

## IN THE MATTER OF

## THE MAGNAVOX COMPANY

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

*Docket 8822. Consent Order, June 9, 1971—Modifying Order, Mar. 12, 1990*

This order reopens the proceeding and modifies Commission's order issued on June 9, 1971 (78 FTC 1183) by setting aside paragraphs I.(H), I.(I), I.(E) and I.(S), and by modifying paragraphs I.(N), I.(P) and I.(T), in certain respects.

ORDER GRANTING IN PART AND DENYING IN PART  
REQUEST TO REOPEN AND MODIFY ORDER

The Magnavox Company ("Magnavox"), has filed a "Request to Reopen and Modify Consent Order" ("Request"), pursuant to Section 5(b) of the Federal Trade Commission Act, 45 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. The Request asks the Commission to reopen the proceeding and modify the consent order issued by the Commission on June 9, 1971, in this matter. 78 FTC 1183. The order was previously modified by the Commission on July 11, 1983. 102 FTC 807. Magnavox asks the Commission to set aside and modify several provisions contained in Paragraph I of the order, each of which imposes restrictions on Magnavox's relationships with its dealers in connection with the distribution and sale of consumer electronics products.<sup>1</sup> In support of its Request, Magnavox argues that the modification is warranted by changed conditions of law and fact, and by the public interest. Magnavox's Request was placed on the public record for thirty days, pursuant to Section 2.51(c) of the Commission's Rules. No [2] comments were received. For the reasons discussed below, the Commission has determined that Magnavox has not shown that changed conditions of law or fact require reopening the order but that Magnavox has shown that granting portions of the Request would be in the public interest. The Commission has therefore reopened and modified the order.

<sup>1</sup> After filing its Request, Magnavox requested certain alternative relief relating to the announcement of prices and unilateral refusals to deal.

## I.

The complaint in this case alleged that Magnavox violated Section 5 of the Federal Trade Commission Act by fixing the prices at which its retail dealers advertised and sold its consumer electronic products in the United States. 78 FTC 1185. The complaint listed numerous specific acts and practices allegedly used by Magnavox “[i]n furtherance of [Magnavox’s price-fixing] policy,” including, for example, threatening to discontinue doing business with dealers suspected of selling Magnavox’s products at other than its established retail prices. *Id.* at 1186. The complaint did not allege that the specific acts were themselves unlawful outside the scope of a resale price maintenance scheme. The complaint also charged that Magnavox had engaged in exclusive dealing, full-line forcing and tying practices in connection with the sale and distribution of its consumer electronic products. *Id.* at 1186-87. Magnavox consented to the Commission’s order.

Paragraph I of the consent order prohibits Magnavox and its successors<sup>2</sup> and assigns from engaging in any of twenty-two specified acts and practices related to vertical price fixing. Magnavox’s Request seeks the deletion and/or modification of certain of the prohibitions set forth in Paragraph I of the order. Specifically, Magnavox requests the Commission to delete [3] subparagraphs (H)<sup>3</sup> and (I)<sup>4</sup> of Paragraph I. Magnavox also requests that the Commission add a new provision to the order expressly permitting Magnavox to establish cooperative advertising programs under which Magnavox would pay for certain dealer advertising of Magnavox’s consumer electronic products on conditions established by Magnavox. Magnavox also requests the Commission to set aside subparagraph (S)<sup>5</sup> and delete “terminating” from subparagraph (T),<sup>6</sup> and add an additional new

<sup>2</sup> Currently, North American Philips Corporation distributes all Magnavox, Sylvania, Philco and Philips consumer electronic products through a division named Philips Electronics Company. Request at 3. When we refer to “Magnavox,” we include all Philips brands, including Sylvania, Philco, and Philips.

<sup>3</sup> Subparagraph (H) prohibits Magnavox from “[t]hreatening to withhold or withholding earned cooperative advertising credits from dealers for the reason that they advertise its products at retail prices other than established or suggested retail prices.” 78 FTC 1189.

<sup>4</sup> Subparagraph (I) prohibits Magnavox from “[r]equiring that a dealer not state a combination price for its products and other merchandise as a condition for reimbursement under any cooperative advertising program pursuant to which reimbursement is offered.” *Id.*

<sup>5</sup> Subparagraph (S) prohibits Magnavox from “[t]erminating business relationships with any dealer because the dealer has sold or is selling or is suspected of selling its products at other than its established prices or suggested retail prices.” 78 FTC 1190-91.

<sup>6</sup> Subparagraph (T), as modified by the Commission in 1983, prohibits Magnavox from “[t]erminating, harassing, threatening, intimidating, coercing or delaying shipments to any dealer because the dealer has sold or is selling its products at other than its established or suggested retail prices.” 102 FTC 808.

provision to the order expressly permitting it to announce its resale prices for consumer electronic products in advance and refuse to deal with any dealer who fails to comply. Additionally, Magnavox requests that the Commission remove the order's restrictions on Magnavox's ability to obtain certain [4] information from its dealers by modifying subparagraphs (N)<sup>7</sup> and (P).<sup>8</sup> Magnavox would also like the Commission to add a new provision to the order expressly permitting Magnavox to offer consumer rebates through its dealers. Finally, Magnavox requests that the Commission delete subparagraph (E)<sup>9</sup> and add a new provision to the order expressly permitting Magnavox to print its suggested resale prices on tickets, tags or other markings affixed, or to be affixed, to consumer electronic products Magnavox ships to its retail dealers ("preticketing").

In its Request, Magnavox argues that the relief it is seeking is required by changed conditions of law and fact, and by the public interest. Magnavox asserts that the aforementioned provisions contain "non-price restrictions, ancillary restrictions which may have, at most, an incidental effect on resale prices, and restrictions on the unilateral pricing policies of [Magnavox] which do not involve any contract, agreement, understanding, or arrangement with [Magnavox's] dealers." Request at 7. Magnavox believes that under decisions rendered by the Supreme Court and the Commission since entry of the order in 1971, these restrictions proscribe conduct that is no longer *per se* unlawful and must thus be judged under the rule of reason test. Magnavox asserts that the markets for consumer electronic products are highly competitive and are fragmented among numerous competitors, "none of which enjoys anything near a dominant position in any market." Request at 3. Magnavox also asserts that these restrictions hinder its efforts to compete with firms not subject to the order's constraints. Magnavox states that granting its Request would enable Magnavox to become a more effective competitor. [5]

<sup>7</sup> Subparagraph (N) prohibits Magnavox from "[i]nspecting sales and business records of any dealer for the purpose of ascertaining the prices at which, or the customers to whom, such dealer sells its products . . ." 78 FTC at 1190.

<sup>8</sup> Subparagraph (P) prohibits Magnavox from "[r]equiring . . . dealers to report the identity of other dealers, and the prices at which such other dealers . . . sell its products, or the customers to whom such other dealers sell its products." *Id.* Under the proposed modification, Magnavox would be able to require its dealers to report only the identity of customers to whom such other dealers sell its products.

<sup>9</sup> Subparagraph (E) prohibits Magnavox from "[r]equiring dealers to affix to any of its products . . . price tags bearing its established or suggested retail prices." 78 FTC at 1189.

## II.

Section 5(b) of the FTC Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" require such modification. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order to make continued application of it inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4.

The Commission may also modify an order pursuant to Section 5(b) when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. Therefore, Section 2.51 of the Commission's Rules of Practice invites respondents in petitions to reopen to show how the public interest warrants the requested modification. In the case of a request for modification based on this latter ground, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2. If the showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Id.* The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm.

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of Section 5(b) plainly anticipates that the petitioner must make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified.<sup>10</sup> If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether modification is required and, if

<sup>10</sup> The Commission may properly decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979). See also Rule 2.51(b) of the Commission's Rules of Practice and Procedure, which requires affidavits in support of petitions to reopen and modify.

so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to [6] meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in the finality of Commission orders.<sup>11</sup>

### III.

Magnavox has failed to show that the modifications it seeks are required by a change in law. All of the provisions that Magnavox seeks to have set aside or modified are parts of the order's overall prohibition of resale price maintenance. Nothing in the complaint or order suggests that they were imposed because the prohibited conduct itself, absent resale price maintenance, was *per se* unlawful. Of course, resale price maintenance schemes remain *per se* unlawful. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), which was decided six years after the Commission issued the order in this case, recognized that non-price vertical restraints are not inherently anticompetitive and must thus be judged under the rule of reason.<sup>12</sup> The Supreme Court in *Sylvania* replaced the *per se* test for non-price vertical customer restraints outside resale price maintenance with a rule of reason test, but the Court did not change the *per se* rule for non-price vertical restraints that are part of a resale price maintenance scheme. Magnavox has failed to show that any of the conduct in which it wishes to engage has become lawful *if* part of resale price maintenance. Because these provisions prohibit conduct that is unlawful if engaged in as part of resale price maintenance, and because *Sylvania* did not change the law as to such conduct, Magnavox has failed to show that its request should be granted based upon a change in law.

Magnavox has also failed to show that changed conditions of fact require the Commission to reopen and modify the order. Although Magnavox has presented evidence intended to show that the United States consumer electronic products market today is competitive, the record does not contain any evidence of market structure at the time the Commission issued the order, because the complaint was premised on a *per se* theory of resale price maintenance. Based only upon a

<sup>11</sup> See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

<sup>12</sup> See *In the Matter of Beltone Electronics Corporation, et al.*, 100 FTC 68 (1982) (illustrating that *Sylvania* has significantly affected the Commission's analysis of non-price vertical restraints).

description of today's consumer electronic market, Magnavox has not shown that changed conditions of fact make the order unnecessary or harmful to competition, requiring the order to be reopened and modified. Indeed, resale price maintenance would be unlawful today, even if Magnavox had [7] shown that the market had changed from concentrated to unconcentrated since the order was issued.

#### IV.

Notwithstanding Magnavox's failure to demonstrate changed conditions of law or fact, Magnavox has shown that the public interest warrants reopening and modifying the order. The provisions it seeks to have changed prohibit some lawful conduct if engaged in outside of a resale price maintenance scheme, and Magnavox, in most instances, has shown that it is being injured in competing with other firms who are free to and do engage in such things as cooperative advertising, preticketing, and rebates. So long as Magnavox continues to be prohibited by the core provisions of Paragraph I from engaging in resale price maintenance, certain broader prohibitions of that paragraph now impose costs that outweigh their continuing benefit. See generally *Lenox, Inc.*, Order Granting in Part and Denying in Part Request to Reopen and Set Aside Order, 5 Trade Reg. Rep. (CCH) ¶ 22,672 (1989). We discuss each of those provisions below:

#### The Cooperative Advertising Restrictions

Magnavox has requested two modifications of the order and the addition of a proviso to allow it to offer certain price-restrictive cooperative advertising programs. Specifically, Magnavox asks the Commission to modify the order as follows:

1. Delete Paragraphs I(H) and I(I) of the order;<sup>13</sup> and
2. Add a new Paragraph IX, which would read:

*It is further ordered,* That nothing in this order shall be construed to prohibit respondent from offering, establishing or maintaining cooperative advertising programs under which respondent will pay for certain dealer advertising of respondent's consumer electronic products on conditions established by respondent, including conditions as to the prices at which Magnavox's consumer electronic products are offered in such dealer advertising.

Magnavox contends that its ability to compete is adversely affected by the order's restrictions concerning price-restrictive cooperative

<sup>13</sup> See 78 FTC 1189.

advertising programs. Many of Magnavox's competitors currently use such programs with respect to consumer electronic product lines that are directly competitive with the Magnavox, Sylvania, Philips and Philco lines. Request at 79-83, 95-98, 102-03, 107-08 and 112-113. In light of Magnavox's competitors' [8] use of programs that Magnavox cannot offer, Magnavox has made a threshold showing that the order is causing competitive injury.

In 1987, the Commission set aside the order in *The Advertising Checking Bureau, Inc.*, 93 FTC 4 (1979), which prohibited the respondent from auditing cooperative advertising programs that require dealers to advertise at a specified price, or not to advertise at discount prices, as a condition to receiving advertising allowances or credits. In support of its determination to set aside that order, the Commission relied on the Supreme Court's decision in *Sylvania and Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), noting, among other things, that those decisions "make it clear that the rule of reason should be applied in determining whether non-price vertical restraints unreasonably restrain competition and violate the antitrust laws. In a vertical setting, the *per se* rule applies only to agreements to fix resale prices that prevent the dealer from making independent pricing decisions. See *Monsanto*, 465 U.S. at 764." *The Advertising Checking Bureau, Inc.*, Slip Opinion, p. 2 (FTC Docket No. C-2947, 1987).<sup>14</sup> The Commission also noted that "[t]he fact that a distributional restraint may have an incidental effect on resale prices is not by itself enough to condemn the practice as *per se* unlawful." *Id.* With respect to price restrictive cooperative advertising programs specifically, the Commission held that such programs "would not by themselves constitute agreements to fix resale prices." *Id.* Moreover, the Commission recognized that price restrictive cooperative advertising programs are in fact "likely to be procompetitive . . . in most cases . . . by . . . channeling the retailer's advertising efforts in directions that the manufacturer believes consumers will find more compelling and beneficial . . . [t]his, in turn, may stimulate dealer promotion and investment and, thus, benefit interbrand competition." *Id.* at 3.<sup>15</sup>

In conjunction with the Commission's decision to set aside the order in *The Advertising Checking Bureau, Inc.*, the Commission also announced that it had withdrawn its 1980 policy statement regarding price restrictions in cooperative advertising programs, which had

<sup>14</sup> Of course, *Sylvania* did not change the *per se* rule against resale price maintenance, the conduct that the order against Magnavox was designed to end.

<sup>15</sup> The Commission set aside *The Advertising Checking Bureau, Inc.* order on public interest grounds.

stated the Commission's intention to challenge as *per se* unlawful cooperative advertising programs restricting reimbursement for the advertising of discounts. The Commission announced its new policy as to price restrictions in cooperative advertising programs as follows: [9]

The Commission now concludes that price restrictions in cooperative advertising programs, standing alone, are not *per se* unlawful. The *per se* rule applies to conduct that is so plainly anticompetitive that it is conclusively presumed to be unreasonable without an elaborate inquiry into competitive effects. Cooperative advertising programs that restrict reimbursement for the advertising of discounts do not appear to fall into this category . . . .

6 Trade Reg. Rep. (CCH) ¶ 39,057.

The approach followed by the Commission when it adopted its new cooperative advertising policy and set aside the order in *The Advertising Checking Bureau, Inc.* is equally applicable to Magnavox's request that the Commission set aside Paragraphs I(H) and I(I) of the order. These "fencing-in" provisions prohibit price restrictions that Magnavox might want to impose on its dealers in connection with its cooperative advertising programs. Such restrictions may not necessarily be part of an illegal resale price maintenance scheme. Of course, any cooperative advertising program implemented by Magnavox as part of a resale price maintenance scheme would be *per se* unlawful and would violate the order even if modified as Magnavox requests.<sup>16</sup>

Magnavox has further shown that setting aside these provisions is not likely to permit Magnavox to exert market power. The markets for most of the consumer electronic products sold by Magnavox appear to be competitive and fragmented and have numerous competitors, none of which has a controlling market share. Because these industries generally appear competitive, Magnavox's use of price-restrictive cooperative advertising programs, without further agreement on the price or price levels to be charged by retailers, is not likely to restrict interbrand competition or reduce output.<sup>17</sup> Additionally, Magnavox has demonstrated that there have been numerous new entrants into the markets for consumer electronic products since the Commission issued the order in this case. Request at 49-50. In view of

<sup>16</sup> Moreover, Magnavox would continue to be subject to any duties and obligations arising from the Robinson-Patman Act's requirement that promotional allowances be accorded to competing customers on proportionally equal terms.

<sup>17</sup> See, e.g., *Sylvania, supra*, where the Court noted that "[t]he degree of intrabrand competition is wholly independent of the level of interbrand competition confronting the manufacturer." 433 U.S. at 52 n.19.

the fragmented market shares and the historical ease of entry, the exercise of market power would seem unlikely, suggesting that the proposed modifications should be considered efficiency enhancing. *Teac Corp. of America*, 104 FTC 634, 635-37 (1984). Setting [10] aside the order's restrictions on Magnavox's adoption and implementation of price-restrictive cooperative advertising programs would allow Magnavox to compete more effectively, to the benefit of consumers of Magnavox's consumer electronic products.

In its Request, Magnavox argues that certain remaining order provisions might be construed to prohibit Magnavox from engaging in otherwise lawful price-restrictive cooperative advertising programs, and that setting aside the order's specific restrictions concerning cooperative advertising programs may not afford Magnavox the relief it seeks unless it is expressly stated that nothing in the order prevents Magnavox from engaging in such conduct. Consequently, Magnavox asks the Commission to add to the order a new provision conferring that express assurance. We believe that the requested proviso is neither necessary nor warranted. Beyond subparagraphs (H) and (I), which we agree should be set aside, Magnavox cites subparagraphs (A), (B), (F), (G) and (O) as arguably prohibiting these cooperative advertising programs. However, Paragraphs I(A) and I(B), the order's "core" resale price maintenance prohibitions, speak of fixing resale prices, or establishing plans to fix resale prices. Paragraphs I(F) and I(G) prohibit Magnavox from disseminating mandatory price lists or designating mandatory prices in advertisements or promotional materials. Finally, Paragraph I(O) prohibits efforts to obtain dealers' promises to charge certain prices. The revisions to the advertising guidelines, and the setting aside of *Advertising Checking Bureau*, make clear that price-restrictive cooperative advertising programs do not in themselves constitute agreements on resale prices. Thus, such an advertising program would not violate Paragraphs I(A), I(B) or I(O) and would not amount to the establishment of mandatory prices in violation of Paragraphs I(F) or I(G). The Commission would therefore not construe the remaining portions of the modified order to prohibit Magnavox from establishing and maintaining a cooperative advertising program that included conditions as to the prices at which Magnavox offered its consumer electronic products, so long as such advertising program were not part of a resale price maintenance scheme. In light of the foregoing, the Commission has determined to deny Magnavox's request that the Commission add the aforementioned proviso to this order.

