

Modifying Order

114 F.T.C.

IN THE MATTER OF

T&N PLC

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3312. Consent Order, Nov. 8, 1990—Modifying Order, Nov. 13, 1991*

This order reopens the proceeding and modifies the Commission's 1990 order [113 FTC 1016], regarding the divestiture of certain thinwall engine bearing assets. The Commission has determined that the potential harm to respondent's ability to compete outweighs any further need to require a divestiture of the remaining VanAm inventory.

ORDER REOPENING PROCEEDING
AND MODIFYING ORDER

On September 24, 1991, respondent T&N plc ("T&N") filed a "Request for Confirmation that T&N has Discharged its Obligation to Divest the Thinwall Engine Bearing Assets or, in the Alternative, to Reopen the Proceeding and Modify the Consent Order" ("Request") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. T&N seeks acknowledgement that it has fully complied with its obligations under paragraph III of the consent order in Docket No. C-3312 ("order") to divest the thinwall engine bearing assets or, in the alternative, a modification of paragraph I.10(a) of the order to relieve it of any further divestiture obligations under paragraph III.

Paragraph III of the order requires T&N to divest the "thinwall engine bearing assets" by November 21, 1991. Paragraph I.10(a) defines the term "thinwall engine bearing assets" to include, among other things:

All assets relating to the sale, marketing and distribution of bearings for U.S. gasoline engine applications manufactured by Vandervell directed to the U.S. aftermarket that are based at VanAm's facility in Tucker, Georgia, including, but not limited to, all customer lists, inventory (to be repackaged in plain boxes), and assignment of the building lease and all agreements with sales agencies and fee warehouses, excluding any trademarks or trade names[.]

To date T&N has received Commission approval for a divestiture to

Automotive Components Limited ("ACL") of all the thinwall engine bearing assets required to be divested, with the exception of part of the VanAm inventory.

T&N asserts that the language and purpose of the order do not require it to divest all the VanAm inventory. T&N asserts that where the order requires the divestiture of "all" of a particular asset, it uses the word "all." Paragraph I.10(a) does not call for the divestiture of "all inventory." In addition, T&N urges that requiring the divestiture of the remaining VanAm inventory would be inconsistent with the Commission's unconditional approval of the divestiture to ACL. The Commission notified T&N by letter dated January 30, 1991, that it had approved the divestiture to ACL. That letter did not explicitly require T&N to take any further action to satisfy its obligation under paragraph III. Furthermore, T&N notes that at the time the Commission approved the divestiture to ACL, the Commission was aware of the fact that ACL did not intend to acquire all of the VanAm inventory. In light of the above, T&N asserts that it has complied fully with its obligation under paragraph III to divest the thinwall engine bearing assets.

T&N's arguments are not persuasive. The language of paragraph I.10(a) clearly requires T&N to divest all of the VanAm inventory. T&N's argument ignores the fact that the definition at paragraph I.10(a) begins with the language "all assets relating to the sale, marketing and distribution of bearings for U.S. gasoline engine applications manufactured by Vandervell directed to the U.S. after-market that are based at VanAm's facility in Tucker, Georgia, . . ." (emphasis added). By T&N's own reasoning, because the order expressly uses the word "all" it requires the divestiture of "all assets." The definition identifies a number of assets, such as customer lists and inventory, required to be divested. In enumerating those particular assets the definition uses the language: "including, but not limited to, . . ." (emphasis added). The particular assets enumerated in paragraph I.10(a), such as "all customer lists," operate not as words of limitation, but rather as words to describe some of the assets included within the universe of "all assets." The inventory falls within this universe, and T&N is required to divest all of it.

Furthermore, assuming *arguendo* that its construction of paragraph I.10(a) is correct, T&N fails to explain what part of the inventory it is required to divest. The Commission has explicitly stated in some orders, for example, that the assets in question be divested at the

election of the acquirer. *See e.g.*, Flowers Industries, Inc., Docket No. 9148, 102 FTC 1700 (1983). The Commission has not done so in this case.

