IN THE MATTER OF

BIOPRACTIC GROUP, INC.

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

Docket C-3148. Complaint, Dec. 12, 1984—Decision, Dec. 12, 1984

This consent order requires a Riegelsville, Pa. corporation, among other things, to cease representing that any new drug or device provides relief from the inflammation and joint stiffness associated with arthritis and other musculoskeletal ailments, unless such claims are substantiated by competent and reliable evidence. The Order also bars the company from making unsubstantiated claims that any drug or device has been praised as an effective treatment for arthritis and similar ailments by doctors, medical centers and athletic teams; or that any such product has been reported to be an important breakthrough in pain management in newspaper and magazine articles or on TV or radio. The company is additionally required to maintain records substantiating product claims, and to provide all personnel involved in the preparation of advertising and promotional materials with a copy of the Order.

Appearances

For the Commission: *William Haynes* and *Nancy Warder*

For the respondent: *Pro se.*

COMPLAINT

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

PARAGRAPH. 1. Respondent Biopractic is a corporation with its office and principal place of business located at 328 Easton Road, Riegelsville, Pennsylvania.

PAR. 2. Respondent is now and has been engaged in the manufacturing, advertising, offering for sale, sale and distribution of Therapeutic Mineral Ice. In connection with the manufacture and marketing of Therapeutic Mineral Ice, respondent is now and has been engaged in the dissemination, publication, and distribution of advertisements and promotional material for the purpose of promoting the sale of

Therapeutic Mineral Ice for human use. As advertised, Therapeutic Mineral Ice is a "drug" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 3. Respondent causes Therapeutic Mineral Ice when sold to be transported from its place of business in various states to purchasers located in other states. Respondent maintains, and at all times mentioned herein has had, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, and at all times mentioned herein, respondent has been and now is in substantial competition in or affecting commerce with corporations, firms, and individuals engaged in the manufacture or marketing of health care products.

PAR. 5. In the course and conduct of its business, respondent has disseminated and caused the dissemination of certain advertisements and promotional materials for Therapeutic Mineral Ice, such as the advertising material attached hereto as Exhibit A, through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. Through the use of the advertisements and promotional materials referred to in Paragraph Five, and others not specifically set forth herein, respondent represented, and now represents, directly or by implication, that:

a. Therapeutic Mineral Ice has been praised as an effective treatment for arthritis and other musculoskeletal ailments by medical doctors, leading medical centers, professional athletic teams, and the United States and Russian Olympic track teams; and

b. Therapeutic Mineral Ice has been reported to be an important new breakthrough in pain management in news reports of the Associated Press and in news stories in the *National Enquirer, Globe,* and *Star.*

PAR. 7. In truth and in fact:

a. Therapeutic Mineral Ice has not been praised as an effective treatment for arthritis and other musculoskeletal ailments by medical doctors, leading medical centers, professional athletic teams, and the United States and Russian Olympic track teams; and

b. Therapeutic Mineral Ice has not been reported to be an important new breakthrough in pain management in news reports of the Associated Press and in news stories in the *National Enquirer, Globe* and *Star.*

Therefore, the representations set forth in Paragraph Six were and are false, deceptive, misleading, and unfair, and the advertisements

and promotional materials referred to in Paragraph Five were and are misleading in material respects, and have constituted and now constitute false advertisements.

PAR. 8. Through the use of the advertisements and promotional materials referred to in Paragraph Five and others not specifically set forth herein, respondent represented, and now represents, directly or by implication, that:

a. Therapeutic Mineral Ice will provide relief from the inflammation and joint stiffness that characterizes arthritis and other musculoskeletal ailments; and

b. Therapeutic Mineral Ice stimulates the beta-endorphins present in the human body.

PAR. 9. Through the use of the advertisements and promotional materials referred to in Paragraph Five, respondent has represented and now represents directly or by implication that, at the time the representations set forth in Paragraph Eight were made, it possessed and relied upon a reasonable basis for those representations.

PAR. 10. In truth and in fact, respondent did not, at the time the representations set forth in Paragraph Eight were made, possess and rely upon a reasonable basis for those representations. Therefore, the representation set forth in Paragraph Nine was and is unfair and deceptive.

PAR. 11. The use by respondent of the aforesaid unfair and deceptive representations and the dissemination of the aforesaid false advertisements and promotional materials has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true and has induced, or is likely to induce, directly or indirectly, the purchase of Therapeutic Mineral Ice.