The Modification Concerning Magnavox's Ability  
To Announce Resale Prices And To Refuse To Deal With  
Those Who Fail To Comply

Magnavox has requested that the order be modified to allow it to announce resale prices and unilaterally refuse to deal with those who fail to comply. Specifically, Magnavox requests,

1. That Paragraph I(S) be set aside, and that the word "terminating" be deleted from Paragraph I(T), and [11]

2. That a new Paragraph X be added, which would read:

*It is further ordered,* That nothing in this order shall be construed to prohibit respondent from announcing its resale prices for consumer electronic products in advance and refusing to deal in any such product with any dealer who fails to resell such product at the announced price.

In *Monsanto* and *Sharp*, the Supreme Court reiterated the resale pricing rights of a manufacturer under *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) ("[i]n the absence of any purpose to create . . . a monopoly . . . [a] manufacturer [may] exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell") and discussed the legality of a manufacturer's refusal to deal with distributors who fail to adhere to the resale prices established by the manufacturer for its products. Specifically, the Court held that "[u]nder *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination." *Monsanto*, 465 U.S. at 761.<sup>18</sup> Four years after its decision in *Monsanto*, the Court reaffirmed the rationale of its *Monsanto* decision in *Sharp* when it held that a manufacturer's agreement with a distributor to terminate a competing distributor to eliminate his price cutting was not unlawful *per se* unless the retained distributor also agreed with the manufacturer to set its prices at some level. 108 S. Ct. at 1518, 1521.<sup>19</sup> [12]

<sup>18</sup> The Court in *Monsanto* also recognized the pro-competitive reasons why a manufacturer may wish to exercise its right to announce its resale prices and refuse to sell to dealers who do not comply, when it stated that "[t]he manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the products, and will want to see that 'free riders' do not interfere . . ." 465 U.S. at 762-63.

<sup>19</sup> In *Sharp*, the Court again recognized that a manufacturer may have legitimate reasons for exercising its right under *Monsanto* to refuse to sell its products to distributors who fail to adhere to the manufacturer's suggested resale prices. Specifically, the Court noted that "manufacturers are often motivated by a legitimate desire to have dealers provide services, combined with the reality that price cutting is frequently made possible by 'free riding' on the services provided by other dealers." *Id.* at 1523.

Subparagraph (S) and the word “terminating” in subparagraph (T) prohibit Magnavox from exercising the unilateral right it would have under *Monsanto* to announce its resale prices in advance and refuse to deal with those who fail to comply. Magnavox has shown, however, that since the Court’s decision in *Monsanto*, many of its competitors have adopted and implemented resale pricing policies that are consistent with the Court’s decision in *Monsanto*. See, e.g., Request at 51-52, 85-89, 95-96, 102-03, 107 and 113-14. Additionally, Magnavox has shown that its inability freely to adopt similar lawful resale pricing policies impedes its ability to correct distributional problems and adopt efficiency-maximizing distributional arrangements that would intensify interbrand competition. For example, unlike its competitors, Magnavox cannot refuse to deal with discounting retailers (without the risk of being accused of violating the order and, consequently, the risk of a civil penalty suit and judgment) and thus support its full-service dealers who dedicate substantial resources to educating potential consumers about the features of Magnavox’s products but who then often lose the ultimate sale to “free-riding” retailers who offer the same products at a discounted price. This restriction has caused Magnavox to lose the services of a number of full-service dealers who discontinued the line because of Magnavox’s “failure to prevent competing retailers who provide little or no service in their stores from selling Magnavox products at deeply discounted prices.” Request at 96. See also Request at 102, 107-08 and 113-14.

It is now appropriate to set aside these restrictions.<sup>20</sup> This modification will allow Magnavox to announce its resale prices for consumer electronic products in advance and refuse to deal with any dealer who fails to comply. It should therefore enable Magnavox to protect its full-service dealers from the activities of “free-riding” dealers and encourage its full-service dealers to provide the promotion and sales-related services that it believes are necessary to market Magnavox consumer electronic products efficiently. This modification retains all the order’s provisions that prohibit Magnavox from engaging in resale price maintenance. The Commission may invoke them if Magnavox engages in conduct that goes beyond what is lawful under *Monsanto*. Having set aside subparagraph (S) and “terminating” from subparagraph (T), the Commission would not [13] construe

<sup>20</sup> The remaining part of subparagraph (T) will continue to prohibit Magnavox from harassing, threatening, or coercing its dealers (all actions which still may lead to agreements and which therefore remain unlawful).

the remaining portions of the modified order<sup>21</sup> as prohibiting Magnavox from announcing its resale prices for consumer electronic products in advance and refusing to deal in any such product with any dealer who fails to comply, so long as such conduct is not part of a resale price maintenance scheme. Therefore, Magnavox's requested proviso is unnecessary.

The Modifications Concerning Magnavox's Ability To Obtain  
Certain Information From Its Dealers

Paragraph I(N) of the order prohibits Magnavox from inspecting the records of any of its dealers for the purpose of ascertaining the prices at which, or the customers to whom, such dealer sells its products. 78 FTC at 1190. Consequently, Magnavox may not even request any dealer to permit such inspection. Paragraph I(P) prohibits Magnavox from requiring dealers to report the identity of other dealers, the prices at which such other dealers sell its products, or the customers to whom such other dealers sell Magnavox's products. *Id.* Therefore, Magnavox has requested that the Commission,

1. Modify Paragraph I(N) of the order by adding the words underlined below and deleting the words in brackets below, as follows:

N. [Inspecting sales and business records of any dealer] Requiring any dealer to permit respondent to inspect the dealer's sales and business records for the purpose of ascertaining the prices at which [, or the customers to whom,] such dealer sells its products; provided, however, that nothing in this order shall be deemed to prevent respondent from inspecting such records where such inspection is authorized by law, or for the purpose of assisting respondent to establish its compliance with the provisions of the order issued on December 23, 1964 in Consent Order No. C-869, or with any other obligation or requirement of any government authority. [14]

2. Modify Paragraph I(P) by deleting the words in brackets below, as follows:

P. Requiring, soliciting or encouraging dealers to report the identity of other dealers, and the prices at which such other dealers advertise, offer for sale or sell its products [, or the customers to whom such other dealers sell its products].

The proposed modifications would allow Magnavox to request information from its dealers as to the prices at which they sell

<sup>21</sup> Magnavox has also cited Paragraphs I(B) and I(F), in addition to I(S) and I(T) discussed previously, as arguably prohibiting the unilateral conduct in which Magnavox seeks to engage. Those two provisions, however, prohibit fixing resale prices, and publishing mandatory prices, and the Commission will not read them as prohibiting a mere announcement of resale prices. Because the dealer would remain free to follow that announced price or not (and subject itself to the risk of being terminated), the announced price would not be mandatory. Paragraph I(F) would continue to prohibit Magnavox from requiring its dealers to charge the published resale prices.

Magnavox's products.<sup>22</sup> Additionally, Magnavox would no longer be prohibited from requesting or requiring any dealer to provide information as to the customers to whom that dealer or any other dealer sells Magnavox's products, or from inspecting any such information provided.<sup>23</sup>

Magnavox has failed to meet its burden of demonstrating that the order should be modified with respect to inspection of dealer price data. Although the Supreme Court's decisions in *Monsanto* and *Sharp* suggest that legitimate reasons may exist for a manufacturer and a distributor to exchange price information,<sup>24</sup> Magnavox has presented no factual basis for finding that this aspect of the order should be amended. Magnavox asserts that it is placed at a competitive disadvantage by the inability to inspect dealer price records, but it does not allege that any [15] competitor employs this practice.<sup>25</sup> Magnavox states that access to dealers' price records would assist it "to maintain an efficient distribution system," Request at 53, but Magnavox provides no elaboration. This is not a particularized showing of harm from the existing consent order, and it does not satisfy Magnavox's burden of demonstrating why modification of the order would serve the public interest. There are strong public interest considerations in finality of consent orders, and Magnavox has failed to present any facts demonstrating that this requested modification would be appropriate. Accordingly, the Commission has determined to deny Magnavox's request to modify the portions of Paragraph I(N) relating to the inspection of its dealers' pricing records.

The requested modifications regarding identification of customers appear consistent with the Commission's determination in 1983 to delete the order's transshipment provisions. Presumably, Magnavox would like to be able to require or request its dealers to identify the customers to whom they or other dealers sell its products so that it could enforce any transshipment restrictions imposed on its dealers.

<sup>22</sup> Magnavox, however, would continue to be prohibited from requiring any dealer to provide such information. Magnavox states that it "has no desire to impose such a requirement on its dealers." Request at 33.

<sup>23</sup> Magnavox does not seek modification of the provision of paragraph I(P), which prohibits it from requiring dealers to provide information concerning the prices at which other dealers sell Magnavox's products.

<sup>24</sup> In *Monsanto*, the Court recognized that a manufacturer and its distributors have "legitimate reasons to exchange information about the prices and the reception of their products in the market." 465 U.S. at 762. Likewise, in *Sharp*, the Court noted that in *Monsanto* it had "... eschewed adoption of an evidentiary standard that ... 'would create an irrational dislocation of the market' by preventing legitimate communication between a manufacturer and its distributors." 108 S. Ct. at 1520.

<sup>25</sup> In contrast, in areas where Magnavox has demonstrated competitive disadvantage, it has presented a factual showing as to its competitors' practices.

Consequently, not affording Magnavox the relief it seeks concerning the customer information restrictions could impede Magnavox from making any such transshipment restrictions effective<sup>26</sup> and would thus be inconsistent with the previous modification of the order.<sup>27</sup> Additionally, as discussed earlier, Magnavox has shown that granting these modifications is not likely to result in Magnavox engaging in unlawful conduct. [16]

#### The Modification Concerning Consumer Rebates

Magnavox would also like to be able to institute consumer rebate programs, under which it would offer rebates to consumers who purchase its consumer electronic products from a Magnavox dealer. The rebates would be paid by Magnavox as credits issued to its dealers on the condition that the dealers apply the amounts to reduce the prices to consumers for the purchased products. Magnavox believes that certain order provisions may be construed to prohibit Magnavox from offering consumer rebates through its dealers.<sup>28</sup> To eliminate the risk that any Magnavox consumer rebate program might be deemed to violate the order, Magnavox asks the Commission to add the following new paragraph to the order, which would expressly permit Magnavox to offer such programs:

*It is further ordered,* That nothing in this order shall be construed to prohibit respondent from offering, establishing or maintaining any consumer rebate program under which respondent will pay a rebate to consumers who purchase one or more of respondents consumer electronic products from a dealer, regardless of whether said rebate is paid by respondent directly to the consumer or is paid by respondent to the dealer on the condition that the dealer apply the amount of the rebate to reduce the dealer's price to the consumer for the product(s) purchased.

#### Magnavox has demonstrated that many of its competitors in the

<sup>26</sup> In support of the deletion of the transshipment provisions, the Commission pointed out that those provisions were "adopted as 'fencing-in' restraints ancillary to the order's ban on resale price maintenance" and that "particularly in view of the continued existence of the order's underlying prohibitions against [resale price maintenance], there no longer appears to be a need to continue the transshipment provisions of the order." 102 FTC at 807-08.

<sup>27</sup> See also *Lenox, supra*, (Commission deleted certain provisions from the order because they were inconsistent with a previous order modification); and *Dahlberg Electronics, Inc.*, 101 FTC 703 (1983) (Commission deleted order provision prohibiting respondent from requiring or coercing its dealers to submit to respondent the names of any customers of such dealers).

<sup>28</sup> See, e.g., paragraph I(J) which prohibits Magnavox from "[e]ngaging in any retail sales of its products through its dealers in which it establishes . . . the retail prices or discounts therefrom and at the same time either (i) fixes the time and/or duration of such sale, or (ii) preselects the products to be offered." 78 FTC at 1189-90. See also paragraph I(K) which prohibits Magnavox from "[e]stablishing any criteria as to the type of merchandise eligible for or fixing or suggesting the amount of an allowance which dealers may grant on merchandise traded in on the purchase of [Magnavox's] products." *Id.* at 1190.

consumer electronic products market have offered consumer rebates, which are popular among consumers, through their respective dealers. Additionally, Magnavox has demonstrated that it is at a significant competitive disadvantage because it has not been able to offer such programs, given the risk that they might be deemed to constitute violations of the order.

In *Armstrong Cork Company*, 104 FTC 540 (1984), the Commission modified an order so that it could not be read to [17] prohibit the kind of consumer rebate programs Magnavox would like to offer its dealers. In granting the modification requested by Armstrong, the Commission stated:

Armstrong states that it views the presence of the term "rebates" in that paragraph as prohibiting it from funnelling "direct-to-consumer" rebates through wholesalers and retailers. Armstrong has demonstrated that permitting it to offer rebates in this manner will benefit both Armstrong and consumers. And, permitting Armstrong to funnel "direct-to-consumer" rebates through wholesalers and retailers should not affect [their] ability to independently determine the resale price of the product. Moreover, if Armstrong should use the rebates to engage in [resale price maintenance], it would violate the order provisions prohibiting resale price fixing. Thus, because [this modification] should benefit both Armstrong and consumers without permitting [resale price maintenance], granting [the modification] is in the public interest.

*Id.* at 541.

The original provision in the *Armstrong* order had prohibited:

Enforcing, or attempting to enforce, the price or prices or suggested prices, discounts, rebates or terms or conditions for the resale of Armstrong floor covering products.

68 FTC 849, 854 (1965). The Commission, in 1984, deleted "rebates or terms or conditions" from that provision, leaving the prohibition against,

Enforcing, or attempting to enforce the price or prices or suggested prices or discounts for the resale of Armstrong floor covering products.

104 FTC at 542-43. The Commission has thus interpreted the *Armstrong* order, as it now reads, to allow consumer rebate programs. Comparing the revised *Armstrong* provision to Paragraph I(J) of the *Magnavox* order, it seems clear that direct-to-consumer rebates should not be viewed as prohibited in this order either.

Similarly, Paragraph I(K) also does not appear to prohibit such consumer rebates. Therefore, the Commission has determined to deny Magnavox's request for the aforementioned proviso. The Commission, however, would not construe the order as prohibiting Magnavox from offering consumer rebates (whether paid by Magnavox directly to consumers or dealers), so long as such programs were not part of a resale price maintenance scheme. [18]

#### The Modification Concerning "Preticketing"

Magnavox's last request concerns its desire to engage in a practice commonly known as "preticketing"—printing its suggested retail prices on tickets, tags or other markings affixed to consumer electronic products that Magnavox ships to its dealers. Magnavox believes that paragraph I(E) of the order, which prohibits Magnavox from requiring its dealers to attach to any of its products price tags bearing its established or suggested retail prices, precludes preticketing. 78 FTC 1189. Accordingly, Magnavox asks the Commission to delete paragraph I(E)<sup>29</sup> and add a new paragraph XII, which would read:

*It is further ordered,* That nothing in this order shall be construed to prohibit respondent from engaging in "preticketing," i.e. suggesting resale prices on any tag, ticket or other marking affixed or to be affixed to any product sold to a reseller.

Setting aside paragraph I(E) is consistent with the Supreme Court's holding in *Monsanto* that "the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply." 465 U.S. at 761. The Commission has also recognized that preticketing is one way in which a manufacturer announces its resale price in advance and that the practice is not in itself unlawful. *See Interco Incorporated*, Trade Reg. Rep. (CCH) Transfer Binder ¶ 22,512 (1988) (order setting aside a ban on preticketing because, among other things, "[r]espondents have shown that the ban on preticketing prohibits them from marketing their products in a manner that is available to their competitors and that would otherwise be lawful." *Id.*, slip op. at 6.).

As discussed earlier, given the consumer electronic products market structure, and Magnavox's relative position, Magnavox's preticketing

<sup>29</sup> The prohibitions in Paragraphs I(A), I(B), I(F), I(G) and I(J) against suggesting retail prices expired by their terms in 1973.

practices are unlikely to be unreasonable. Magnavox has demonstrated that the ban on preticketing places it at a competitive disadvantage with respect to its competitors who are not subject to similar provisions. Request at 54-55, 117-118. Consequently, the affirmative need to modify the order to eliminate the competitive disadvantage outweighs any continuing [19] need for the prohibition on preticketing.<sup>30</sup>

The Commission has determined to deny Magnavox's request to add to the order the aforementioned preticketing provision. Magnavox suggests that the provision is needed because Paragraph I(O), which prohibits securing or attempting to secure dealers' promises on retail prices, would still prohibit preticketing. While Paragraph I(O) generally prohibits efforts to obtain dealers' agreements to maintain resale prices, the Commission does not construe Paragraph I(O) and the remaining portions of the order, as modified, as prohibiting Magnavox from engaging in "preticketing," so long as such conduct is not part of a resale price maintenance scheme.