Finally, T&N's assertion that the Commission should have attached some condition to its approval of the divestiture to ACL is unfounded. Nothing in the order required the Commission to take such action in the event T&N chose to divest something less than all the thinwall engine bearing assets. The order does not require T&N to divest the assets to a single acquirer. The language of paragraph III(A) states that the divestiture of the thinwall assets "shall be only to an acquirer (or acquirers) that receive the prior approval of the Commission," (emphasis added), clearly recognizing the fact that the divestiture of the thinwall engine bearing assets might require T&N to enter into one or more transactions. Similarly, the Commission did not condition its approval of the divestiture to ACL upon T&N's divestiture of the tri-metal heavywall engine bearing assets required by paragraph IV of the order. The Commission obviously did not thereby relieve T&N of its obligation to divest those assets.

Accordingly, the Commission believes that T&N has not fulfilled its obligation to divest the thinwall engine bearing assets and will treat T&N's Request as a petition to reopen and modify the order.

T&N asserts that it would be in the public interest to reopen and modify the order to relieve it of the obligation to divest the remaining thinwall engine bearing assets. T&N has not requested, and the Commission has not considered, reopening and modification of the order on the basis of changed conditions of fact or law. Pursuant to Rule 2.51, the Request was placed on the public record for ten days. No comments were received.

After reviewing respondent's Request, the Commission has concluded that the public interest warrants reopening the order and modifying the language of paragraph I.10(a) to relieve T&N of any further obligation to divest thinwall engine bearing assets.

Reopening and Modification of a Commission Order.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission "shall reopen" an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside in whole or in part."¹ The language

¹ Section 5(b) provides,

[T]he Commission shall reopen any such order to consider whether such order (including any affirmative

(footnote cont'd)

of Section 5(b) plainly anticipates that the burden is on the petitioner to make the satisfactory showing of changed conditions to obtain a reopening. T&N has not requested relief on these grounds.

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

The Order Should Be Reopened and Modified

T&N has demonstrated an affirmative need to modify the order. *Damon Corp.*, *supra*. T&N has demonstrated that the goals of the divestiture have been achieved and that requiring T&N to divest the remaining VanAm inventory could create an impediment to ACL's, as well as T&N's, ability to compete effectively.

ACL neither wants nor needs any additional VanAm inventory. ACL acquired from T&N the exclusive right to use the VanAm trademark until February, 1992, and the non-exclusive right to use the trademark until March, 1993. ACL acquired the rights to the VanAm

relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part.

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

trademark to allow it to enter the market in an orderly fashion and to establish its presence in the market before developing its own trademark. Accordingly, it acquired sufficient quantities of the VanAm inventory to service its needs for that period of time. The order as currently written, however, requires T&N to divest all of the VanAm inventory, whether or not ACL wants or needs that additional inventory. If ACL, nonetheless, acquired the additional inventory, it would incur costs it did not anticipate in acquiring the rest of the thinwall engine bearing assets, which could undermine its ability to compete.

T&N is also being harmed by the continued operation of the Asset Maintenance and Improvement Agreement ("Asset Agreement"). The Asset Agreement prohibits T&N from integrating the McConnellsville facility it obtained from JP Industries into its other operations until it has accomplished the divestitures required by the order.² T&N has demonstrated that the Asset Agreement imposes considerable costs on its operations and limits its ability to respond to changes in the market, thereby reducing its ability to compete effectively.

The reasons favoring modification outweigh any reasons for retaining the order as written. Requiring T&N to divest the remaining inventory would not provide any competitive benefit, since there is no reason to believe that such a divestiture would facilitate entry of a new competitor.

The purpose of the thinwall engine bearing assets divestiture is "to remedy the lessening of competition resulting from the acquisition of [JP Industries] by T&N," order at ¶ III, by establishing an acquirer, in this case ACL, as a viable competitor in the market. The order does not seek to reduce competition by depriving T&N of the assets it needs to compete. Here, T&N has divested most of the thinwall engine bearing assets as required by the order and in doing so has satisfied the purpose of the order by establishing ACL as a competitor in the market.³ Having determined that ACL would be a viable competitor

² On September 10, 1991, the Commission approved T&N's application to divest the tri-metal heavywall engine bearing assets to Babbitt Bearings, Inc. T&N and Babbitt Bearings closed that transaction on September 18, 1991.