PAR. 12. The facts and practices of respondent, as herein alleged, including the dissemination of the aforesaid false advertisements and promotional materials, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce, and unfair and deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

Commissioner Bailey voted in the negative. Commissioner Azcuenaga abstained.

EXHIBIT A

Doctors at leading Medical Pain Centers reveal amazing new anti-inflammatory ICE THERAPY treatment for control of Arthritic, Rheumatic pain.

Associated Press, National Inquirer, Globe. Star, report on important new break-through in pain management.

Called "cryotherapy", Doctor's hail this important new "pain-icing" technique as a remarkable, yet safe and simple answer to controlling *inflammation*, a major cause of the stiffness, swelling and pain associated with Rheumatism and Arthritis. Inflammation means heat . . . so it makes no sense to treat inflammation with more heat, or heat-creating products such as methylsalicilate, Capsicum, wintergreen, which can actually aggravate the problem. Only ice can counter this heat or inflammation.

Modern Biochemistry has now created a product that actually "ices pain away"

Called Therapeutic Mineral Ice, this new discovery utilizes a unique combination of tested and proven ingredients in a totally absorbent dew gel formula. It's the only formula of it's kind in the world and it attacks and fights pain like nothing ever has before. In fact, with Therapeutic Mineral Ice many people report they can now cope with and endure and function with their pains controlled . . . and enjoy life once again. YES, NOW FOR THE FIRST TIME, YOU CAN CONTROL PAIN AND END THE FEELING THAT PAIN CONTROLS YOU. You simply apply Therapeutic Mineral Ice externally to the afflicted area as often as needed and with complete safety. It goes to work immediately. Starts relieving inflammation and pain on contact. Brings blessed relief day and night.

New Therapeutic Mineral Ice Reduces Dependence On Aspirin, Drugs, All Medication

You hurt, but why punish the rest of your body to reach the pain? Since nature is the true healer and pain fighter, it makes sense to use a product that works with nature. New Therapeutic Mineral Ice provides that assistance . . . helps your body stimulate the Beta-Endorphins, natures own pain fighters. Breaking the pain cycle allows your body to [illegible] . . . to strengthen . . . [illegible] feeling of [illegible] soon follows. Therapeutic Mineral Ice actually helps nature fight pain better [illegible] pain faster.

[illegible] Rheumatism is not limited to pain, but agonizing stiffness as well. Therapeutic Mineral Ice understands this. With Therapeutic Mineral Ice, you can triumph over morning stiffness and fatigue. You need not be caged in an aching body because Therapeutic Mineral Ice miraculously [illegible] . . . [illegible] freedom of movement without inflammation . . . without stiffness . . . without pain. Remember, inflammation is considered the key to the pain problem and *Therapeutic Mineral Ice is the anti-inflammatory pain fighter.*

Doctors, Medical Pain Centers, Physical Therapists, Health Clinics, Professional Athletic Teams, U.S. And Russian Olympic Track Teams Praise "Ice Therapy"

The simplest management of pain is preferred by the medical profession. Physicians have a motto "Primum non nocere" which means "above all, do no damage." Now, so many have been able to eliminate the harsh, damaging internal drugs and the irritating, conflicting external heat rubs. These things can often bring little relief and prove to be very expensive. Therapeutic Mineral Ice provides a totally new and different kind of answer to the Doctor's management of pain. And it is comparatively inexpensive. Doctors now recognize that effective relief can be delivered through the skin and need not be taken internally. Therapeutic Mineral Ice provides all the beneficial relief of non-steroid, anti-inflammatory agents, helping to reduce inflammation, swelling, stiffness and pain, without the side effects and expense of other drugs or drug products you have tried.

Therapeutic Mineral Ice, The Amazing Pain-Fighter, Is Not Only [illegible] To Relief Of Inflammation, Swelling And Pain [illegible] [illegible] Relief [illegible] Of Other Problems

Pain comes from many sources. It's the body's way of telling you there's something wrong. Because Therapeutic Mineral Ice is such a potent pain fighter on contact, it will dramatically [illegible] associated with joint inflammation and stiffness, Sciatica, Bursitis, [illegible], Neuralgia, sore elbow and Knees, muscle strain, back pain, stiff neck and muscle spasm . . . even symptomatic relief of skin problems like Poison Ivy, Herpes, Simplex, Rash and itching. And Therapeutic Mineral Ice, a cool, blue, absorbent gel, stands between you and your pain with no stain to body or clothes, no grease, no unpleasant after smell. Only you know you have it on. Sleep with it on in complete comfort, apply during the day and put your clothes on immediately. No waiting for it to dry or absorb. Be with friends and family attend social functions; BRING THERAPEUTIC MINERAL ICE WITH YOU AND YOU'LL ALWAYS HAVE COMFORT AT HAND. IT'S A VERY SPECIAL SECRET FRIEND, ALWAYS READY TO [illegible].