#### V.

In sum, the Commission has determined that Magnavox generally has made a satisfactory showing that reopening the order and modifying the non-price vertical restraints provisions discussed above is in the public interest. With the exception of the portion of its Request relating to inspection of its dealers' price records, Magnavox has adequately demonstrated that the modifications it seeks would enable Magnavox to use what it considers the most efficient and cost effective distribution of its consumer electronic products and put Magnavox on an equal basis with its competitors. It would also retain the prohibitions against resale price maintenance. Magnavox's conduct would of course also continue to be subject to a case-by-case, rule of reason analysis under the antitrust laws. In light of the Commission's interpretations of the remainder of the order, Magnavox's requested provisos are unnecessary.

Accordingly, *it is ordered*, that this matter be reopened and that the

<sup>30</sup> In *Interco*, the Commission, in support of its decision to set aside a ban on preticketing contained in a 1978 order, noted, among other things, that "[t]he ban on preticketing is in the nature of a 'fencing-in' provision to prevent respondents from using otherwise lawful preticketing as a device to accomplish vertical price fixing. The Commission believes that the conduct that led to the entry of this order has been interrupted for a sufficient period of time so that the ban on preticketing is no longer necessary either to dissipate the effects of respondents' past conduct or to prevent its recurrence." *Id.* The Magnavox order has been in effect since 1971—seven years longer than the order in *Interco*.

Commission's modified order in Docket No. 8822, be, and it hereby is, modified, as of the date of service of this order, by setting aside Paragraphs I(H), I(I), I(E) and I(S), and by modifying Paragraphs I(N), I(P), and I(T), respectively, as follows: [20]

N. Inspecting sales and business records of any dealer for the purpose of ascertaining the prices at which such dealer sells its products; provided, however, that nothing in this Order shall be deemed to prevent respondent from inspecting such records where such inspection is authorized by law, or for the purpose of assisting respondent to establish its compliance with the provisions of the order issued on December 23, 1964 in Consent Order No. C-869, or with any other obligation or requirement of any government authority.

P. Requiring, soliciting or encouraging dealers to report the identity of other dealers, and the prices at which such other dealers advertise, offer for sale or sell its products.

T. Harassing, threatening, intimidating, coercing or delaying shipments to any dealer because the dealer has sold or is selling its products at other than its established or suggested retail prices.

Commissioner Strenio not participating.

## IN THE MATTER OF

## ILLINOIS CEREAL MILLS, INC.

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 9213. Complaint, June 30, 1988—Decision, March 12, 1990*

This consent order prohibits, among other things, a manufacturer and seller of industrial dry corn milling products from acquiring industrial dry corn milling assets in the U.S., or any interest in a U.S. industrial dry corn milling company, for a period of ten (10) years, without prior Commission approval.

*Appearances*

For the Commission: *Joseph S. Brownman* and *Ronald B. Rowe*.

For the respondent: *James Sneed, Steven P. Murphy, and Lizbeth R. Levinson, McDermott, Will & Emery, Washington, D.C. Eugene J. Meigher, Joyce L. Bartoo, and Randall J. Boe, Arent, Fox, Kitner, Plotkin & Kahn, Washington, D.C. Dennis R. Rilinger, Watson, Ess, Marshall & Enggas, Kansas City, MO. Kael B. Kennedy, Matrov, Salzman, Madoff & Gunn, Chicago, IL.*

## COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Illinois Cereal Mills, Inc., a corporation subject to the jurisdiction of the Commission, has entered into an agreement to acquire, took actions to implement the agreement to acquire, and did in fact acquire, certain assets from respondent Elders Grain, Inc. 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, 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. "*ICM*" means Illinois Cereal Mills, Inc., its subsidiaries, divisions and groups controlled by ICM and its directors, officers, employees, agents and representatives, and their successors and assigns.

b. "*Elders*" means Elders Grain, Inc., its subsidiaries, divisions and groups controlled by Elders and its directors, officers, employees, agents and representatives, and their successors and assigns.

c. "*Industrial dry corn milling*" means the milling process whereby degerminated, milled and sifted corn prime products are produced at large volume dry corn mills that are able to produce a variety of prime products required by buyers in several different product applications. Prime products include flaking grits, brewer's grits, corn meal, corn flour, pregelatinized corn flour and corn-soy-milk. Dry corn mills that produce milled corn products in small packages sold at retail to the consuming public are not industrial dry corn mills and the products they produce are generally not used for the same purposes.

d. "*Flaking grits*" are the largest size prime products or corn grits that are produced by the dry-milled process. They are used principally for the production of corn flakes by cereal manufacturers. Flaking grits are also referred to as number 4 grits.

e. "*Brewer's grits*," the next largest size corn grits produced by the dry-milled process, are used principally as an adjunct in the brewing of beer.

f. "*Corn meal*," smaller in size than brewer's grits, is an ingredient in a wide variety of food uses, such as in snack foods, pancake mixes, bakery mixes and in muffin and breading applications.

g. "*Corn flour*" is the smallest size prime corn grits, ground to a fine consistency. Corn flour has a wide variety of food applications.

h. "*Pregelatinized corn flour*" is corn flour that has been further processed by dry corn millers. It is generally used as a binder in the production of some cereals.

i. "*Corn-soy-milk*" is a further processed, blended and vitamin-enriched product consisting of corn grits, soy and milk. It is sold to the United States Department of Agriculture for donation to overseas relief organizations. Corn-soy-milk is also referred to as CSM.

## II. THE PARTIES

2. Respondent ICM is a Delaware Corporation with its principal place of business located in Paris, Illinois.

3. Over the past several years, ICM has had annual net sales in excess of \$100 million.

4. ICM is, and at all times relevant herein has been, engaged in commerce as the term "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, 15 U.S.C. 44.

5. Respondent Elders is a subsidiary of Elders IXL Limited, a foreign corporation located in Australia. Elders' dry corn mill and grain elevator facilities are located in Atchison, Kansas, which it operated as the Lincoln Grain Co.

6. Elders and its related companies have annual net sales and assets far in excess of \$100 million.

7. Elders is, and at all times relevant herein has been, engaged in commerce as the term "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, 15 U.S.C. 44.

### III. THE ACQUISITION

8. In or about May 1988, ICM entered into an agreement with Elders to purchase its dry corn milling assets. These assets had been operated by Elders through the Lincoln Grain Co. The transaction closed on June 5, 1988.

9. The acquisition included a dry corn mill, approximately 91 rail cars, a lease for a portion of the grain elevator attached to the mill and a five-year option to purchase the grain elevator.

### IV. TRADE AND COMMERCE

10. The relevant lines of commerce in which to assess the effects of ICM's acquisition of Elders' dry corn milling assets are (1) industrial dry corn milling for food use and (2) the specific prime products produced by dry corn mills for food use, such as flaking grits, brewer's grits, corn meal, corn flour, pregelatinized corn flour and corn-soy-milk.

11. The relevant section of the country in which to assess the effects of ICM's acquisition of Elders' dry corn milling assets is the United States as a whole.

### V. MARKET STRUCTURE

12. The production and sale of industrial dry corn milling products is highly concentrated, whether measured by the Herfindahl-Hirschmann indices or two-firm and four-firm concentration ratios.

## VI. ENTRY CONDITIONS

13. Entry into the relevant markets is difficult or unlikely.

## VII. COMPETITION

14. ICM and Elders were (1) actual competitors in industrial dry corn milling and the production and sale of industrial dry corn milling products, (2) actual competitors in the production and sale of brewer's grits, corn meal, corn flour and pregelatinized corn flour and (3) actual potential competitors in the production and sale of flaking grits and corn-soy-milk, in the United States.

## VIII. EFFECTS

15. The effect of the acquisition may be substantially to lessen competition in each of the relevant lines of commerce in the United States, in the following ways, among others:

- a. By eliminating direct and actual competition between ICM and Elders;
- b. By eliminating potential competition between ICM and Elders; and
- c. By increasing the likelihood of, or facilitating, actual or tacit collusion.

16. All of the above increase the likelihood that firms will increase prices and restrict output both in the near future and in the long term.

## IX. VIOLATIONS CHARGED

17. The acquisition agreement between ICM and Elders for Elders' dry corn milling assets violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and the acquisition violates 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.

## DECISION AND ORDER

The Commission having heretofore issued its complaint charging respondent Illinois Cereal Mills, Inc. ("Illinois Cereal") with violations of Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, as amended, and respondent Illinois Cereal having been served with a copy of that complaint, together with a notice of contemplated relief; and

Respondent Illinois Cereal, its attorney, and counsel for the

Commission having thereafter executed an agreement containing a consent order, an admission by the respondent Illinois Cereal 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 Illinois Cereal 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, 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 Illinois Cereal Mills, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 616 Jefferson Avenue, Paris, Illinois.

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

#### ORDER

##### I. DEFINITIONS

*It is ordered,* That, for purposes of this order, the following definitions apply:

1. "*Industrial dry corn milling industry*" means firms engaged in the United States in the dry milling of yellow corn whereby degermed, milled and sifted grits of different sizes are produced for resale to food processors, brewers and industrial users. Dry corn mills that produce corn products in small packages solely for retail sale or in-the-home use are not in the industrial dry corn milling industry.

2. "*Industrial dry corn milling assets*" mean dry corn mills, equipment, machinery and rail hopper cars used to mill, sift or transport corn in connection with an industrial dry corn mill, and grain storage elevators that are owned or leased by the operator of an

industrial dry corn mill. Corn is not an industrial dry corn milling asset.

3. "*Respondent Illinois Cereal Mills, Inc.*" means Illinois Cereal Mills, Inc., its foreign and domestic parents, predecessors, subsidiaries, divisions, affiliates, partnerships and joint ventures controlled by Illinois Cereal Mills, Inc., and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

## II. PRIOR APPROVAL FOR ACQUISITIONS

*It is further ordered,* That respondent Illinois Cereal Mills, Inc., for a period of ten (10) years from the date this order becomes final, shall not acquire or lease, directly or indirectly, without the prior approval of the Commission, industrial dry corn milling assets of any company in the industrial dry corn milling industry, or the whole or any part of the stock, share capital or equity interest of any company in the industrial dry corn milling industry;

*Provided, however,* that prior approval is not required for the acquisition by respondent Illinois Cereal Mills, Inc. of industrial dry corn milling assets that are either:

(1) Acquired from a single seller (including all parents, predecessors, subsidiaries, divisions, partnerships, joint ventures and affiliates thereof) if the total price of such assets acquired in any twelve-month period is less than one hundred thousand dollars (\$100,000); or

(2) Acquired from a single seller (including all parents, predecessors, subsidiaries, divisions, partnerships, joint ventures and affiliates thereof) if the total price of such assets acquired is less than five hundred thousand dollars (\$500,000), and thirty (30) days prior written notice of the details of the proposed transaction is given to the Commission. The prior notice shall include the following information: (a) a full description of the assets to be acquired, (b) an identification of the proposed seller, (c) copies of all management documents discussing the proposed acquisition, and (d) copies of all proposed acquisition agreements and all drafts thereof. In the event representatives of the Federal Trade Commission request additional documents or information in writing within the thirty (30) day waiting period, respondent Illinois Cereal Mills, Inc. shall not consummate the proposed acquisition until twenty (20) days after submitting the requested additional documents or information. Respondent Illinois

Cereal Mills, Inc. may request early termination of either waiting period.

### III. OTHER OBLIGATIONS

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

*It is further ordered,* That respondent Illinois Cereal Mills, Inc., shall file with the Commission a verified report in writing within thirty (30) days after the date this order becomes final, setting forth in detail:

(1) The manner and form in which it has complied and is complying with this order; and

(2) The manner and form in which it has complied with the rescission order of the United States District Court for the Northern District of Illinois in Civil Action No. 88-2494.

Commissioner Owen not participating.

IN THE MATTER OF  
THE AMERICAN COLLEGE OF RADIOLOGY

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

*Docket C-2871. Consent Order, Mar. 1, 1977—Modifying Order, Mar. 29, 1985*<sup>1</sup>

This order reopens the proceeding and modifies the Commission's consent order issued March 1, 1977 (89 FTC 144) by allowing respondent to participate in discussions concerning other organizations' development of new or alternative types of health care financing, including those using relative value scales.

ORDER REOPENING AND MODIFYING FINAL ORDER

By petition filed December 3, 1984, the American College of Radiology ("ACR") asked the Commission to reopen and modify the Commission order in Docket No. C-2871 entered by consent against ACR on March 1, 1977 ("order"). ACR requested that the Commission modify the order by a) deleting paragraph II(B) of the order, which prohibits ACR from advising in favor of or against any relative value scale developed by third parties (except that ACR is permitted to provide historical data), and b) inserting a provision identical to a provision contained in the Commission's order in *Michigan State Medical Society*, Docket No. 9129, 101 FTC 191 (1983) ("*Michigan State*") that would allow ACR more freedom to discuss issues relating to reimbursement with third-party payers and governmental entities. ACR's petition was placed on the public record and no comments were received.

Upon consideration of ACR's petition and other relevant information, the Commission finds that the public interest would be served by deleting paragraph II(B) of the order and by inserting the relevant provision contained in the order in *Michigan State*. The Commission's order against the American College of Obstetricians and Gynecologists ("ACOG") in Docket No. 2855 is similar to the ACR order, and the Commission recently reopened and modified the ACOG order, finding that its restriction on ACOG's ability to discuss relative value scales with third-party payers and governmental entities has caused injury to ACOG and the public that outweighed any benefit that might

<sup>1</sup> This matter was inadvertently omitted from the Federal Trade Commission Decisions-Volume 105.

be derived from the restriction. ACR's petition is based on ACOG's petition and the Commission has determined that its finding in ACOG is applicable to ACR. Accordingly, the Commission has modified the ACR order in the same manner as it modified the ACOG order. The modification is also consistent with the Commission's decision in *Michigan State*.

The order continues to prohibit ACR from developing or circulating its own relative value guide for use by its members. In addition, although the order no longer will prohibit ACR from discussing relative value scales with governmental entities and third-party payers, serious antitrust concerns would arise were ACR to negotiate or attempt to negotiate an agreement with any such party or engage in any type of coercive activity to effect such an agreement.

Accordingly, *it is ordered*, that this matter be, and it hereby is, reopened and that the order in Docket No. C-2871 be modified 1) to delete paragraph II(B) and to redesignate paragraphs II(C) and II(D) of the order as paragraphs II(B) and II(C) respectively; 2) to renumber paragraphs III, IV and V of the order as paragraphs IV, V and VI respectively; and 3) to insert the following:

### III.

*It is further ordered*, That this order shall not be construed to prevent ACR from:

A. Exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government, executive agency, or legislative body concerning legislation, rules or procedures, or to participate in any federal or state administrative or judicial proceeding.

B. Providing information or views, on its own behalf or on behalf of its members, to third-party payers concerning any issue, including reimbursement.

IN THE MATTER OF  
OUTDOOR WORLD CORPORATION

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

*Docket 9229. Complaint\*, July 17, 1989—Decision, April 2, 1990*

This consent order requires, among other things, a membership campground promoter, based in Bushkill, Pa., to cease and desist from representing that any consumer will receive a prize, award, gift, bonus, premium, or any other good or service at no cost without disclosing any cost the consumer must pay to receive such good or service. The consent order also requires the respondent to retain accurate records, for a period of 3 years, of all advertising and promotional materials containing representations regarding prize or gift offerings, and records of all prizes and gifts awarded. In addition, respondent is required to notify the Commission of any proposed corporate changes.

*Appearances*

For the Commission: *Lawrence M. Hodapp* and *Eileen Harrington*.

For the respondent: *Alan Schlaifer*, Washington, D.C.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof 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 the notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the 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

\*Complaint previously published at 113 FTC 70 (1990).

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. Outdoor World Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the state of Pennsylvania with its principal office and place of business located at Route 209, Bushkill, 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, Outdoor World Corporation, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from representing, directly or by implication, to any consumer that the consumer will receive a prize, award, gift, bonus, premium, or any other good or service that is similarly described as being available at no cost, without disclosing fully, in type of equal size to that used to identify such good or service and immediately following each good or service thus represented, any cost that the consumer must pay to receive such good or service.

##### II.

*It is further ordered,* That respondent, its successors and assigns shall for three years after the date the representation was last made maintain and upon request make available to the Federal Trade Commission for inspection and copying accurate records of (1) all advertising, promotional or sales materials containing representations regarding prize or gift offerings and (2) all prizes or gifts awarded pursuant to such offerings.

## III.

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

## IV.

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

IN THE MATTER OF  
THE READING HOSPITAL, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 7 OF THE CLAYTON ACT

*Docket C-3284. Complaint, Apr. 10, 1990—Decision, Apr. 10, 1990*

This consent order prohibits, for a period of ten years, among other things, two Berks County, Pa. hospitals from acquiring, without prior Commission approval, all or part of any hospital in Berks County, Pa., with a fair market value or purchase price greater than \$1 million. Respondents are also prohibited, for a period of ten years, from transferring any hospital they operate in Berks County to a person that operates or is acquiring a hospital in Berks County, without prior Commission approval.