³ In *Batus, Inc.*, Docket No. C-3099, 104 FTC 632 (1984), the Commission modified the order to eliminate the respondent's remaining obligation to divest assets where the respondent had demonstrated a good faith effort to comply fully with the divestiture requirements of the order and had divested most of those assets. The Commission modified the order in *Chevron, supra*, to eliminate a hold separate agreement where the respondent had submitted divestiture applications for all the assets required to be divested and the Commission had approved the divestitures with the exception of one application. The final divestiture application was awaiting Commission action. The Commission held that the potential harm resulting from the costs of continuing the hold separate agreement outweighed any need to keep it in effect. The hold separate had "accomplished its primary objectives" and was therefore eliminated.

without obtaining all the VanAm inventory, the Commission sees no need to require T&N to divest the remaining VanAm inventory. In addition, modification of the order to relieve T&N of its remaining divestiture obligation will also result in the termination of T&N's continuing obligations under the Asset Agreement.

Having balanced the reasons favoring the requested modification against those opposing the modification, the Commission has determined that the potential harm to respondent's ability to compete outweighs any further need to require a divestiture of the remaining VanAm inventory. *Chevron Corp., supra.* In addition, T&N has shown that the modification it seeks would eliminate that impediment.

Accordingly, *it is ordered*, that the proceeding be, and it hereby is, reopened for the purpose of modifying the order entered therein;

It is further ordered, That Paragraph I.10(a) be, and hereby is, amended to read:

All assets relating to the sale, marketing and distribution of bearings for U.S. gasoline engine applications manufactured by Vandervell directed to the U.S. aftermarket that are based at VanAm's facility in Tucker, Georgia, including, but not limited to, all customer lists, at the option of the acquirer all or part of VanAm's inventory (to be repackaged in plain boxes), and assignment of the building lease and all agreements with sales agencies and fee warehouses, excluding any trademarks or trade names;

IN THE MATTER OF

NINTENDO OF AMERICA INC.

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

Docket C-3350. Complaint, Nov. 14, 1991—Decision, Nov. 14, 1991.

This consent order prohibits, among other things, a Redmond, Wa., based corporation from fixing the prices at which its dealers advertise and sell Nintendo home video-game hardware to consumers. In addition, the consent order requires the respondent to mail a letter to all of its dealers advising them of the order and that they can advertise and sell the products at any price without adverse action by Nintendo.

Appearances

For the Commission: *L. Barry Costilo, Kevin J. Arquit, and Michael E. Antalics.*

For the respondent: *Robert A. Longman, Mudge, Rose, Guthrie, Alexander & Ferdon, New York, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Nintendo of America Inc. (hereinafter "Nintendo" or "respondent") has violated the provisions of 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 as follows:

PARAGRAPH 1. The respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal place of business at 4820-150th Ave., N.E., Redmond, Washington. Respondent is a wholly-owned subsidiary of Nintendo Co. Ltd., with its principal place of business in Kyoto, Japan.

PAR. 2. Respondent is now, and for some time has been, engaged in the offering for sale, sale and distribution of home video game

hardware, software and accessories to retail dealers located throughout the United States, including many of the nation's largest retail chains. Respondent's Nintendo Entertainment System is the number one selling toy in America. In 1989, Nintendo products, and products licensed by Nintendo, accounted for \$2.7 billion in retail sales. In 1989, Nintendo home video game hardware accounted for over 80% of all home video game hardware sales, and Nintendo software, together with Nintendo licensed software, accounted for over 80% of all home video game software sales.

PAR. 3. Nintendo maintains, and has maintained, a substantial course of business, including the acts or practices alleged in the complaint, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In connection with the sale and distribution of Nintendo products, respondent, in combination, agreement and understanding with certain of its dealers, has engaged in a course of conduct to maintain the resale prices at which certain of its dealers advertise, offer for sale, and sell its home video game hardware.