[illegible] There Is Presently No Known Cure For Arthritis And Rheumatism, The Continuing Management Of The Symptoms Of Inflammation, Swelling, Stiffness And Pain Should Not Be A Cause Of Prohibitive Expense.

So often you have taken very expensive drugs that do little to relieve the inflammation and pain. And many times, less costly products [illegible] The developers and manufacturers of Therapeutic Mineral Ice realize this and have not made the price prohibitive. On the contrary, the price has been purposefully kept down, so it can be available to as many as possible. Many thousands know that Therapeutic Mineral Ice brings the promised, continuing relief at a price they can afford. Furthermore, *we guarantee you relief or your money will be refunded* with no questions asked. Just mail us the jar with the unused portion for a full refund. *Therapeutic Mineral Ice promises you relief, or you pay nothing.* Again, there is no cure for Arthritis and Rheumatism, but until there is, there is Therapeutic Mineral Ice. Send for it today. Start enjoying life more tomorrow . . . a tomorrow freer of pain.

MAIL YOUR ORDER TODAY!

The Biopractic Group Inc.
P.O. Box 328
Riegelsville, PA 18077

Please send me ________ jars of Therapeutic Mineral Ice in the 8 oz. (one-half pound) size. (An average 30-40 day supply). If not fully satisfied, I understand my purchase price will be refunded upon return of jar with unused portion. Enclosed is $8.95 plus $1.00 handling... total of $9.95 for each jar.

Total ________ (check or money order only).

Name ____________________

Address ____________________ Apt.# ______

City ____________ State ______ Zip ______

Sorry, no C.O.D.'s, cash or charge.

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DECISION AND ORDER

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

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

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

1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 328 Easton Road, in the city of Riegelsville, State of Pennsylvania.

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

ORDER

I

It is ordered, That respondent Biopractic Group, Inc., a corporation, its successors, assigns, officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any "drug" or "device," as those terms are defined

in the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing that such product

a. Provides relief from the inflammation and joint stiffness that characterizes arthritis and other musculoskeletal ailments;

b. Stimulates the beta-endorphins present in the human body;

c. Has been praised as an effective treatment for arthritis and other musculoskeletal ailments by medical doctors, leading medical centers, professional athletic teams, or Olympic teams; or

d. Has been reported to be a breakthrough in pain management in articles in newspapers, magazines, or in television or radio news reports;

unless at the time of the dissemination of such representation respondent possesses and relies upon adequate substantiation for such representation, including, for the representations described in subparts a and b, competent and reliable scientific or medical evidence in the form of at least two independently conducted, well-controlled, double-blinded clinical studies that conform to acceptable designs and protocols, are conducted by persons who are qualified by training and experience to conduct such studies, and substantiate the reprsentations made by the respondent. *Provided, however,* with respect to any such representation set forth in subparts a and b above for over-the-counter drugs, if the Food and Drug Administration publishes any tentative or final standard which establishes conditions under which a product is safe and effective, then, in lieu of the two double-blinded clinical studies, respondent may possess and rely upon such standard (until such standard is superseded) if it substantiates the representation.

II

It is further ordered, That respondent maintain, for at least three (3) years beyond the last dissemination of any advertisement or promotional material covered by this order, complete business records demonstrating compliance with this order. Such records shall include, but not be limited to, copies of and dissemination schedules for all advertisements and promotional materials; and documents that substantiate or that contradict or qualify any claim made in advertising, promoting or selling any product covered by this order.

III

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

IV

It is further ordered, That the respondent shall forthwith distribute a copy of this order to each of its operating divisions, and to all present and future personnel, agents, or representatives who are engaged in the preparation and dissemination of advertisements and promotional materials and that the respondent shall secure from each such person a signed statement acknowledging receipt of the order.

V

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

Commissioner Bailey voted in the negative. Commissioner Azcuenaga abstained.