*Appearances*

For the Commission: *Jonathan Banks* and *Mark Horoschak*.

For the respondents: *David H. Roland, Roland & Schlegel*, Reading, Pa. and *Christopher Mattson, Barley, Snyder, Cooper & Barber*, Lancaster, PA.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Reading Hospital and Community General Hospital were consolidated through their formation of Berkshire Health System in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, 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 the provisions of Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, stating its charges as follows:

I. THE RESPONDENTS

PARAGRAPH 1. Respondent The Reading Hospital ("Reading Hospital") is a non-profit corporation organized, existing and doing business under the laws of the State of Pennsylvania, with its office, principal place of business and mailing address at Sixth Avenue and Spruce Street, Reading, Pennsylvania. Reading Hospital is a person

subject to the jurisdiction of the Commission pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21.

PAR. 2. Respondent Community General Hospital ("Community General") is a non-profit corporation organized, existing and doing business under the laws of Pennsylvania, with its office and principal place of business in Reading, Pennsylvania, and its mailing address at P.O. Box 1728, Reading, Pennsylvania. Community General is a person subject to the jurisdiction of the Commission pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21.

## II. THE TRANSACTION

PAR. 3. Until December 27, 1985, Reading Hospital was an independent, private, non-profit corporation, controlled by a self-perpetuating board of directors. Reading Hospital had net revenues of approximately \$86 million in its fiscal year 1985.

PAR. 4. Until December 27, 1985, Community General was an independent, private, non-profit corporation, controlled by a self-perpetuating board of trustees. Community General had net revenues of approximately \$27 million in its fiscal year 1985.

PAR. 5. Pursuant to an Affiliation Agreement, dated December 27, 1985, between Reading Hospital and Community General, the two corporations formed a new corporation, Berkshire Health System ("BHS"), for the purpose of consolidating their operations under the control of BHS. BHS immediately became the sole member of, and thereby acquired control over, both Reading Hospital and Community General.

PAR. 6. After the consolidation described above, and until the disaffiliation and dissolution described below, BHS was a non-profit corporation organized, existing and doing business under the laws of the State of Pennsylvania. BHS was primarily engaged in the establishment and management of a system of health care providers in southeastern Pennsylvania, including Reading Hospital and Community General, among others. BHS was governed by a self-perpetuating Board of Directors, composed principally of members of the Board of Directors of Reading Hospital and of the Board of Trustees of Community General.

PAR. 7. BHS remained the sole member of both Reading Hospital and Community General until on or about March 28, 1989, when BHS relinquished its rights as member of Community General, pursuant to a Disaffiliation Agreement entered into on January 18, 1989, among

BHS, Reading Hospital and Community General. Soon thereafter, Community General trustees resigned from the BHS board of directors, and the articles of incorporation and bylaws of BHS and Community General were amended to eliminate Community General's representation on the BHS board of directors and BHS' status as member of Community General. Subsequently, on December 19, 1989, BHS was dissolved. As a result of BHS' dissolution, Reading Hospital or its affiliates assumed control over BHS' subsidiaries, affiliates and other assets. Reading Hospital and Community General are now, as they were prior to the consolidation described above, independent corporations controlled by separate, self-perpetuating boards of directors or trustees.

PAR. 8. At all times relevant herein, BHS, Reading Hospital and Community General have been and (except for BHS) are now engaged in or affecting commerce within the meaning of Section 1 of the Clayton Act, as amended 15 U.S.C. 12.

### III. TRADE AND COMMERCE

PAR. 9. The relevant line of commerce is general acute care hospital services. General acute care hospital services are services provided by health facilities that provide 24-hour inpatient care in connection with services of physicians for conditions for which nursing, medical or surgical services would be appropriate for care, diagnosis, or treatment, other than services provided by facilities that are specially intended for treatment of mental illness, emotional disturbance or substance abuse.

PAR. 10. The relevant section of the country is the Berks County, Pennsylvania, area, and/or parts thereof.

PAR. 11. Prior to the consolidation described above, the general acute care hospital services market in the Berks County area was highly concentrated, with only three firms doing business in the relevant market. Reading Hospital was the largest firm in the relevant market. In 1985, Reading Hospital had a share of approximately 63% of the general acute care hospital services market in the Berks County area. St. Joseph Hospital had a market share of approximately 23%. Community General had a market share of approximately 14%.

PAR. 12. Entry into the general acute care hospital services market in the Berks County area is difficult, especially in light of Pennsylvania's certificate-of-need regulation of entry.

## IV. THE EFFECTS OF THE CONSOLIDATION

PAR. 13. As a result of the consolidation of Reading Hospital and Community General through the formation of BHS, BHS controlled two of the three general acute care hospitals in the Berks County area. The consolidation increased the market share of the largest provider of general acute care hospital services in the Berks County area from approximately 63% to approximately 77%, and increased the two-firm concentration ratio from approximately 86% to 100%. As a result of the consolidation, the Herfindahl-Hirschmann index increased by over 1,700 points, from approximately 4,700 points to approximately 6,500 points.

PAR. 14. The consolidation eliminated direct and actual competition between Reading Hospital and Community General.

PAR. 15. Until the disaffiliation described above, the effect of the consolidation of Reading Hospital and Community General through the formation of BHS may have been substantially to lessen competition or tend to create a monopoly in the relevant market in the following ways, among others:

- (a) By substantially reducing actual and potential competition in the relevant market;
- (b) By giving BHS a dominant position in the relevant market;
- (c) By substantially increasing the likelihood of collusion in the relevant market; and
- (d) By denying patients, physicians, and purchasers of health care coverage the benefits of free and open competition based on price, quality, and service.

## V. VIOLATION CHARGED

PAR. 16. The consolidation of Reading Hospital and Community General through their formation of BHS violated Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and

which, if issued by the Commission, would charge respondents with violation of the Clayton Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said 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 procedures prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent The Reading Hospital is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office, principal place of business and mailing address at Sixth Avenue and Spruce Street, Reading, Pennsylvania. Respondent Community General Hospital 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 in Reading, Pennsylvania, and its mailing address at P.O. Box 1728, Reading, Pennsylvania.

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

#### ORDER

##### I.

For the purposes of this order:

A. "*Reading Hospital*" means The Reading Hospital (a Pennsylvania corporation), its directors, trustees, officers, agents, employees,

and representatives, its parents and affiliates, and its subsidiaries, divisions, successors, and assigns.

B. "*Community General*" means Community General Hospital (a Pennsylvania corporation, which operates a hospital of the same name in Reading, Pennsylvania), its directors, trustees, officers, agents, employees, and representatives, its parents and affiliates, and its subsidiaries, divisions, successors, and assigns.

C. "*Respondents*" means Reading Hospital and Community General, collectively and individually.

D. "*General acute care hospital*," herein referred to as "*hospital*," means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized medical staff, that provides 24-hour inpatient care, as well as outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

E. To "*acquire a hospital*" means to directly or indirectly acquire all or any part of the stock or assets of any hospital, or enter into any arrangement to obtain direct or indirect ownership, management or control of any hospital or any part thereof, such as a lease of or management contract for a hospital, or the acquisition of the right to designate directly or indirectly the directors of a hospital corporation.

F. To "*operate a hospital*" means to own, lease, manage, or otherwise control or direct the operations of a hospital, directly or indirectly.

G. "*Affiliate*" means any entity whose management and policies are controlled or directed in any way, directly or indirectly, by the person with which it is affiliated.

H. "*Person*" means any natural person, partnership, corporation, company, association, trust, joint venture or other business or legal entity, including any governmental agency.

## II.

*It is ordered*, That, for a period of ten (10) years from the date this order becomes final, no respondent shall, without the prior approval of the Federal Trade Commission:

- A. Acquire any hospital in Berks County, Pennsylvania; or
- B. Permit any hospital it operates in Berks County to be acquired by

any person that operates, or is in the process of acquiring, any other hospital in Berks County.

*Provided, however,* that no acquisition shall be subject to this Paragraph II of this order if the fair market value of (or, in case of a purchase acquisition, the consideration to be paid for) the hospital or part thereof to be acquired does not exceed one million dollars (\$1,000,000).

### III.

*It is further ordered,* That, for a period of ten (10) years from the date this order becomes final, no respondent shall, without the prior approval of the Federal Trade Commission, permit any hospital it operates in Berks County, Pennsylvania to be acquired by any person other than another respondent unless the respondent requires, as a condition precedent to the acquisition, that the acquiring party file with the Commission, prior to the closing of the acquisition, a written agreement to be bound to the provisions of this order.

### IV.

*It is further ordered,* That respondents, upon written request of the Secretary of the Federal Trade Commission or the Director of the Bureau of Competition of the Federal Trade Commission made to them at their principal offices, for the purpose of securing compliance with this order, and for no other purpose, and subject to any legally recognized privilege, shall permit duly authorized representatives of the Federal Trade Commission or the Director of the Bureau of Competition:

1. Reasonable access during their office hours, in the presence of counsel, to those books, ledgers, accounts, correspondence, memoranda, reports, and other records and documents in their possession or control that relate materially and substantially to any matter contained in this order; and

2. An opportunity, subject to their reasonable convenience, to interview their officers or employees, who may have counsel present, regarding such matters.

### V.

*It is further ordered,* That respondents shall notify the Commission

at least thirty (30) days prior to any proposed change, such as dissolution, assignment, sale resulting in the emergence of a successor corporation or association, or the creation or dissolution of subsidiaries or affiliates, which may affect compliance obligations arising out of this order.

IN THE MATTER OF  
NATURE'S WAY PRODUCTS, INC., ET AL.

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

*Docket C-3285. Complaint, Apr. 10, 1990—Decision, Apr. 10, 1990*

This consent order prohibits, among other things, the Springville, Utah distributors and advertisers of Control from making any claims, contrary to fact, that a consumer can self-diagnose certain yeast conditions; and from making any claims without adequate substantiation concerning whether certain dietary, food, or nutritional supplements can cure, treat, or prevent certain yeast conditions. It also prohibits any unsubstantiated claims that six ingredients of the supplements affect any disease. The consent agreement requires respondents to pay \$30,000 to the National Institutes of Health to support research in candidiasis or the effects of yeast organisms on health.

*Appearances*

For the Commission: *Toby M. Levin* and *Robert C. Cheek*.

For the respondents: *Kenneth Murdock, Chairman & Brett Wood, General Counsel*, Springville, UT.

COMPLAINT

The Federal Trade Commission, having reason to believe that Nature's Way Products, Inc., a corporation, Murdock International Corporation, a corporation, and Kenneth Murdock, individually and as an officer of said corporations, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1.

- (a) Nature's Way Products, Inc. is an Arizona corporation.
- (b) Murdock International Corporation is a Utah corporation.
- (c) Nature's Way Products, Inc. is a wholly owned subsidiary of Murdock International Corporation.
- (d) Murdock International Corporation dominates and controls the acts and practices of Nature's Way Products, Inc.

(e) Each of the above corporate respondents has its principal office and place of business at 10 Mountain Springs Parkway, Springville, Utah.

(f) Kenneth Murdock is President of each of the corporate respondents. He formulates, directs and controls the acts and practices of the corporate respondents, including the acts and practices alleged in this complaint. His principal office and place of business is the same as that of the corporations.

(g) The aforementioned respondents cooperate and act together in carrying out the acts and practices alleged in this complaint.

PAR. 2. Respondents have advertised, offered for sale, sold and distributed various nutritional and other food supplements, including Control and related products, which products are "foods" and "drugs" within the meaning of that term in Section 12 of the Federal Trade Commission Act.

PAR. 3. Respondents have disseminated or caused to be disseminated advertisements for such supplements. These advertisements have been disseminated by various means in or affecting commerce, including magazines distributed across state lines, for the purpose of inducing purchases of such foods and drugs by members of the public.

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

PAR. 5. Typical of respondents' advertisements, but not necessarily inclusive thereof, are the advertisements attached hereto as Exhibits A through D. Specifically, the aforesaid advertisements contain the following statements:

(a) "Control. Nutritional Control of Yeast (*Candida albicans*) Infections." (Exhibits A, B, C, D).

(b) "Do you have a yeast infection? Here's what it is and how to fight it." (Exhibit A).

(c) "[Intestinal *Candida albicans* colonies] can sometimes grow rapidly due to a variety of conditions. When this happens they are no longer friendly microorganisms, but have developed into a '*Candida albicans*' problem. Worse, they will have an adverse effect on our health." (Exhibit C).

(d) "What can cause *Candida albicans* to develop?"

A number of conditions can lead to a *Candida* problem. Steroid drugs (such as cortisone), birth control pills and the long-term use of antibiotics (such as those used to control acne or various bacterial infections) can invite the condition. Poor nutrition or a sluggish or impaired immune system will often contribute to yeast problems. Stress and environmental pollutants also play a role.

Antibiotics can reduce the numbers of beneficial bacteria that normally keep the

yeast under control. When this happens the yeast multiply in an unrestrained manner and a Candida problem may result." (Exhibit C).

(e) "Cantrol's high potency formula helps keep [can keep] yeast colonies from overpopulating in the intestines where they grow." (Exhibits A, B, C, D).

(f) "Nature's Way Control (Candida Control Pack) is a complete nutritional approach for the control of Candida albicans." (Exhibits A, B).

(g) "Cantrol. A safe sensible way to fight Candida albicans. Control, from Nature's Way, is a complete nutritional approach to Candida albicans control. Each portion-controlled pack contains a combination of natural ingredients that help to control the discomfort associated with Candida albicans." (Exhibit C).

(h) "Properly followed the Cantrol program offers the greatest chance for success in restoring your body to good health." (Exhibit A).

(i) "Take the Yeast Test....

Y N

- — 1. Do you feel tired most of the time?
- — 2. Do you suffer from intestinal gas, abdominal bloating or discomfort?
- — 3. Do you crave sugar, bread, beer or other alcoholic beverages?
- — 4. Are you bothered by constipation, diarrhea, or alternating constipation and diarrhea?
- — 5. Do you suffer from mood swings or depression?
- — 6. Are you often irritable, easily angered, anxious or nervous?
- — 7. Do you have trouble thinking clearly, suffer occasional memory losses or have difficulty concentrating?
- — 8. Are you ever dizzy or lightheaded?
- — 9. Do you have muscle aches or stiffness with normal activity?
- — 10. Have you had an unexpected weight gain without a change in diet?
- — 11. Are you bothered by itching or burning of the vagina or prostate or a loss of sexual desire?
- — 12. Have you ever taken antibiotics?
- — 13. Are you currently or have you ever used birth control pills?
- — 14. Have you ever taken steroid drugs, such as cortisone?"

"If you answered 6 or more questions with a 'yes', the probability is high to very high that you, like so many others, have a yeast infection." (Exhibit A).

(j) "[Y]ou should know that Cantrol was developed to be the first effective, total program for the nutritional control of yeast." (Exhibit D).

PAR. 6. Through the use of the statements referred to in paragraph five (i), and other statements in advertisements not specifically set forth herein, respondents have represented, directly or by implication, that answering affirmatively at least six questions listed in respondents' advertisements demonstrates that a person is likely to have a yeast infection.

PAR. 7. In truth and fact, answering affirmatively at least six

questions listed in respondents' advertisements does not demonstrate that a person is likely to have a yeast infection. Therefore, the representation set forth in paragraph six was and is false and misleading.

PAR. 8. Through the use of the statements referred to in paragraph five, and other statements in advertisements not specifically set forth herein, respondents have represented, directly or by implication, that:

(1) Consumption of Control controls adverse effects on health commonly caused by excessive levels of yeast (*Candida albicans*) in the intestines;

(2) Consumption of Control controls yeast (*Candida albicans*) infection in the vagina.

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

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

PAR. 11. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce and the making of false advertisements in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Commissioner Strenio dissenting.

EXHIBIT A

# Take the Yeast Test.

**Do you have a yeast infection? Here's what it is and how to fight it.**

We call the type of yeast normally found in our intestines "intestinal candida colonies." Normally these bacteria are harmless. However, they can sometimes grow rapidly due to a variety of conditions. When this happens they are no longer friendly

microorganisms but have developed into a "Candida albicans" infection. Worse, they have an adverse effect on our health.

Nature's Way, the makers of Control™, a natural product designed to help control Candida infections, has designed a simple test to help you determine if you have a yeast infection.\*

**Y/N**

- 1. Do you feel tired most of the time?
- 2. Do you suffer from intestinal gas, abdominal bloating or discomfort?
- 3. Do you crave sugar, bread, beer or other alcoholic beverages?
- 4. Are you bothered by constipation, diarrhea, or alternating constipation and diarrhea?
- 5. Do you suffer from mood swings or depression?
- 6. Are you often irritable, easily angered, anxious or nervous?
- 7. Do you have trouble thinking clearly, suffer occasional memory losses or have difficulty concentrating?
- 8. Are you ever dizzy or lightheaded?
- 9. Do you have muscle aches or stiffness with normal activity?
- 10. Have you had an unexpected weight gain without a change in diet?
- 11. Are you bothered by itching or burning of the vagina or prostate or a loss of sexual desire?
- 12. Have you ever taken antibiotics?
- 13. Are you currently or have you ever used birth control pills?
- 14. Have you ever taken steroid drugs, such as cortisone?