PAR. 5. The purpose, effects, tendency, or capacity of the acts and practices described in paragraph 4 are and have been to restrain trade unreasonably and hinder competition in the provision of home video game products in the United States, and to deprive consumers of the benefits of competition in the following ways, among others:

(a) Prices to consumers of Nintendo home video game hardware have been increased; and

(b) Price competition for Nintendo home video game hardware among retail dealers has been restricted.

PAR. 6. The aforesaid acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. These acts and practices are continuing and will continue in the absence of the relief requested.

Commissioner Yao not participating.

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, as amended, 15 U.S.C. 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Nintendo of America Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal place of business located at 4820-150th Ave., N.E., Redmond, Washington. Respondent is a wholly-owned subsidiary of Nintendo Co. Ltd., with its principal place of business in Kyoto, Japan.

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 purpose of this order, the following definitions shall apply:

(1) "*Product*" means any home video game hardware, software, accessories, or items related thereto which are manufactured, offered for sale or sold by respondent to dealers.

(2) “*Dealer*” means any person, corporation, or firm not owned by Nintendo that in the course of its business sells any product. The term “dealer” does not include licensees of Nintendo which do not act as agents, representatives, or distributors of Nintendo.

(3) “*Resale Price*” means any price, price floor, price ceiling, price range, or any mark-up formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any suggested, established, or customary resale price as well as the retail price advertised, promoted or offered for sale by any dealer.

II.

It is ordered, That respondent Nintendo of America Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, offering for sale, sale or distribution of any product in or affecting “commerce,” as defined by the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Fixing, controlling, or maintaining, directly or indirectly, the resale price at which any dealer may advertise, promote, offer for sale or sell any product.

(2) Requiring, coercing, or otherwise pressuring any dealer, directly or indirectly, to maintain, adopt, or adhere to any resale price.

(3) Securing or attempting to secure, directly or indirectly, any commitment or assurance from any dealer concerning the resale price at which the dealer may advertise, promote, offer for sale or sell any product.

(4) Reducing the supply of products to any dealer or imposing different credit terms in whole or in part due to the dealer’s resale price of any product.

(5) Requesting dealers, directly or indirectly, to report the identity of other dealers who advertise, promote, or offer for sale or sell any product below any resale price.

(6) For a period of five (5) years from the date on which this order becomes final, terminating any dealer due in whole or in part to the dealer’s resale price of any product. *Provided, however,* that the respondent retains the right to terminate unilaterally any dealer for lawful business reasons, unrelated to resale prices, that are not inconsistent with this paragraph or any other paragraph of this order.

III.

It is further ordered, That, for a period of five (5) years from the date on which this order becomes final, respondent shall clearly and conspicuously state the following on any list, advertising, book, catalogue, or promotional material where respondent has suggested any resale price to any dealer:

ALTHOUGH NINTENDO OF AMERICA INC. MAY SUGGEST RESALE PRICES FOR PRODUCTS, DEALER IS FREE TO DETERMINE ON ITS OWN THE PRICES AT WHICH IT WILL SELL THE PRODUCTS.

IV.

It is further ordered, That within thirty (30) days after the date on which this order becomes final, respondent mail by first class mail the letter attached as Exhibit A, together with a copy of this order, to all of respondent's present dealers, personnel, distributors, agents, or representatives having sales or policy responsibilities with respect to respondent's products.

V.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate 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 respective corporation which may affect compliance obligations arising out of the order.

VI.

It is further ordered, That respondent, within sixty (60) days after this order becomes final, and at such other times as the Commission or its staff shall request, file with the Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with this order.

Commissioner Yao not participating.

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Decision and Order

EXHIBIT A

Dear Retailer:

Nintendo of America Inc. has agreed, without admitting any violation of the law, to the entry of a Consent Order by the Federal Trade Commission prohibiting certain practices relating to resale prices. A copy of the Order is enclosed. Nintendo has also agreed to a similar order with New York, Maryland and other states. This letter and the accompanying Order have been sent to all of our dealers, sales personnel and representatives.