IN THE MATTER OF

B.A.T INDUSTRIES, LTD., ET AL.

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

Docket 9135. Complaint, May 13, 1980—Final Order, Dec. 17, 1984

This Order affirms the Initial Decision of the Administrative Law Judge and dismisses the FTC complaint alleging that acquisition of Appleton Papers, Inc., the leading U.S. producer of chemical carbonless paper (CCP) by B.A.T Industries, Ltd. ("B.A.T") had violated Sec. 7 of the Clayton Act and Sec. 5 of the FTCA, by eliminating the potential for competition between the two companies in the U.S. CCP market. For reasons set forth in its Opinion, the Commission held that the record showed no "clear proof" that B.A.T would have entered the U.S. CCP market independently had it not acquired Appleton.

Appearances

For the Commission: *Steven A. Newborn, John V. Lacci, Sandra G. Wilkof* and *Daniel J. Yakoubian.*

For the respondents: *David Schechter,* in-house counsel, *Jay Topkis, Daniel J. Beller, Eric M. Freedman,* and *Daniel Victor, Paul, Weiss, Rifkin, Wharton & Garrison,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that B.A.T Industries, Ltd. ("BAT"), and Appleton Papers, Inc. ("Appleton"), respondents herein, have violated Section 7 of the Clayton Act, as amended (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45) through the acquisition by BAT of the assets of the Appleton Papers Division of NCR Corporation ("NCR"), and that a proceeding 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)), stating its charges as follows:

I. DEFINITIONS

1. For purposes of this Complaint, the following definition will apply:

Chemical carbonless paper ("CCP") is any product which uses a

chemical imaging system to transfer an image from one sheet of a multipart business form to another when pressure is applied to the top sheet.

II. BAT

2. BAT is a United Kingdom company having its registered office in London, England.

3. BAT is a multinational holding company with interests in paper, tobacco, cosmetics and retailing. BAT's holdings in the United States include Brown and Williamson Tobacco Company, Gimbel Brothers, Saks Fifth Avenue and Germaine Monteil.

4. In 1978, BAT had sales in excess of 6,676,000,000 pounds sterling (or approximately $13.0 billion) and had total assets of approximately $7 billion. In 1977, BAT ranked as the 43rd largest industrial company in the world and the 11th largest industrial company outside the United States.

5. The Wiggins Teape Group, Ltd. ("Wiggins Teape"), a wholly-owned subsidiary of BAT, is the largest manufacturer of fine and specialty papers in the United Kingdom and is the largest exporter, in value, of paper products from the United Kingdom, It operates mills in the United Kingdom and several other countries. In 1978, [2] Wiggins Teape had sales of approximately 461,000,000 pounds sterling (or approximately $920 million.)

6. "Idem" brand CCP is Wiggins Teape's most important paper product and its highest profit generator. Wiggins Teape is the second largest producer of CCP (in terms of tonnage) in the world. In 1977, Wiggins Teape accounted for approximately 45% of CCP production in the United Kingdom and Europe with over $200 million in sales. Prior to BAT's acquisition of Appleton, Wiggins Teape did not produce or sell CCP in the United States.

7. At all times relevant herein, BAT sold and shipped its products throughout the United States and was a corporation engaged in commerce as commerce is defined in the Clayton Act, as amended, and was a corporation whose business was in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

III. APPLETON

8. Appleton is a Delaware corporation having its principal office and place of business in Appleton, Wisconsin.

9. Appleton, formerly the Appleton Papers Division of NCR, is a major producer of CCP and coated papers used in the graphic arts and publishing industry. In 1977, Appleton accounted for $271 million in sales.

10. Appleton is the world's largest producer of CCP (in terms of

tonnage) and presently has approximately 55% of U.S. domestic sales. Appleton is also the major licensor of CCP technology in the world. In 1977 Appleton had $171 million in sales of CCP.

11. NCR is a Maryland corporation having its principal office and place of business in Dayton, Ohio. NCR produces and sells, among other products, computers and other business machines and systems. In 1977, NCR had approximately $1.625 billion in sales and $2.3 billion in total assets.

12. At all times relevant herein, Appleton sold and shipped its products throughout the United States and was a corporation engaged in commerce as commerce is defined in the Clayton Act, as amended, and was a corporation whose business was in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

IV. THE ACQUISITION

13. On or about June 30, 1978, BAT, through its wholly-owned indirect subsidiary, Lentheric, Inc. (since renamed Appleton Papers, Inc.), purchased from NCR the Appleton Papers Division for a purchase price of $280 million. As a result of the acquisition, BAT acquired the assets of Appleton and the patents held by NCR relating to the manufacture of CCP, and control over the licenses issued under such patents.