\*This test is provided for general information only and is not intended to be used for self-diagnosis without the advice and supervision of a health professional. Some of the symptoms listed will occur in many various conditions which could require the assistance of a health professional.

If you answered 6 or more questions with a "yes", the probability is high to very high that you, like so many others, have a yeast infection. Read about how Control can help.

**What is a yeast infection?**

A number of conditions can lead to candida infections. Steroid drugs (such as cortisone), birth control pills and the long-term use of antibiotics (such as those used to control acne or various bacterial infections) can invite the problem. Poor nutrition or a sluggish or impaired immune system will often contribute to yeast problems. Stress and environmental pollutants also play a role.

Antibiotics can reduce the numbers of beneficial bacteria that normally keep the yeast under control. Those who eat meat may be exposed to low levels of antibiotics without even knowing it. Widespread use of antibiotics in stock animals to control infections and stimulate growth has been connected with yeast infections in humans. When this happens the yeast multiply in an unrestrained manner and a candida infection may result.

**How Nature's Way Control combats troublesome yeast infections.**

Nature's Way Control (Candida Control Pack) is a complete nutritional approach for the control of Candida albicans. Each Control pack contains a combination of natural ingredients that helps to control Candida infections. These ingredients come in portion-controlled packages for added convenience and freshness.

Control's high potency formula helps keep yeast colonies from overpopulating in the intestines where they grow. One major ingredient in Control is contained in unique enterosoluble capsules, so it can pass through the stomach and be released in the intestines for maximum benefit. Other brands in powdered, liquid or ordinary gelatin capsule form are exposed to destructive stomach acids before they ever reach the lower intestines.

Additional ingredients such as Pan D'Arco, linseed oil and vitamin E are included in the Control portion-controlled pack for nutritional support and to help strengthen the immune system. Properly following the Control program offers the greatest chance for success in restoring your body to good health.

**Proper diet and Control: A sensible approach to good health.**

If you suspect you have a Candida albicans infection, put Control to the test. Ask for Control at fine health and nutrition stores everywhere.



# Control™

## EXHIBIT B

# Take the Yeast Test.

**Do you have a yeast problem? Here's what it is and how to fight it.**

We call the type of yeast normally found in our bodies "Candida colonies." Normally they are harmless. However, they can sometimes grow rapidly due to a variety of conditions. When this happens they are no longer friendly microorganisms, but have

developed into a "Candida albicans" problem. Worse, they have an adverse effect on our health.

Nature's Way, the makers of Cantrol™, a total nutritional plan designed to help control Candida albicans, has developed a simple test to help you determine if you have a yeast problem.\*

Y N

1. Do you feel tired most of the time?
2. Do you suffer from intestinal gas, abdominal bloating or discomfort?
3. Do you crave sugar, bread, beer or other alcoholic beverages?
4. Are you bothered by constipation, diarrhea, or alternating constipation and diarrhea?
5. Do you suffer from mood swings or depression?
6. Are you often irritable, easily angered, anxious or nervous?
7. Do you have trouble thinking clearly, suffer occasional memory losses or have difficulty concentrating?
8. Are you ever dizzy or lightheaded?
9. Do you have muscle aches or stiffness with normal activity?
10. Have you had an unexpected weight gain without a change in diet?
11. Are you bothered by itching or burning of the vagina or prostate or a loss of sexual desire?
12. Have you ever taken antibiotics?
13. Are you currently or have you ever used birth control pills?
14. Have you ever taken steroid drugs, such as cortisone?

\*This test is provided for general information only and is not intended to be used for self-diagnosis without the advice and recommendation of a qualified health professional. Some of the symptoms could indicate a more serious condition which would require the attention of a health professional.

If you answered 6 or more questions with a "yes," you may have a yeast problem. Read about how Cantrol can help.

### What causes a yeast problem?

A number of conditions can lead to Candida or yeast problems. Steroid drugs (such as cortisone), birth control pills and the long-term use of antibiotics (such as those used to control acne or various bacterial infections) can invite the problem. Poor nutrition or a sluggish or impaired immune system will often contribute to yeast populations. Stress and environmental pollutants also play a role.

Antibiotics can reduce the numbers of beneficial bacteria that normally keep the yeast under control. When this happens the yeast multiply in an unrestrained manner and a Candida problem may result.

### How the Nature's Way Cantrol Program controls troublesome yeast.

Nature's Way Cantrol (Candida Control Pack) is a complete nutritional approach for the control of Candida albicans. Each Cantrol pack contains a combination of natural ingredients

that helps to control Candida. These ingredients come in portion-controlled packages for added convenience and freshness.

Cantrol's high potency formula helps keep yeast colonies from overpopulating in the intestines where they grow. One major ingredient in Cantrol is Primadophilus® brand acidophilus, contained in unique enter-soluble capsules. This allows it to pass through the stomach and be released in the intestines for maximum benefit.

Additional ingredients such as Nature's Way anti-oxidant, linseed oil and vitamin E are included in the Cantrol portion-controlled pack for nutritional support. We have also included a free booklet, "Dietary Guidelines and Program Overview" which provides dietary suggestions along with complete information on the Cantrol program.

Properly following the Cantrol dietary and nutritional program gives you a fighting chance against yeast.

### Proper diet and Cantrol: A sensible approach to good health.

Ask for Cantrol at fine health food stores everywhere.

If Cantrol is unavailable in your area, write Nature's Way, 10 Mountain Springs Parkway, Springville, UT, 84663, or call toll-free 1-800-453-9000.



# Cantrol™

## EXHIBIT C



## Combat troublesome yeast with Cantrol.

We call the type of yeast normally found in our intestines "intestinal candida albicans colonies." Usually they're harmless.

However, they can sometimes grow rapidly due to a variety of conditions. When this happens they are no longer friendly microorganisms, but have developed into a "Candida albicans" problem. Worse, they will have an adverse effect on our health.

Left uncontrolled, Candida albicans can make you feel fatigued, bloated, moody and irritable. Fortunately, there's something you can do to fight the problem.

### **Cantrol. A safe, sensible way to fight Candida albicans.**

Cantrol, from Nature's Way, is a complete nutritional approach to Candida albicans control. Each portion-controlled pack contains a combination of natural ingredients that help to control the discomfort associated with Candida albicans.

### **What can cause Candida albicans to develop?**

A number of conditions can lead to a candida problem. Steroid drugs (such as cortisone), birth control pills and the long-term use of antibiotics (such as those used to control acne or various bacterial infections) can invite the condition. Poor nutrition or a sluggish or impaired immune system will often contribute to yeast problems. Stress and environmental pollutants also play a role.

Antibiotics can reduce the numbers of beneficial bacteria that normally

keep the yeast under control. When this happens the yeast multiply in an unrestrained manner and a candida problem may result.

### **Fight yeast discomfort with Cantrol.**

Cantrol's high potency formula can keep yeast colonies from overpopulating in the intestines where they grow.

One of the key ingredients in Cantrol is Primadophilus® brand acidophilus. Only Primadophilus is contained in special enterosoluble capsules, so it can pass through the stomach to the lower intestine, for maximum benefit.

Other acidophilus brands in powdered, liquid or ordinary gelatin capsule form, are exposed to destructive stomach acids before they ever reach the lower intestines.

### **Let Cantrol help you keep feeling your best.**

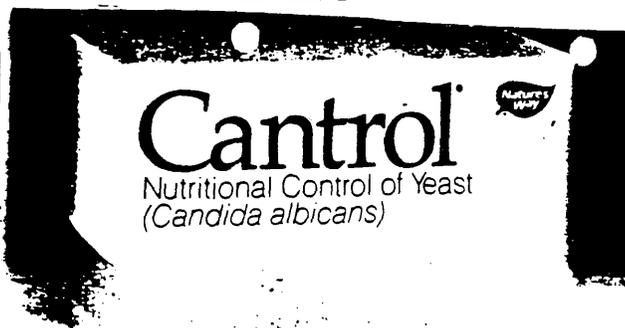
Properly following the Cantrol program offers a good chance for success in restoring your body to good health.

Look for gentle, natural Cantrol in portion-controlled packages which also contain a free booklet of dietary suggestions and nutritional support. Available in fine health and natural food stores.

If Cantrol is not available in your area, write Nature's Way, 10 Mountain Springs Parkway, Springville, UT 84663, or call toll-free 1-800-453-9000.

**Cantrol**  
 America's Natural Herbivore Control™  
 ©1988 Nature's Way Products, Inc.

## EXHIBIT D



21 day supply in 42 individual packets

# Do you have a yeast problem?

Health care professionals call the type of yeast normally found in our intestines "intestinal *Candida albicans* colonies". Usually they're harmless.

However, studies show they can sometimes grow rapidly due to a variety of conditions. When this happens they may no longer be friendly microorganisms. They've actually developed into a "*Candida albicans*" problem. And while there is debate about its precise effect on the body, chronic candidiasis has been reported as a significant problem among a portion of the U.S. population.

Physicians who feel candidiasis can be a health issue look for a number of signals that may indicate the presence of a *Candida albicans* problem. They include:

- Fatigue
- Intestinal gas, bloating and discomfort
- Craving for sugar, bread, beer or other alcoholic beverages
- Constipation, diarrhea
- Mood swings or depression
- Irritability, nervousness, apatousness
- Occasional memory loss, difficulty in concentration
- Dizziness or lightheadedness

**Control®. A safe, sensible way to fight *Candida albicans*.**

If you suspect you suffer from one or more of the symptoms that are associated with chronic candidiasis, Nature's Way urges you to consult a health professional familiar with the candida debate. They can help you determine whether candida is the problem.

In the meantime, you should know that Control was developed to be the first effective, total program for the nutritional control of yeast.

**What can cause *Candida albicans* to develop?**

Studies show a number of conditions may lead to a candida problem. Steroid drugs (such as cortisone), birth control pills and the long-term use of antibiotics (such as those used to control acne or various bacterial infections) can invite the condition. Poor nutrition or a sluggish or impaired immunity system can often contribute to yeast problems. Stress and environmental pollutants may also play a role.

**Fight yeast discomfort with Control.**

Control's high potency formula can keep yeast colonies from overpopulating in the intestines where they grow.

One of the key ingredients in Control is Nature's Way acidophilus. Our acidophilus is unique. It's contained in special enterosoluble capsules so it can pass through the stomach to the lower intestine, for maximum benefit.

**Don't let *Candida albicans* keep you from feeling your best.**

Consulting a health professional and properly following the Control program offers a good chance for success in controlling candida.

Look for gentle, natural Control in portion-controlled packages which also contain a free booklet of guidelines for dietary and lifestyle support. Available in fine Health and Natural Food stores nationwide.

If Control is unavailable in your area, write Nature's Way, 10 Mountain Springs Parkway, Springville, Utah 84663. Or call toll-free 1-800-453-9000.

**Control**  
Nature's Way  
 America's Natural Selfcare Company  
 © 1987 Nature's Way Products, Inc.

Let's Live, April 1988

## DECISION AND ORDER

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

The respondents, their attorney, and counsel for 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.

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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. Nature's Way Products, Inc is an Arizona corporation.
2. Murdock International Corporation is a Utah corporation.
3. Nature's Way Products, Inc. is a wholly owned subsidiary of Murdock International Corporation.
4. Murdock International Corporation dominates and controls the acts and practices of Nature's Way Products, Inc.
5. Each of the above corporate respondents has its principal office and place of business at 10 Mountain Springs Parkway, Springville, Utah.
6. Kenneth Murdock is President of each of the corporate respondents. He formulates, directs and controls the acts and practices of the corporate respondents, including the acts and practices alleged in this complaint. His principal office and place of business is the same as that of the corporations;

7. The aforementioned respondents cooperate and act together in carrying out the acts and practices alleged in this complaint.

8. 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 respondents Nature's Way Products, Inc., a corporation, its successors and assigns, and its officers; Murdock International Corporation, a corporation, its successors and assigns, and its officers; Kenneth Murdock, individually and as an officer of the said corporations; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of any dietary, food, or nutritional supplement, including "Cantrol," in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication:

A. Contrary to fact, that a consumer can use any test to self-diagnose an intestinal yeast condition, problem or infection.

B. Concerning such product's ability to cure, treat, prevent, or reduce the risk of developing *candida albicans* or a yeast condition, problem or infection, unless at the time of making such representation respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of this order, "*competent and reliable scientific evidence*" shall mean those tests, analyses, research, studies or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession to yield accurate and reliable results.

### II.

*It is further ordered,* That respondents Nature's Way Products, Inc., a corporation, its successors and assigns, and its officers; Murdock International Corporation, a corporation, its successors and assigns, and its officers; Kenneth Murdock, individually and as an

officer of the said corporations; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of any dietary, food, or nutritional supplement, including Cantrol, that contains any or all of the ingredients acidophilus, Evening Primrose Oil, Pau D'Arco, linseed oil, caprylic acid, or vitamin E, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, concerning such product's ability to cure, treat, prevent or reduce the risk of developing any disease, unless at the time of making such representation respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of this order, "disease" shall mean an illness or sickness.

### III.

*It is further ordered,* That respondents shall pay, in lieu of redress, the sum of \$30,000 to the National Institutes of Health. The funds shall be designated for the support of research or fellowships relating to products for the cure, prevention, or treatment of candidiasis, which may include vulvovaginal candidiasis, or relating to the effects of *Candida albicans* or other yeast organisms on health. In the event the National Institutes of Health do not accept any or all of such funds, such remaining funds shall be paid to the United States Treasury. All funds shall be paid by respondents within sixty (60) days of the date of service of this order.

### IV.

*It is further ordered,* That for three (3) years after the last date of dissemination of the representation, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying copies of:

1. All materials that were relied upon by respondents in disseminating any representation covered by this order; and
2. All test reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call into question any representation that is covered by this order.

## V.

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

## VI.

*It is further ordered,* That respondents shall forthwith distribute a copy of this order to each of their operating divisions and to all distributors of products manufactured or marketed by respondents.

## VII.

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

Commissioner Strenio dissenting.

## IN THE MATTER OF

## METRO MLS, INC.

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

*Docket C-3286. Complaint, Apr. 18, 1990—Decision, Apr. 18, 1990*

This consent order prohibits, among other things, a Virginia Beach, Va. real estate multiple listing service from forbidding or refusing publication of exclusive agency listings on its multiple listing service. However, respondent is free to require designation of a listing as one granting an exclusive agency. Respondent is required to furnish a copy of the Commission's order to each of its current and future members; to amend its by-laws, rules, and regulations to conform to the order; and to notify the Commission of certain corporate changes.

*Appearances*

For the Commission: *Paul J. Nolan* and *Jacques C. Fewillan*.

For the respondent: *Stephen Story, Kaufman & Canoles*, Norfolk, VA.

## 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 the respondent Metro MLS, Inc., a corporation, has violated and is violating Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Metro MLS, Inc. ("Metro"), is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its offices and principal place of business located at 2850 Ansol Lane, Virginia Beach, Virginia.

PAR. 2. Metro is now, and since 1969 has been, providing a multiple listing service for its member-owners, who are real estate brokers. Each member-owner of Metro owns one share of Metro's stock, which

is non-transferable except between the member and Metro. Only member-owners' firms may participate in Metro's multiple listing service. Each member-owner agrees to submit all of his or her firm's exclusive right to sell listings for publication on Metro's multiple listing service to the entire membership, and to share any brokerage commissions due with any member whose firm successfully locates a purchaser for any property so listed.

PAR. 3. Metro serves real estate brokers doing business, primarily, in the cities of Virginia Beach and Norfolk and the Great Bridge and Greenbriar Boroughs of the city of Chesapeake, Virginia (the "Tidewater Area"). The Tidewater Area has a population of approximately 600,000 persons. In calendar year 1987, more than 70 percent of the listings published on Metro's multiple listing service were for properties in the Tidewater Area.

PAR. 4. Approximately 80 to 90 percent of real estate brokerage firms operating in the Tidewater Area are members of Metro. In 1987, at least 72 percent of the total number of residential real estate sales in the cities of Virginia Beach and Norfolk involved listings that were published on Metro. Sales of residential real estate listings published on Metro totaled approximately \$1.6 billion in 1987. Membership in Metro significantly increases the opportunities for members' brokerage firms to enter into listings with residential property owners. Membership in Metro also significantly reduces members' costs of obtaining up-to-date and comprehensive information on listings and sales.

PAR. 5. Metro's general business practices, and the acts and practices described below, are in or affect commerce as commerce is defined in the Federal Trade Commission Act.

PAR. 6. Except to the extent that competition has been restrained as described below, Metro's members and their brokerage firms are now and have been in competition among themselves, and with other brokers and brokerage firms in the Tidewater Area, with respect to the provision of real estate brokerage services.

PAR. 7. Metro requires each member to abide by its bylaws and its rules, regulations, and official policies. If any member or any member's firm is found to be in violation of any of Metro's bylaws, rules, and regulations, or official policies, such member is subject to penalties or disciplinary action, including suspension or termination of membership in Metro.

