasonable steps to prevent, any change in the Livonia Repackaging Operations or its manner of operation that would impair its Current Condition as a repackaging and swimming pool chemicals support operation.

(c) *Maintenance of the Sun Brand*

Olin agrees to preserve the independence of the Sun brand, to use its best efforts to restore or improve upon the sales volumes achieved by the Sun brand in 1984, and not to knowingly cause the diminution of the brand.

5. Withdrawal From The Monsanto Tolling Agreement

Olin agrees to withdraw from the Monsanto Tolling Agreement in accordance with the following provisions:

(a) Olin shall take all necessary steps to terminate, and shall terminate, the Monsanto Tolling Agreement as of December 31, 1986, and, within seven business days of the execution of this Agreement, shall notify Monsanto of its intention to terminate the Monsanto Tolling Agreement; [11]

(b) Olin will order a maximum of [] pounds of trichlor and [] pounds of dichlor from Monsanto for delivery between the date of this Agreement and December 31, 1985;

(c) Olin will order a maximum of [] pounds of trichlor and [] pounds of dichlor from Monsanto for delivery between December 31, 1985, and June 30, 1986; and

(d) Olin will accept no trichlor, dichlor or cyanuric acid from Monsanto under the Monsanto Tolling Agreement after the above orders are received.

6. Maintenance of Books and Records

Olin shall maintain separate cost books and records for the South Charleston Isocyanurate Plant and the Livonia Repackaging Operations. Olin shall prepare, in a manner consistent with its standard reporting procedures, a separate financial statement for the Sun brand and Olin's bulk isocyanurate business. Olin shall provide the Commission's Bureau of Competition with quarterly and annual financial statements for the Sun brand and Olin's bulk isocyanurate business, and capital spending reports for the South Charleston Isocyanurate Plant and the Livonia Repackaging Operations. All such books, records and statements will be kept in a manner consistent

with Olin's standard accounting practices. In addition, Olin shall provide the Commission with copies of all licensing agreements between Olin and Chlor-Chem, and all contracts or agreements between Olin and any other producer(s) of cyanuric acid, trichlor or dichlor relating to the purchase, sale, transfer or exchange of cyanuric acid, trichlor or dichlor between Olin and that producer or producers.

[12]

7. Disposal or Encumbrance of Assets

The Isocyanurate Assets shall not be sold, transferred, or otherwise disposed of by Olin to any third party, except in the ordinary course of business, without the prior written approval of the Commission; provided, however, that nothing in this Agreement shall prohibit Olin from transferring technology to Chlor-Chem in a manner consistent with the purposes of this Agreement. With respect to any such technology transferred to, or developed within, Chlor-Chem, Olin agrees to transfer said technology, in such a manner, and under such terms and conditions, that Olin retains the right to divest itself of said technology, including all improvements thereto, should the Commission order said divestiture. In addition, Olin shall not mortgage, pledge, or incur liens against the Isocyanurate Assets or any portion thereof as security for any indebtedness of Olin or pursuant to any loan transaction, unless the proceeds are utilized entirely for the Isocyanurate Assets operation.

8. Confidential Information

Olin shall hold in strict confidence and shall not, without prior written Commission approval, divulge to any third party, with the exception of Chlor-Chem, any Material Confidential Information about the Isocyanurate Assets that Olin may obtain from its ownership of those assets; provided, however, that Olin may disclose Material Confidential Information to consultants, contractors or suppliers retained by Olin.

9. Access By Commission

For the purpose of ensuring compliance with this Agreement, Commission counsel or other authorized representatives shall be permitted, upon written request and on reasonable notice to Olin, (a) access, during office hours of Olin, to all ledgers, books, accounts, correspondence, memoranda and other documents in the possession or

under the control of Olin relating to any matters contained in this Agreement and reasonably [13] related to Olin's compliance with this Agreement, and (b) to interview appropriate officers and employees of Olin and managerial personnel responsible for supervision of the Isocyanurate Assets, at their place of employment, or at another mutually agreeable site, regarding matters not privileged which are covered by this Agreement.

10. Undertaking Not To Sue

The Commission agrees that it will not seek a temporary restraining order or preliminary injunction barring consummation of the Asset Acquisition, and will not otherwise seek to delay or prevent consummation of the Asset Acquisition.

11. General Provisions

(a) Nothing contained herein shall constitute an admission of fact or law by Olin with respect to the legality of the Asset Purchase Agreement, the Asset Acquisition, or the Monsanto Tolling Agreement;

(b) In any action brought by the Commission in a United States District Court to enforce this Agreement, Olin waives its right to contest personal jurisdiction, venue, and the validity or enforceability of this Agreement; and

(c) Nothing herein shall be construed to derogate from the Commission's right or authority to challenge, or to authorize the challenging of, the Asset Purchase Agreement, the Asset Acquisition, or the Monsanto Tolling Agreement in a Commission administrative proceeding. [14]

The undersigned signatory for Olin certifies that he has been duly authorized to enter into and execute this Agreement. The undersigned signatory for the Commission certifies that he has been duly authorized by the Commission to enter into and execute this Agreement.

OLIN CORPORATION

FEDERAL TRADE COMMISSION

By: /s/
Chairman and CEO

By: /s/

Exhibits A and B Contain Confidential Information