V. TRADE AND COMMERCE

A. *Relevant Market*

14. The relevant product market is the manufacture and sale of CCP. [3]

15. The relevant geographic market in the United States as a whole.

B. *Market Structure*

16. In 1978, U.S. industry sales of CCP totaled approximately $250 million.

17. The U.S. CCP market is a highly concentrated industry with a four-firm concentration ratio of approximately 96%. The top two firms, Appleton and Mead, accounted for 86% of industry sales in 1977. Only five firms produced CCP in the United States in 1977, and only four of those firms produced CCP other than for their own consumption.

18. The barriers to entry into the production and sale of CCP are extremely high.

19. The production of CCP is a highly technical field that is protect-

ed by U.S. patents of Appleton and other domestic carbonless producers.

20. The high technology requirements of the CCP market constitute substantial barriers to entry into the industry. The manufacture of CCP requires encapsulation technology, sophisticated coating technology, and manufacturing know-how. It is extremely difficult to develop a commercially acceptable CCP technology. Such development is an expensive undertaking and can take anywhere from 3 to 10 years to complete. The new entrant also runs the substantial risk that its attempts to develop a viable technology will be unsuccessful.

21. The new entrant into the CCP market must make a substantial capital investment for specialized encapsulation, coating and other equipment.

C. *BAT Was A Significant Actual Potential Entrant Into The U.S. CCP Market*

22. Objective factors demonstrate that at the time of the acquisition BAT was an actual potential entrant into the production and sale of CCP in the United States.

23. From the late 1950's until BAT's acquisition of Appleton, Wiggins Teape (which was acquired by BAT in 1972) manufactured CCP under license from NCR. Wiggins Teape was one of the first manufacturers of CCP, and was the only NCR licensee outside the United States that was permitted to use NCR's encapsulation technology. The license gave BAT the exclusive right to manufacture CCP under NCR's patents and know-how worldwide, except for the United States, Canada and Japan, and the nonexclusive right to sell CCP worldwide except for the United States and Canada. The license also provided for a continuous, complete and timely exchange between NCR and BAT of all information constituting carbonless know-how and all other information helpful in the development, manufacture or sale of CCP.

24. On or about June 1, 1977, BAT gave NCR notice of termination of the aforesaid license, effective July 1, 1980. Thus, after July 1, 1980, BAT would have been free of the license provisions which restricted it from manufacturing or selling CCP in the United States. The right to use unpatented know-how would have survived the termination of the license.

25. The size of the U.S. CCP market, its high growth in comparison to other paper products, and its considerable profit potential provided substantial incentives for BAT's entry into the U.S. market. [4]

26. BAT, by reason of its size and financial resources, its independent carbonless technology, and its expertise in the production and sale of CCP, was capable, at the time of the acquisition, of entering

the U.S. CCP market in the near future by means other than the acquisition of Appleton.

27. Feasible means existed by which BAT could have entered the U.S. CCP market, including the establishment of manufacturing facilities in the United States, joint ventures or licensing relationships with U.S. firms not already in the CCP market, acquisition of a toehold firm, or export of CCP into the U.S.

28. Due to BAT's financial resources, its CCP technology and marketing expertise, and the concentrated nature of the U.S. CCP market, it is likely that BAT would have entered the production or sale of CCP in the United States through means other than the acquisition of Appleton, and that such entry would have exerted a procompetitive effect on the market and preserved the potential for the significant future deconcentration of the industry.

D. *BAT Is One Of The Few Most Likely Entrants Into The Market*

29. The CCP industry is a highly technical industry which requires that a new entrant develop a sophisticated capsule technology and substantial production expertise before the entrant can establish a position in the market.

30. BAT's longstanding license with NCR provided BAT with the most extensive knowledge of a total CCP technology in the world, excluding Appleton.

31. BAT's substantial expertise in CCP technology and its large technical staff had allowed BAT to develop elements of its own carbonless technology and to achieve technological independence from NCR, as well as to develop substantial production expertise.

32. NCR's other CCP licensees had not been given access to a total carbonless paper technology and are dependent on their licensor (now BAT) for technical assistance, especially with respect to a supply of carbonless capsules, one of the most difficult aspects of CCP production.