PAR. 8. At the time of the initiation of the Commission's

investigation, Metro was acting as a combination of its members, or in conspiracy with at least some of its members, to restrain trade in the provision of residential real estate brokerage services in the Tidewater Area. Since at least 1980, Metro has maintained a policy that prohibits publication on Metro's multiple listing service of any but exclusive right to sell listings. Such listings are those in which a property owner appoints a specified broker as his or her sole agent for the sale of a property, and contracts to pay to that broker an agreed-upon commission if a ready, willing, and able buyer is procured, or if the property is sold, whether by the broker or by any other person, including the owner. By this policy, Metro has forbidden and refused publication on its multiple listing service of exclusive agency listings. That is, Metro has forbidden and refused publication of any listing under which a property owner appoints a broker as exclusive agent for the sale of the property at an agreed commission, but reserves the right to sell the property personally to a direct purchaser (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission due to the agent broker.

PAR. 9. The purposes, effects, tendency, or capacity of the combination or conspiracy alleged in paragraph eight above and the policies, acts, or practices of Metro described in paragraph eight above, have been to restrain competition unreasonably in one or more of the following ways among others:

a. By restraining competition among brokerage firms based on willingness to offer or accept different contract terms that may be attractive and beneficial to consumers, such as terms that allow the property owner to pay a reduced commission or no commission if the owner sells the property through means alternative to a broker's services;

b. By limiting the ability of consumers to negotiate brokerage contract terms that may be more advantageous to them than an exclusive right to sell listing; and

c. By limiting the ability of property sellers to compete against real estate brokers in locating purchasers.

PAR. 10. The policies, acts, practices, and combination or conspiracy described above constitute unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The relief herein requested is

necessary to ensure no reoccurrence of such alleged policy, or the effects thereof.

#### DECISION AND ORDER

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

The respondent, its duly authorized officer, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all of 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 respondent has violated the said Act, 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 procedures 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. Metro MLS is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its office and principal place of business located at 2850 Ansol Lane, in the City of Virginia Beach, Commonwealth of Virginia.

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

## ORDER

## DEFINITIONS

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

1. "*Multiple listing service*" shall mean a clearinghouse through which members' real estate brokerage firms exchange information on listings of real estate properties and share sales commissions with members who locate purchasers.

2. "*Listing*" shall mean any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

3. "*Exclusive agency listing*" shall mean any listing under which a property owner appoints a broker as exclusive agent for the sale of the property at an agreed commission, but reserves the right to sell the property personally to a direct purchaser (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission owed to the agent broker.

## I.

*It is ordered*, That respondent Metro MLS, Inc. ("Metro"), and its successors, assigns, officers, directors, committees, agents, representatives, or employees, directly, indirectly, or through any device, in or in connection with the operation of a multiple listing service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist from forbidding or refusing publication on Metro's multiple listing service of any exclusive agency listing, or restricting such publication in any way other than by requiring designation of the listing as one granting an exclusive agency or by imposing terms applicable to all listings accepted for publication by Metro's multiple listing service.

## II.

*It is further ordered*, That Metro shall:

(A) Within thirty (30) days after this order becomes final, furnish a copy of this order to each of its members.

(B) Within sixty (60) days after this order becomes final, amend, if and to the extent necessary to conform to the provisions of this order,

its bylaws, rules and regulations, associated business forms, and any other of its documents that are made binding by Metro on its members, required or recommended by Metro for use by its members when transacting business with the public, or that are used by Metro itself in its business dealings with any third party or institution and shall make a copy of all conforming or conformed documents available to each of its members if it has not already done so.

(C) For a period of three (3) years after this order becomes final, furnish a copy of this order to each new member of Metro's multiple listing service, within thirty (30) days of his or her admission to membership.

(D) Within sixty (60) days after this order becomes final, submit a verified written report to the Federal Trade Commission setting forth in detail the manner and form in which Metro has complied and is complying with this order.

(E) For a period of five (5) years after this order becomes final, maintain and make available to the Commission staff for inspection and copying, upon reasonable notice, all documents that relate to the manner and form in which Metro has complied with and is complying with this order.

(F) Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in Metro, 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 Metro that may affect compliance obligations arising out of this order.

IN THE MATTER OF  
IMO INDUSTRIES, INC.

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 9235. Complaint, Nov. 8, 1989—Decision, Apr. 25, 1990*

This consent order requires, among other things, a Lawrenceville, N.J. based corporation to seek prior FTC approval, for a period of ten years, before acquiring any company that has manufactured and sold 25 millimeter second generation image intensifier tubes in the U.S., or that has sold such tubes to the U.S. Dept of Defense at any time since January 1, 1988. In addition, for ten years, respondent is required to notify the Commission at least thirty days prior to any proposed corporate changes that may affect compliance with the order.

*Appearances*

For the Commission: *Ann B. Malester* and *Steven A. Newborn*.

For the respondent: *Margaret K. Pfeiffer, Sullivan & Cromwell*,  
Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the respondent, Imo Industries Inc. ("Imo"), a corporation subject to the jurisdiction of the Commission, has entered into an agreement that violates Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); that through this agreement Imo has agreed to acquire Optic-Electronic Corp. ("OEC") and that such acquisition of OEC, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); and it appearing that a proceeding in respect thereof would be in the public interest, the Commission 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. IMO INDUSTRIES INC.

1. Imo is a corporation organized and doing business under the laws

of Delaware, with its principal place of business at 3450 Princeton Pike, Lawrenceville, New Jersey.

2. In fiscal year 1988, Imo had net sales of \$687 million and net assets of \$756 million.

3. In September 1988, Imo acquired Varo Inc. ("Varo") at a cost of approximately \$117 million. Varo's principal offices are located in the Dallas metropolitan area.

4. In fiscal year 1988, Varo had net sales of approximately \$113 million.

5. Varo is engaged in the manufacture and sale of products, including 25 millimeter second generation ("25mm 2d generation") image intensifier tubes, throughout the United States and is engaged in or affects commerce within the meaning of the Clayton Act, as amended, and the Federal Trade Commission Act, as amended.

## II. JURISDICTION

6. At all times relevant herein, respondent Imo 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.

## III. THE PROPOSED ACQUISITION

7. Pursuant to a Stock Purchase Agreement ("Agreement") dated September 11, 1989, Imo agreed to purchase all of the outstanding and issued shares of OEC's common stock from United Scientific Inc., a Delaware corporation and a wholly owned subsidiary of United Scientific Holdings plc ("USH"), a British company with its principal offices in London. OEC is a wholly owned subsidiary of USH. The total transaction is valued at approximately \$69 million.

## IV. NATURE OF TRADE AND COMMERCE

8. The relevant product market is the manufacture and sale of 25mm 2d generation image intensifier tubes. 25mm 2d generation image intensifier tubes are used to enhance visual images in low light conditions by amplifying available illumination to visible levels.

9. The relevant geographic market is the United States as a whole.

## V. MARKET STRUCTURE

10. The relevant market is highly concentrated whether measured

by the Herfindahl-Hirschmann Index ("HHI") or by four-firm and eight-firm concentration ratios.

#### VI. BARRIERS TO ENTRY

11. The barriers to entry into the manufacture and sale of the relevant product are significant.

#### VII. ACTUAL AND POTENTIAL COMPETITION

12. Imo and OEC are actual and potential competitors in the manufacture and sale of the relevant product.

#### VIII. EFFECTS

13. The effects of the aforesaid agreement and the aforesaid acquisition, if consummated, may be substantially to lessen competition in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

- (a) It will eliminate actual and potential competition between Imo and OEC and between OEC and others in the relevant market;
- (b) It will significantly increase the already high levels of concentration in the relevant market;
- (c) It will create a firm whose share of the relevant market is so high as to lead to dominant firm status;
- (d) It will eliminate OEC as a substantial independent competitive force in the relevant market; and
- (e) It will enhance the possibility of collusion or interdependent coordination by the remaining firms in the relevant market.

#### IX. VIOLATIONS CHARGED

14. The proposed acquisition of OEC by Imo would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

15. The Stock Purchase Agreement set forth in Paragraph 7 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

16. The proposed acquisition of OEC by Imo would, if consummated, violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Owen not participating

## DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent, Imo Industries, Inc., with violation of Section 7 of the Clayton Act, as amended, and 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, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the 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 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, 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 Imo Industries Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3450 Princeton Pike, in the City of Lawrenceville, State of New Jersey.

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

## ORDER

## I.

For the purposes of this order, the following definitions shall apply: "Imo" means Imo Industries Inc., as well as its officers, employees,

representatives, agents, parents, divisions, subsidiaries, successors, and assigns, as well as the officers, employees and agents of its parents, divisions and subsidiaries.

## II.

*It is ordered,* That for a period commencing on the date this order becomes final and continuing for ten (10) years from the date this order becomes final, Imo shall not acquire, without the prior approval of the Commission, directly or indirectly, the whole or any part of the stock, share capital, equity interest, or assets, other than purchases of manufactured product in the ordinary course of business, of any company that has manufactured and sold 25 millimeter second generation image intensifier tubes in the United States, or that has sold 25 millimeter second generation image intensifier tubes to the United States Department of Defense, at any time since January 1, 1988.

## III.

*It is further ordered,* For a period commencing on the date this order becomes final and continuing for ten (10) years from the date this order becomes final, that any successor corporation to Imo shall be bound by this order to the same extent as Imo; further Imo shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation that may affect compliance obligations arising out of the order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of any subsidiary manufacturing or selling 25 millimeter second generation image intensifier tubes in the United States, or any other change that may affect compliance obligations arising out of the order.

## IV.

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

## IN THE MATTER OF

## DIAMOND SHAMROCK CORPORATION

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF  
THE FEDERAL TRADE COMMISSION ACT

*Docket C-2493. Consent Order, Mar. 18, 1974—Set Aside Order, Apr. 30, 1990*

The Federal Trade Commission has set aside a 1974 consent order as it applies to Occidental, a successor to a part of Diamond Shamrock Corporation, (83 FTC 1389), thus removing the order's prohibition of reciprocal dealing with customers and suppliers and certain related conduct. Occidental argued, among other things, that the restrictions in the order constrained its ability to compete, and that reopening and vacating the order would be in the public interest.

## ORDER REOPENING AND SETTING ASIDE ORDER

Occidental Chemical Corporation ("Occidental"), a successor to a part of the business of Diamond Shamrock Corporation ("DSC"),<sup>1</sup> has filed a "Request of Occidental Chemical Corporation To Reopen and Vacate a Consent Order" ("Request"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. In the Request, Occidental asks the Commission to reopen the proceeding in Docket No. C-2493 and set aside the consent order issued by the Commission on March 18, 1974, "insofar as it applies to Occidental." Request at 1. In support of its Request, Occidental states that the relief it seeks is required by changed conditions and the public interest. Request at 3. Occidental's request was placed on the public record for thirty days, pursuant to Section 2.51 of the Commission's Rules of Practice. No comments were received. For the reasons stated below, the Request is granted.

## I.

The Commission issued its complaint and order in this matter on March 18, 1974. The complaint alleged that DSC had engaged in reciprocal dealing by "systematically utiliz[ing] its actual or potential purchases to obtain or increase sales of its products, services or raw

<sup>1</sup> The order applies to DSC and its "subsidiaries, successors, and assigns." 83 FTC at 1392. Occidental is a successor by acquisition. Request at 1.

materials to certain companies." 83 FTC at 1390. The complaint further alleged that DSC's conduct had the effect, among other things, of foreclosing actual or potential suppliers of DSC, foreclosing DSC's competitors from selling to DSC's suppliers or giving DSC an unfair competitive advantage over its competitors. *Id.* at 1391.

The order prohibits DSC from engaging in reciprocal dealing with its suppliers and customers and from engaging in certain conduct that was thought to foster reciprocal dealing. Although some of the order's provisions expired in 1984, DSC still is prohibited from, among other things, discussions with another company "to ascertain, develop, facilitate, or further any relationship between purchases and sales of the nature prohibited by [the] order." 83 FTC at 1393. DSC also is prohibited from making purchasing data available to its sales personnel and from making sales data available to its purchasing personnel. *Id.* at 1394.

## II.

The order in *Occidental Petroleum Corp.*, Docket C-2492, 83 FTC 1394 (1974), like the *Diamond Shamrock* order, prohibited Occidental from engaging in reciprocal dealing and contained various fencing-in provisions to prevent opportunities for reciprocal dealing. In 1982, Occidental asked the Commission to reopen the order in *Occidental Petroleum Corp.* and set it aside, limit its duration to ten years or "bring it in line with current case law and enforcement attitudes." Request at 20. Occidental asserted that modification was warranted by changed conditions of law, fact and the public interest. Occidental argued, among other things, that similar orders entered against its competitors had expired, that the Commission and the Department of Justice were unlikely to challenge reciprocal dealing arrangements and that the order impeded Occidental's ability to compete. Request at 11.

On March 9, 1983, the Commission set aside the fencing-in provisions of the *Occidental* order and ordered that the remaining provisions of the order should expire ten years from the date of their original entry based on public interest considerations. *Occidental Petroleum Corp.*, Docket C-2492, 101 FTC 373 (1983) (Reopening and Vacating in Part and Modifying in Part Order Issued March 18, 1974). The Commission concluded that the fencing-in provisions of the *Occidental* order, with the passage of time, prohibited innocuous and

possibly procompetitive conduct, resulting in competitive harm that outweighed any continuing need for them. The Commission concluded that the same public interest considerations warranted setting aside the remaining order provisions at the end of the specified ten-year period. *Id.* at 373-74.

The Commission consistent with its decision to modify and set aside the *Occidental* order, set aside two additional orders that prohibited the respondents from engaging in reciprocal dealing. In *The Southland Corp.*, Docket 8915, 102 FTC 1337 (1983), the Commission set aside the fencing-in provisions of a 1974 order "at this time" and ordered that the remaining provisions be set aside ten years from the date of their original entry.<sup>2</sup> The Commission set aside a 1973 order prohibiting reciprocal dealing in *Georgia-Pacific Corp.*, Docket C-2402, 103 FTC 203 (1984).<sup>3</sup>

### III.

In its Request, Occidental asserts that changed conditions and the public interest require the Commission to set aside the *Diamond Shamrock* order, which now applies to Occidental as a result of Occidental's acquisition of part of DSC's business. Request at 3. Occidental argues that the order prohibits conduct that the Commission described as "innocuous and often procompetitive" in its decisions to set aside the reciprocal dealing orders against Occidental, Southland and Georgia-Pacific. Request at 2. Occidental also argues that because the public policy considerations that "motivated [the Commission's decision to modify and set aside the *Occidental* order] have not changed," it would be "illogical and manifestly unfair" to subject Occidental, by reason of its acquisition of a part of DSC's business, to the same order provisions that the Commission decided should not apply to Occidental. Request at 4. Finally, Occidental asserts that it is "injured by the continued applicability of the *Diamond Shamrock* order to it, especially when similar consent orders applicable to several of its competitors have been permitted to expire." Request at 2 and 5 n.4.

<sup>2</sup> The original *Southland* order was issued January 24, 1974. See 83 FTC 1282.

<sup>3</sup> The order in *Georgia-Pacific*, 82 FTC 1428 (1973), which had been in effect for more than ten years when the Commission issued the 1984 order, was set aside in its entirety.

## IV.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" require such modification. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket C-2956, Letter to John C. Hart (June 5, 1986), at 4.

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 ("Damon letter"). For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, Docket C-2916, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. Damon letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, by means other than conclusory statements, why an order should be modified. 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 modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.

## V.

A reciprocal dealing arrangement exists when two parties deal with each other as both a buyer and seller, one party offering to buy the other party's goods conditioned on the second party buying goods from the first party.<sup>4</sup> The elements of proof required to show that reciprocal dealing violates the antitrust laws are equivalent to the elements required to provide an unlawful tying arrangement, in which, similarly to reciprocal dealing, a party's willingness to enter one transaction is conditioned on the other party's willingness to enter into a different one too.<sup>5</sup> Unilateral conduct, such as buying from a present customer in order to give that customer an incentive to keep buying from it, or to maintain "goodwill," does not violate the law,<sup>6</sup> nor does two parties maintaining a consensual relationship to purchase each other's products.<sup>7</sup> Continued order restraints against unilateral and consensual reciprocal dealing are legally unsupportable. Coercive reciprocal dealing may violate the law, if there is an actual agreement between the parties to make reciprocal purchases, if one party has substantial market power that tends to coerce the reciprocal transaction,<sup>8</sup> and if the reciprocal dealing arrangement forecloses a substantial amount of commerce.<sup>9</sup>

Occidental demonstrates that orders against reciprocal dealing, of all forms, by its competitors have now expired. *See Georgia-Pacific Corp.*, Docket C-2402, 103 FTC 203 (1984); *United States v. PPG Industries, Inc.*, 1970 Trade Cas. (CCH) ¶ 73,373 (W.D. Pa. 1970).

Occidental demonstrates that it has lost caustic soda business as a result of not having the ability to enter into reciprocal dealing arrangements. Public Record at 49-53. This showing supports Occidental's assertions that the restrictions in the Order constrain its

<sup>4</sup> *Betaseed, Inc. v. U and I Inc.*, 681 F.2d 1203, 1216 (9th Cir. 1982); *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419, 424 (5th Cir. 1978), *cert. denied*, 444 U.S. 831 (1979); *E.T. Barwick Industries, Inc. v. Walter E. Heller & Co.*, 692 F. Supp. 1331, 1337 (N.D. Ga. 1987); *Skepton v. County of Bucks, Pennsylvania*, 613 F. Supp. 1013, 1018 (E.D. Pa. 1985).

<sup>5</sup> *E.T. Barwick Industries, Inc.*, 692 F. Supp. at 1337; *Skepton*, 613 F. Supp. at 1018, *citing Betaseed, Inc.*, 681 F.2d at 1216-17; *Spartan Grain and Mill Co.*, 581 F.2d at 425.

<sup>6</sup> *Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532, 537 (7th Cir. 1986). *See Davis v. First National Bank of Westville*, 868 F.2d 206, 208 (7th Cir. 1989).

<sup>7</sup> *Great Escape, Inc.*, 791 F.2d at 537; *see Davis*, 868 F.2d at 208.

<sup>8</sup> *Great Escape, Inc.*, 791 F.2d at 537; *E.T. Barwick, Inc.*, 692 F. Supp. at 1331; *Skepton*, 613 F. Supp. at 1018. *See Davis*, 868 F.2d at 208; *Bruce v. First Federal Savings and Loan Association of Conroe, Inc.*, 837 F.2d 712, 718 (5th Cir. 1988).

<sup>9</sup> *Bruce*, 837 F.2d at 718, *citing, Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 13-16 (1984).

ability to compete, and that reopening and vacating the order would thus tend to serve the public interest.

## VI.

In modifying and setting aside the *Occidental* order, the Commission said that the conduct prohibited by the order is "innocuous and may, in certain circumstances, be procompetitive." 101 FTC at 373-74. The Commission believes that there is no sound reason to deny Occidental now relief equivalent to what the Commission already granted it in 1983.

Occidental has shown an affirmative need to reopen and modify the order, and this need is not outweighed by any reasons to continue the order. Accordingly, the Request to reopen and set aside the order, insofar as it applies to Occidental, is granted.

Accordingly, *it is ordered*, that the proceeding in Docket C-2493 be, and it hereby is, reopened and that the order, insofar as it applies to Occidental, be, and it hereby is, set aside.

Commissioner Azcuenaga and Commissioner Strenio dissenting.

### DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

A majority of the Commission today grants the petition of Occidental Chemical Corporation to reopen and set aside the order in *Diamond Shamrock Corporation*, Docket C-2493, insofar as it applies to Occidental.<sup>1</sup> The majority takes this action although Occidental failed to demonstrate changed conditions of fact or law that require reopening or public interest considerations that warrant reopening.<sup>2</sup> I cannot agree.

## I.

The majority relies on the public interest to set aside the order in *Diamond Shamrock*. Reopening an order may be warranted in the public interest when the respondent shows as a threshold matter some affirmative need to modify the order, usually a competitive disadvan-

<sup>1</sup> Occidental filed the petition as a successor under the order by its 1986 acquisition of Diamond Shamrock Chemical Corporation.

<sup>2</sup> Although Occidental alleges "changed conditions" generally, Petition at 3, it does not specifically identify any changed conditions of fact.

tage resulting from the order.<sup>3</sup> Occidental has not made the requisite threshold showing. Instead, Occidental's public interest arguments are vague and conclusory.

Occidental asserts that similar consent orders once applicable to several of its competitors have been set aside or permitted to expire. Petition at 2 & 5. Even if true, this assertion does not create an inference that Occidental is competitively disadvantaged. The mere fact that other firms are not precluded by order from engaging in certain conduct does not mean that the conduct is necessary to compete effectively or that Occidental is competitively disadvantaged by its inability to engage in that conduct. Occidental makes no claim or showing that it is unable to compete effectively by reason of the order.<sup>4</sup>

Affidavits from Occidental personnel are similarly uninformative. The affiants claim "instances" in the three and a half years since Occidental acquired Diamond Shamrock Chemical Corporation that Occidental has not completed transactions because it could not discuss reciprocal dealing. Not even one of these "instances" is identified, and no other specific information such as the identity of the potential customer or the volume of business is provided.

One would expect that Occidental could identify any competitive disadvantage it suffers with some degree of particularity.<sup>5</sup> Certainly that is a minimum we have required in other cases, and I see nothing here to justify a departure from our usual standards. In the absence of a showing of competitive harm, we cannot evaluate whether the order unnecessarily hinders competition, nor can we assess the appropriateness of the requested order revision to remedy the identified harm. This is law enforcement in a vacuum.

Occidental in its Petition and the majority in its order rely primarily and almost exclusively on the fact that the Commission set aside a similar order in *Occidental Petroleum Corp.*, Docket C-2492, 101

<sup>3</sup> Once such a showing is made, the Commission will consider the reasons for and against modification and whether the particular modification requested is appropriate to remedy the identified harm. See Order Reopening and Setting Aside Order, Docket C-2493, at 4 ("Order").

<sup>4</sup> Occidental's allegation that other orders banning reciprocal dealing have expired, Petition at 5 n.4, does not identify either a change in law or a change in fact. The orders cited by Occidental had a definite term when they were issued, and almost all of them were issued before the Commission issued the order in *Diamond Shamrock*.

<sup>5</sup> Despite this vagueness, the majority concludes that the affidavits show that Occidental "has lost caustic soda business as a result of not having the ability to enter into reciprocal dealing arrangements." Order Reopening and Setting Aside Order ("Order") at 5. Occidental claimed only that several sales were not made to unidentified customers when it could not discuss reciprocity. Even assuming the truth of the claim, at most it shows a transaction cost. Occidental neither claims nor shows that it lost business overall as a result of the *Diamond Shamrock* order.

FTC 373 (1983). According to Occidental, the 1983 decision of the Commission to set aside the *Occidental* order is the “most significant factor” in favor of setting aside the *Diamond Shamrock* order, Petition at 3, and it is “obviously controlling here.” Petition at 4. Apparently acquiescing, the majority states that “there is no sound reason to deny Occidental now relief equivalent to what the Commission already granted it in 1983.” Order at 6.

Occidental’s argument is tantamount to saying that a decision to set aside one order requires setting aside all orders imposed for similar violations of law, regardless of the industry involved, differences in the competitive positions of different respondents or any other factual difference. This would be an astonishing development.<sup>6</sup> It ignores the reality that every law enforcement order is and must be based on its particular facts. Similarly, each petition to reopen and modify an order must be decided on its own merits. The Commission did not in 1983 decide that Occidental should never be subject to an order prohibiting reciprocal dealing, *see* Petition at 4; Order at 6, the Commission did not in 1983 decide that all reciprocal dealing orders should be set aside and most assuredly the Commission did not in 1983 decide that Occidental should be treated differently from any other potential successor to the terms of the *Diamond Shamrock* order. Instead, the Commission in 1983 considered a different petition in the context of a different order and found that modification of that order, *Occidental Petroleum Corp.*, Docket C-2492, was in the public interest.<sup>7</sup> Whatever competitive injury Occidental may have shown then, clearly the requisite showing has not been made here.

Nor is the 1983 decision in *Occidental* “controlling” by virtue of *stare decisis* or *res judicata*. *Stare decisis* requires that we follow established legal principles—here, the standards for reopening and modification under Section 5(b) of the Federal Trade Commission Act. *Res judicata* does not make the 1983 decision “controlling,” because the order at issue here is based on a cause of action different from that in *Occidental*, and Occidental, by virtue of its 1986 acquisition of Diamond Shamrock Chemical Corporation, is different from Occidental as it was constituted in 1983.

<sup>6</sup> By this reasoning, for example, if a firm subject to a divestiture order under Section 7 of the Clayton Act persuades the Commission to relieve it of its divestiture obligation, then all other Section 7 divestiture requirements similarly should be lifted.

<sup>7</sup> The order modifications in *Georgia-Pacific Corp.*, Docket C-2402, 103 FTC 203 (1984), and *The Southland Corporation*, Docket 8915, 102 FTC 1337 (1983), both reciprocal dealing orders, also were based on the public interest. In neither case did the Commission rely “expressly on its decision in *Occidental*,” as Occidental erroneously claims. Petition at 6. Instead, in both cases, the Commission cited the public interest and said that the result “is consistent” with the decision in *Occidental*.

## II.

A change in law sufficient to require reopening is a change in statutory or decisional law that has the effect of bringing the provisions of the order in conflict with existing law, so that to continue the order would work an injustice. *Louisiana-Pacific Corp.*, Docket C-2956, slip op. at 20 (Nov. 15, 1989). Occidental fails to meet this standard, but the majority appears to conclude that the law has changed sufficiently that some provisions of the order are "legally unenforceable."

In its summary petition, Occidental alleges generally and without citation to authority that the law applicable to reciprocal dealing has changed and that it is "widely accepted" that most forms of reciprocal dealing are "entirely innocuous." According to Occidental, "even in its most extreme form—so-called 'coercive reciprocity'—the practice is not so anticompetitive in effect or lacking in redeeming virtues to justify applying a strict *per se* rule." Petition at 5.<sup>8</sup> These allegations fall far short of identifying a change in law sufficient to require reopening under Section 5(b). Occidental does not otherwise embellish its bare assertion on the state of the law.

The cases the majority cites quite simply do not demonstrate that the law has changed. See Order at 4-5. Two of those cases, *Betaseed, Inc. v. U and I Inc.*, 681 F.2d 1203 (9th Cir. 1982), and *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419 (5th Cir. 1978), were cited in Occidental's 1982 petition in support of its argument that the law had changed.<sup>9</sup> After considering these and other cases Occidental cited, the Commission in 1983 specifically found that Occidental had failed to demonstrate a change in law.<sup>10</sup>

Nor do the cited cases provide any support for the proposition that the law of reciprocity has changed since 1983. This is hardly surprising, because if any such authority existed, Occidental presumably would have included those citations in its petition. The court in *Skepton v. County of Bucks, Pennsylvania*, 613 F. Supp. 1013 (E.D. Pa. 1985) (cited in the Order at 4 n.4), cited *FTC v. Consolidated*

<sup>8</sup> Occidental also alleges that the Commission and the Antitrust Division "have discontinued efforts to enjoin reciprocal practices." Petition at 5. It is not clear whether Occidental proffers this as a change in law or a change in fact. Neither, however, can be inferred from government inaction with respect to a particular restraint of trade, which reflects the exercise of prosecutorial discretion or, perhaps, a dearth of violations.

<sup>9</sup> Request To Reopen and Vacate or Modify Consent Order in *Occidental Petroleum Corp.*, Docket C-2492 (Nov. 8, 1982), at 27, a copy of which was attached to the 1989 petition to reopen the *Diamond Shamrock* order "for the convenience of the Commission." Petition at 4 n.3.

<sup>10</sup> Occidental obviously could not incorporate by reference the change of law arguments in its 1982 petition, because the Commission already has rejected them.

*Foods Corp.*, 380 U.S. 592 (1965), *Betaseed* and *Spartan Grain* for its discussion of reciprocity, and the court in *E.T. Barwick Industries, Inc. v. Walter E. Heller & Co.*, 692 F. Supp. 1331 (N.D. Ga. 1987) (cited in the Order at 4 n.4), relied, *inter alia*, on *Skepton*. A more recent case cited by the majority, *Great Escape, Inc. v. Union City Body Company, Inc.*, 791 F.2d 532 (7th Cir. 1986) (cited in the Order at 5 n.6), applied the same legal principles that were applied in *Betaseed* and *Spartan Grain*.<sup>11</sup>

Neither Occidental nor the majority suggests that reciprocal dealing is never unlawful. Indeed, both concede that so-called coercive reciprocal dealing may be unlawful. Order at 5; Petition at 5. The majority does conclude, however, that “[c]ontinued order restraints against unilateral and consensual reciprocal dealing are legally unsupportable.”<sup>12</sup> Order at 5.

I agree with the implication of the majority’s statement that unilateral reciprocity is not, indeed, never was unlawful. This does not mean that provisions in the *Diamond Shamrock* order barring unilateral reciprocity were or are “legally unsupportable.” At best, a finding that the order is too broad in its present context might support modifying the order to eliminate fencing-in provisions that may, with the passage of time, have served their purpose and may now needlessly impede competition. But neither Occidental nor the majority individually examines the so-called “legally insupportable” provisions in this light.<sup>13</sup>

I am not prepared to say, as does the majority, that consensual reciprocity can never be unlawful.<sup>14</sup> A consensual reciprocity agreement, like any contract, combination or conspiracy, may constitute an unreasonable restraint of trade under Section 1 of the Sherman Act, although, presumably, only the government or a foreclosed competitor would have standing to raise the issue. See *Industria Siciliana Asfalti, S.p.A. v. Exxon Research & Engineering Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,256, at 70,778-80 (S.D.N.Y. 1977); *Spartan Grain*,

<sup>11</sup> Two cases cited by the majority, *Davis v. First National Bank*, 868 F.2d 206 (7th Cir. 1989), and *Bruce v. First Federal Savings & Loan*, 837 F.2d 712 (5th Cir. 1988), arose under the Bank Holding Company Act, which prohibits reciprocal dealing but under standards different from those applied in Sherman Act cases, and the courts in both cases expressly stated that Sherman Act standards did not apply.

<sup>12</sup> Like all final orders, the order in *Diamond Shamrock* is of course presumptively valid, absent mistake or fraud, see *Louisiana-Pacific Corp.*, Docket C-2956, slip op. at 9 (Nov. 15, 1989), yet this statement suggests that the majority is willing to second guess what the Commission did in 1974.

<sup>13</sup> If the order appears too broad, the appropriate procedure, because Occidental has not requested modification and therefore has not attempted to limit the appropriate scope of modification, is to deny the petition and issue an order to show cause under Section 3.72 of the Commission’s Rules of Practice.

<sup>14</sup> Indeed, this is a unique and interesting departure from the rest of our enforcement agenda.

581 F.2d at 425 n.5; see also *Heublein, Inc.*, 96 FTC 385, 596-97 (1980). The foreclosure and entry-detering effects of reciprocity could be the same whether the reciprocal agreement is consensual or coercive. See *V Areeda & Turner, Antitrust Law* ¶ 1129h, at 176-77 (1980).

### III.

The standards under Section 5(b) of the Federal Trade Commission Act for reopening an order are stringent, and the petitioner carries a heavy burden of proof in light of the public interest in repose and the finality of orders. See *United States v. Swift & Co.*, 286 U.S. 106 (1932); *United States v. Swift & Co.*, 276 U.S. 311 (1928); *United States v. Swift & Co.*, 189 F. Supp. 885 (N.D. Ill. 1960), *aff'd per curiam*, 367 U.S. 909 (1961). These interests are threatened if the Commission reopens and modifies orders absent a satisfactory showing of changed conditions or public interest considerations that eliminate the need for the order or make continued application of the order inequitable or harmful to competition. Insubstantial or frivolous petitions may be encouraged, wasting our resources. Decisions based on inadequate showings may tend to be arbitrary, resulting in inequitable treatment and lessening respect for the Commission's enforcement efforts. We can avoid these dangers by adhering to the standards for reopening set forth in Section 5(b) of the Federal Trade Commission Act.

No right of appeal obtains for today's decision, and it will be little remarked beyond a specialized segment of the bar. Nevertheless, this kind of decisionmaking diminishes the agency. I dissent.

## IN THE MATTER OF

## FITNESS QUEST, INC., ET AL.

*Docket 9236. Interlocutory Order, April 30, 1990*

## ORDER AMENDING COMPLAINT

Upon consideration of the parties' Joint Motion to Amend Complaint, dated April 27, 1990, and pursuant to Section 3.15(a)(1) of the Commission's Rules of Practice in Adjudicative Proceedings, the complaint is hereby amended as set forth below:

1. The caption of the case is amended to read:

In the Matter of  
Consumer Direct, Inc.,  
The Gut Buster Corporation, and  
Fitness Quest, Inc.,  
corporations, and  
Richard A. Suarez and  
LuAnn Suarez,  
individually and as officers of said  
corporations.

2. The preamble of the complaint is amended to read:

The Federal Trade Commission, having reason to believe that Consumer Direct, Inc., The Gut Buster Corporation, and Fitness Quest, Inc., corporations, Richard A. Suarez, individually and as an officer of said corporations, and LuAnn Suarez, individually and as an officer of The Gut Buster Corporation and Fitness Quest, Inc., hereinafter sometimes referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

3. Paragraph one of the complaint is amended to read:

PARAGRAPH 1. Respondent Consumer Direct, Inc. is an Ohio corporation, with its office and principal place of business located at 1375 Raff Road, S.W., Canton, Ohio.

Respondent The Gut Buster Corporation is an Ohio corporation, with its office and principal place of business located at 1400 Raff Road, S.W., Canton, Ohio.

Respondent Fitness Quest, Inc. is an Ohio corporation, with its office and principal place of business located at 1400 Raff Road, S.W., Canton, Ohio.

Respondent Richard A. Suarez is an officer and director of each of the corporate respondents named herein. Respondent LuAnn Suarez is an officer of The Gut Buster Corporation and an officer and director of Fitness Quest, Inc. They formulate, direct and control the acts and practices of said corporate respondents. LuAnn Suarez's address is the same as that of respondent Fitness Quest, Inc. Richard Suarez's address is the same as that of respondent Consumer Direct, Inc.

The aforementioned respondents cooperated and acted together in carrying out the acts and practices hereinafter set forth.