33. Because of the difficulty, expense and risk involved in developing CCP technology, the expense of constructing manufacturing facilities, and the scale requirements of efficient production, few firms, if any, other than BAT, are likely to enter the production of CCP for sale to others in the United States.

VI. EFFECTS

34. The effects of the acquisition of Appleton by BAT may be substantially to lessen competition or to tend to create a monopoly in the production and sale of CCP throughout the United States in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and the effects of the acquisition may be unreasonably to restrain trade and

to hinder competition unduly in the production and sale of CCP in the United States thereby constituting a restraint of trade and an unfair act and practice and an unfair method of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), in the following ways among others:

(a) Substantial potential competition between BAT and Appleton and between BAT and other producers of CCP in the United States will be eliminated; [5]

(b) The potential for substantial deconcentration of the U.S. CCP market as a result of BAT's likely alternative entry into the U.S. market will be eliminated;

(c) The competitive benefits of internal expansion and innovation by BAT may be eliminated;

(d) The already high barriers to entry into the U.S. CCP market may be heightened or increased;

(e) The dominant position of Appleton in the U.S. CCP market may be further strengthened by virtue of BAT's financial resources, and its substantial technological and production expertise with respect to CCP; and

(f) Customers of CCP and ultimate consumers of that product may be denied the benefits of free and open competition in the market.

VII. VIOLATIONS CHARGED

35. The acquisition of Appleton by BAT constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18) and of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

INITIAL DECISION BY

MORTON NEEDELMAN, ADMINISTRATIVE LAW JUDGE

NOVEMBER 21, 1983

I

STATEMENT OF THE CASE

The complaint in this proceeding was issued on May 13, 1980. It charges that B.A.T Industries, Limited ("B.A.T")[1] [2] and Appleton Papers, Inc. ("Appleton"), respondents herein, have violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by reason of B.A.T's acquisition of Appleton in 1978.

[1] On July 8, 1981, the official name of respondent B.A.T was changed to B.A.T Industries PLC. Transcript 8905.

According to the complaint, the relevant product market is the manufacture and sale of chemical carbonless paper ("CCP"), a coated paper used to make multi-part business forms in which images are transferred by a chemical reaction from top to middle to bottom sheets through the application of manual or mechanical pressure. The United States as a whole is the alleged relevant geographic market.

The complaint charges that at the time of the acquisition, B.A.T through its Wiggins Teape Group, Ltd. subsidiary ("Wiggins Teape" or "WT"), a paper manufacturer with headquarters in the United Kingdom, was the largest producer of CCP outside of the U.S. Appleton was said to be the largest manufacturer of CCP within the U.S. There is no allegation in the complaint that Appleton and WT were competitors in the U.S. before the acquisition. Nor is any charge made that WT was perceived as a potential entrant on the edge of the U.S. CCP market. The complaint is grounded solely on the theory that B.A.T (or WT) was a significant "actual" potential entrant into the U.S. market. In support of this theory the complaint alleges, in summary form, the following: [3]

- The U.S. CCP market was concentrated at the time of the acquisition, and there were high entry barriers into this market.
- Objective factors demonstrate that WT had the capability and incentive to enter the United States CCP market.
- Feasible means existed by which WT could have entered the U.S. CCP market, including establishment of new manufacturing facilities, a joint venture or licensing relationship with U.S. firms, acquisition of a toehold firm, or export of CCP to the U.S.
- It was likely that WT would have pursued one of the alternative means of entry had it not acquired Appleton.
- WT was one of the few most likely entrants into the U.S. CCP market.
- The effect of the Appleton acquisition was anticompetitive in that deconcentration of the U.S. CCP market as a result of WT's likely alternative entry was eliminated, entry barriers may have been heightened, and Appleton's dominance of the U.S. CCP market was heightened.

Respondents' answer, dated July 25, 1980, denies the allegations of the complaint relating to definition of the [4] relevant product market (respondents argue for a market consisting of all papers used to make multi-part business forms) as well as the elements of the actual potential theory outlined above.[2]

[2] The answer also raises the affirmative defense of laches and questions the Commission's in persona jurisdiction over B.A.T as well as the Commission's subject matter jurisdiction over B.A.T's acquisition of a U.S. firm. None of these affirmative defenses were pressed during the hearings or in the post-hearing briefs.