*So ordered.*

## IN THE MATTER OF

## RHONE-POULENC S.A., 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-3287. Complaint, May 1, 1990—Decision, May 1, 1990*

This consent order requires, among other things, a U.S. subsidiary of the French corporation, for a period of five years, to grant licenses to duplicate and sell, on a royalty free basis, the dairy cultures products of Marschall Dairy Products to any entity except Chris Hansen Laboratories and Dairyland Food Laboratories. In addition, respondents are prohibited, for a period of ten years, from acquiring any interest, with certain exceptions, in any company that manufactures or sells dairy cultures in the U.S., without prior Commission approval.

*Appearances*

For the Commission: *Robert Doyle* and *Steven Newborn*.

For the respondents: *Paul W. Bartel, Davis, Polk & Wardwell*,  
New York, N.Y.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the respondents, Rhone-Poulenc S.A. and Rhone-Poulenc Inc. (collectively "Rhone-Poulenc"), corporations subject to the jurisdiction of the Commission, have entered into an agreement that violates Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); that through this agreement Rhone-Poulenc has agreed to acquire the Marschall Dairy Products ("Marschall") division of Miles Inc. and that such acquisition of Marschall, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); and it appearing that a proceeding in respect thereof would be in the public interest, the Commission 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. RHONE-POULENC S.A.

1. Rhone-Poulenc S.A. is a corporation organized and doing business under the laws of France, with its principal place of business at 25 Quai Paul Doumer, 92408 Courbevoie, Cedex, France.

2. In fiscal year 1988, Rhone-Poulenc S.A. had total sales of approximately \$9.8 billion.

### II. RHONE-POULENC INC.

3. Rhone-Poulenc Inc. is a corporation organized and doing business under the laws of New York, with its principal place of business at 125 Black Horse Lane, Monmouth Junction, New Jersey. Rhone-Poulenc Inc. is a wholly owned subsidiary of Rhone-Poulenc S.A.

4. In fiscal year 1988, Rhone-Poulenc Inc. had total sales of approximately \$1.4 billion.

### III. JURISDICTION

5. At all times relevant herein, respondents have been, and are now, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose businesses are in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

### IV. THE PROPOSED ACQUISITION

6. Pursuant to an Asset Purchase Agreement ("Agreement") executed by Rhone-Poulenc Inc. on September 29, 1989, Rhone-Poulenc agreed to purchase substantially all of the assets of Marschall from Miles, Inc., an Indiana corporation and wholly owned subsidiary of Bayer USA, Inc. Bayer USA is a Delaware corporation and a wholly owned subsidiary of Bayer AG, a German company with its principal offices in Bayerwerk, Federal Republic of Germany. The total transaction is valued at approximately \$41.5 million.

### V. NATURE OF TRADE AND COMMERCE

7. The relevant product market is the manufacture and sale of dairy cultures. Dairy cultures are used in the manufacture of cheese and other dairy products, such as cottage cheese, yogurt, sour cream and buttermilk.

8. The relevant geographic market is the United States as a whole.

## VI. MARKET STRUCTURE

9. The relevant market is highly concentrated whether measured by the Herfindahl-Hirschmann Index ("HHI") or by four-firm and eight-firm concentration ratios.

## VII. BARRIERS TO ENTRY

10. The barriers to entry into the manufacture and sale of the relevant product are significant.

## VIII. ACTUAL AND POTENTIAL COMPETITION

11. Rhone-Poulenc and Marschall are actual and potential competitors in the relevant market.

## IX. EFFECTS

12. The effects of the aforesaid agreement and the aforesaid acquisition, if consummated, may be substantially to lessen competition in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) It will eliminate actual and potential competition between Rhone-Poulenc and Marschall and between Marschall and others in the relevant market;

(b) It will significantly increase the already high levels of concentration in the relevant market;

(d) It will eliminate Marschall as a substantial independent competitive force in the relevant market; and

(e) It will enhance the possibility of collusion or interdependent coordination by the remaining firms in the relevant market.

## X. VIOLATIONS CHARGED

13. The proposed acquisition of Marschall by Rhone-Poulenc would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

14. The Asset Purchase Agreement set forth in paragraph 6 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

15. The proposed acquisition of Marschall by Rhone-Poulenc would, if consummated, violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Azcuenaga dissenting.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of respondents' proposed acquisition of certain assets of the Marschall Dairy Products Division of Miles Inc., and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Clayton Act and the Federal Trade Commission Act; and

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

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

1. Respondent Rhone-Poulenc S.A. is a corporation organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 25 Quai Paul Doumer, 92408 Courbevoie, Cedex, France.

2. Respondent Rhone-Poulenc Inc. is a corporation organized, existing and doing business under and by virtue of the laws of New York, with its office and principal place of business located at 125 Black Horse Lane, Monmouth Junction, New Jersey.

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. "*Rhone-Poulenc*" means Rhone-Poulenc S.A., a French corporation, its predecessors, any other corporations, partnerships, joint ventures, companies, subsidiaries, divisions, groups and affiliates that Rhone-Poulenc controls, directly or indirectly, and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns. "*RPI*" means Rhone-Poulenc Inc., a New York corporation which is a wholly owned subsidiary of Rhone-Poulenc.

b. "*Acquisition*" means RPI's acquisition of substantially all of the assets of the Marschall Dairy Products division of Miles.

c. "*Respondents*" means Rhone-Poulenc and RPI.

d. "*Dairy cultures*" means culture products which are used in the manufacture of various dairy products, including cheese, sour cream, buttermilk, yogurt and cottage cheese.

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

f. "*New entrant or expander*" means any entity which, during the five years following the date this order becomes final, is engaged in the commercial production and sale of dairy culture products in the United States to customers in the United States, or seeks to begin such production and sale. "New entrant or expander" shall not include Chris Hansen Laboratories and Dairyland Food Laboratories, or any entity directly or indirectly controlling, controlled by, under common control with, or otherwise affiliated with either.

g. "*Marschall Dairy Products Dairy Cultures*" means the dairy culture products offered for sale in the United States by Marschall to customers in the United States, immediately prior to the acquisition. "Marschall Dairy Products Dairy Cultures" shall not include any dairy culture products with respect to which Marschall's production or sale of such product involves a license from, or the payment of royalties to, another entity.

## II.

*It is ordered, That:*

A. Respondent RPI shall grant a license to duplicate and sell, on a

royalty free basis, any products among the Marschall Dairy Products Dairy Cultures to any and all new entrants or expanders who, during the five (5) years following the date this order becomes final, request such a license. The license to each such new entrant or expander shall run for four (4) years, and shall contain, as applicable to the license contemplated by this order, the provisions customarily found in licensing agreements. The license will also warrant the quality of the Marschall Dairy Products Dairy Cultures to be provided to the licensee and contain an undertaking concerning their prompt delivery. After the termination of its license, each such new entrant or expander may continue to duplicate and sell the licensed products. Within sixty (60) days after the date this order becomes final, respondents shall file with the Commission a copy of the license agreement that will be offered to new entrants or expanders pursuant to this order.

B. Within sixty (60) days after the date of the acquisition, respondents shall file with the Commission a list of the Marschall Dairy Products Dairy Cultures, together with information identifying the dairy products that each is used to produce. This information shall subsequently be made available to any new entrant or expander that requests information about, or receives, a license.

C. Respondents shall allow any new entrant or expander who licenses products from among the Marschall Dairy Products Dairy Cultures to represent to the public, during the period of its license, and only during that period, that it has received Marschall Dairy Products Dairy Cultures pursuant to a license, that it has been given information identifying the dairy products that each is used to produce, and that it is licensed to duplicate and sell them.

D. In order to compensate respondent RPI for handling costs, and to deter nuisance requests, respondent RPI shall be entitled to request a charge of not more than \$50 per culture at the time any new entrant or expander requests a license of cultures, subject to the condition that the total such charge per license shall not exceed \$4,000.

### III.

*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 respondents made to their principal offices, respondents shall make available, in the United States, to any duly authorized representatives of the Commission:

A. All books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of respondents relating to any matters contained in this order, for inspection and copying during office hours and in the presence of counsel; and

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

#### IV.

*It is further ordered,* That within sixty (60) days after the date this order becomes final and annually thereafter on the anniversary date of the order for each of the five (5) years following the date this order becomes final, respondents shall submit to the Commission a verified report setting forth in detail the manner and form in which they intend to comply, are complying or have complied with this order. Among the other things that are required from time to time, respondents shall include in their compliance reports (and, for a period of five (5) years from the date of the report, maintain all records relating to) the identities of new entrants and expanders who have applied for licenses, and the identities of those who have received licenses. Respondents shall also include copies of the licenses granted.

#### V.

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

#### VI.

*It is further ordered,* That, for a period of ten (10) years from the date this order becomes final, respondents shall cease and desist from acquiring, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise, assets used in, or all or any part of the stock or share capital of, or any interest in, any company engaged in the manufacture or sale of dairy cultures in the

United States. *Provided, however*, that these prohibitions shall not apply to the acquisition of (i) new machinery or equipment from manufacturers or suppliers, or (ii) assets outside the United States. One year from the date this order becomes final and annually thereafter for nine (9) years, respondents shall file with the Commission a verified written report of their compliance with this paragraph.

Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Although I agree with the majority that a remedy is warranted in this matter, the licensing requirement in the consent order may provide no competitive relief at all. No potential licensees have been identified, and Rhone Poulenc is not required to find one. Compulsory licensing may be an appropriate remedy in certain limited circumstances, for example, when an effective divestiture of assets is impracticable, but that does not appear to be the situation here. *See* Separate Statement of Chairman James C. Miller in *Xidex Corp.*, Docket 9146, 102 FTC 1, 19 (1983). The order has the potential to be highly regulatory and falls far short of the competitive relief that a simple structural remedy would provide. I dissent.

IN THE MATTER OF  
IMPORT IMAGE INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE  
TEXTILE FIBER PRODUCTS IDENTIFICATION AND  
THE FEDERAL TRADE COMMISSION ACTS

*Docket C-3288. Complaint, May 1, 1990—Decision, May 1, 1990*

This consent order prohibits, among other things, a New York wholesaler of women's clothing from falsely or deceptively labeling, invoicing, or advertising its textile fiber products as to name or amount of constituent fibers; failing to affix, or removing, labels containing the information required by the Textile Fiber Products Identification Act; and misrepresenting or failing to disclose the country of origin of its products.

*Appearances*

For the Commission: *Katherine B. Alphin* and *Paul K. Davis*.

For the respondents: *Stanley M. Spiegler, Kirschenbaum, Fleischman & Spiegler*, New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and the Textile Fiber Products Identification Act, 15 U.S.C. 70, hereinafter "Textile Fiber Act", and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Import Image Inc., a corporation, and Bertram Turoff, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, 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 Import Image Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 498 Seventh Avenue, New York, New York.

PAR. 2. Respondent Bertram Turoff is sole shareholder and

president of the corporate respondent named herein. He formulates, directs and controls the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. His office and principal place of business are the same as that of respondent Import Image Inc.

PAR. 3. Respondent Import Image Inc., is engaged in the manufacture, importation and sale of women's sportswear, suits, coats, dresses, blouses and other clothing.

PAR. 4. Respondents have in the past and presently continue to import, sell and introduce into commerce textile fiber products and otherwise have been engaged in commerce with textile fiber products as "commerce" and "textile fiber products" are defined in the Textile Fiber Act and the Rules and Regulations under the Textile Fiber Products Identification Act, 16 CFR 303, hereinafter "Rule(s)" as promulgated by the Federal Trade Commission.

PAR. 5. Certain of said textile products were misbranded by the respondents within the intent and meaning of Sections 4(b)(4) and 4(b)(5) of the Textile Fiber Act, 15 U.S.C. 70b(b)4 and 70b(b)5, and Rule 33, 16 CFR 303.33, in that they did not have a country of origin stamp, tag, label, or other identification. Respondents have, therefore, violated Section 3 of the Textile Fiber Act, 15 U.S.C. 70a, and Rule 2, 16 CFR 303.2.

PAR. 6. Certain of said textile products were misbranded by the respondents within the intent and meaning of Sections 3, 4(a), and 4(b)(1), 15 U.S.C. 70a, 70b(a) and 70b(b)(1), of the Textile Fiber Act and Rules 4, 6 and 7, 16 CFR 303.4, 303.6 and 303.7, thereunder, in that they did not identify constituent fibers by their generic name in English. Respondents have, therefore, violated Section 3 of the Textile Fiber Act, 15 U.S.C. 70a, and Rule 2, 16 CFR 303.2

PAR. 7. The acts and practices of respondents as set forth in paragraphs five and six were, and are, in violation of the Textile Fiber Act and the Rules promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a), as amended.

PAR. 8. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the importation, manufacture and sale of

merchandise of the same general kind and nature as merchandise sold by respondents.

PAR. 9. The acts and practices of respondents, as herein alleged, were and are to the prejudice and injury of the public and respondents' competitors. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission would charge respondents with violation of the Textile Fiber Products Identification Act, 15 U.S.C. 70, hereinafter "Textile Fiber Act," and the Rules and Regulations Under the Textile Fiber Products Identification Act, 16 CFR 303, hereinafter "Rule(s)," and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said acts and rules, 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 the Commission's Rules of Practice, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

PARAGRAPH 1. Respondent Import Image Inc., is a corporation organized, existing and doing business under and by virtue of the laws

of the State of New York with its office and principal place of business located at 498 Seventh Avenue, New York, New York.

PAR. 2. Respondent Bertram Turoff is sole shareholder and president of the corporate respondent named herein. He formulates, directs and controls the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. His office and principal place of business are the same as that of respondent Import Image Inc.

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

#### ORDER

##### I.

*It is ordered,* That respondents Import Image Inc., a corporation, its successors and assigns, and its officers, and Bertram Turoff, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States of any textile fiber product, as "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, 15 U.S.C. 70, hereinafter "Textile Fiber Act," and the Rules and Regulations Under the Textile Fiber Products Identification Act, 16 CFR 303, hereinafter "Rule(s)," do forthwith cease and desist from misbranding or falsely or deceptively advertising any such product by:

A. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of constituent fibers contained therein in violation of Sections 3 and 4 of the Textile Fiber Act, 15 U.S.C. 70a and 70b, and Rules 2, 4, 6, and 7, 16 CFR 303.2, 303.4, 303.6, and 303.7;

B. Failing to affix securely to or place securely on each such product in the location, manner, and form required by the Rules, a stamp, tag, label or other means of identification showing in a clear and conspicuous manner each element of information required to be

disclosed by Section 4 of the Textile Fiber Act, 15 U.S.C. 70b, and the Rules;

C. Causing or participating in the removal or mutilation of any stamp, tag, label, or other means of identification affixed to a textile fiber product, unless a substitute stamp, tag, or label or other form of identification is affixed that shows in a clear and conspicuous manner each element of information required to be disclosed by Section 4 of the Textile Fiber Act, 15 U.S.C. 70b, and the Rules.

## II.

*It is further ordered,* That respondents Import Image Inc., a corporation, its successors and assigns, and its officers, and Bertram Turoff, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States of any product in or affecting commerce, as "commerce" is defined in the Textile Fiber Act, do forthwith cease and desist from misrepresenting or failing to disclose, in any manner, the country of origin of such products in violation of Sections 3, 4(b)(4) and 4(b)(5) of the Textile Fiber Act, 15 U.S.C. 70a, 70b(b)(4) and 70b(b)(5), and Rule 33, 16 CFR 303.33.

## III.

*It is further ordered,* That respondents shall forthwith file with the Commission a continuing guaranty applicable to all textile products handled by respondents, in the form prescribed by Rule 38, 16 CFR 303.38.

## IV.

*It is further ordered,* That respondents shall distribute a copy of this order to all present or future personnel, agents or representatives having managerial, purchasing, importing, sales, advertising, or policy responsibilities with respect to the subject matter of this order and that respondents shall secure from each such person a signed statement acknowledging receipt of said order.

## V.

*It is further ordered,* That, for a period of five (5) years, respondents will keep copies of each stamp, tag, label or other form of identification which shows information required by the Textile Fiber Act as well as such records as will show the textile fiber products in which each stamp, tag, label or other form of identification was affixed for each product it introduces, manufactures or introduction, sells, advertises, offers for sale or imports.

## VI.

*It is further ordered,* That respondents shall, for a period of five (5) years after this order becomes final, maintain and upon request make available to the Federal Trade Commission for inspection and copying, upon reasonable notice, all documents that relate to the manner and form in which respondents have complied with this order.

## VII.

*It is further ordered,* That respondents shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in Import Image 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 that may affect compliance obligations arising out of this order.

## VIII.

*It is further ordered,* That Import Image Inc., shall require, as a condition precedent to the closing of the sale of its business or other disposition of all or a substantial part of its assets, that the acquiring party file with the Commission, prior to the closing of such sale or other disposition, a written agreement to be bound by the provisions of the order that relate to Import Image Inc.

## IX.

*It is further ordered,* That the individual respondent named herein shall promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new

business or employment and, in addition, for a period of 10 years from the date of service of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment, each such notice to include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

X.

*It is further ordered,* That respondents shall, within sixty (60) days after the date of service of this order, submit a verified report in writing, to the Federal Trade Commission setting forth in detail the manner and form in which they have complied with this order.