The Order spells out our obligations in greater detail, but we want you to know and understand the following:

1. You can advertise and sell our products at any price you choose.
2. We will not take any adverse action against you because of the price at which you advertise or sell our products.
3. While we may send materials to you which may contain our suggested retail prices, you are completely free to disregard these suggestions.

Sincerely yours,

President
Nintendo of America Inc.

IN THE MATTER OF
CONNECTICUT CHIROPRACTIC ASSOCIATION

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

Docket C-3351. Complaint, Nov. 19, 1991—Decision, Nov. 19, 1991

This consent order requires, among other things, an association of approximately 350 chiropractors to cease and desist from prohibiting, regulating, or interfering with its members offering free services or services at discounted fees and from prohibiting, regulating, or interfering with its members' advertising.

Appearances

For the Commission: *Andrew D. Caverly* and *Phoebe D. Morse*.

For the respondent: *Robert L. Hirtle, Jr., Rogin, Nassau, Kaplan, Lassman & Hirtle*, Hartford, CT.

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 Connecticut Chiropractic Association, a corporation, has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Federal Trade 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 Connecticut Chiropractic Association ("respondent" or "CCA") is a corporation formed and doing business pursuant to the laws of the State of Connecticut. Respondent is a voluntary association of approximately 350 chiropractors, constituting approximately 86 percent of the chiropractors practicing in Connecticut. Its principal business office is located at 28 Main Street, East Hartford, Connecticut.

PAR. 2. Respondent is a corporation organized for the purpose, among others, of serving the interests of its members by associating them into a practical business organization and is engaged in substantial activities that further its members' pecuniary interests. By

virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 3. Respondent's members are engaged in the business of providing chiropractic services for a fee. Except to the extent that competition has been restrained as alleged herein, and depending on their geographic location, respondent's members have been and are now in competition among themselves and with other chiropractors.

PAR. 4. The acts and practices of CCA, including those herein alleged, are in commerce or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 5. Respondent has acted as a combination of its members, or conspired with at least some of its members, to restrain competition among chiropractors in the State of Connecticut by prohibiting its members from offering free services and services at discounted fees, and from disseminating truthful, nondeceptive information through advertising and other means.

PAR. 6. In furtherance of the combination or conspiracy alleged in paragraph five, CCA has engaged in the following acts or practices, among others:

A. Adopted and maintained provisions in its Ethical Code that prohibit its members from:

1. Offering free services or services at discounted fees to consumers, thereby deterring price competition among members;
2. Advertising free or discounted services to consumers, including by use of coupons, thereby deterring members from offering such services and depriving consumers of truthful information;
3. Advertising that CCA considers to be "sensational," "undignified," and not in "good taste," thereby discouraging advertising that is effective because it attracts attention or is memorable; and
4. Implying that they possess "unusual expertise" without meeting additional experience and educational requirements that a recognized chiropractic accrediting agency has approved, thereby depriving consumers of truthful information regarding the quality of chiropractors in areas of practice for which no certification exists, and the quality of chiropractors who acquire expertise in areas of practice without receiving certification.

B. Coerced its members to comply with its Ethical Code by, among other things:

1. Threatening members who violate the Code with expulsion from CCA;

2. Threatening, in the CCA quarterly journal and at CCA meetings, members who advertise free or discounted services that CCA will attempt to influence health insurance companies to disallow or reduce reimbursements to their patients; and

3. Threatening, in the CCA quarterly journal and at CCA meetings, members who violate the Code that CCA will report them to chiropractic malpractice insurance carriers.

PAR. 7. Respondent's actions described in paragraphs five and six have had, or have the tendency and capacity to have, the following effects, among others:

A. Restraining competition among chiropractors with respect to price, quality, and other terms of service;

B. Depriving consumers of truthful, nondeceptive information about the availability, price, and quality of chiropractic services; and

C. Depriving consumers of the benefits of free and open competition among chiropractors.

PAR. 8. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. Such combination or conspiracy, or the effects thereof, is continuing and will continue or recur absent the entry against respondent of appropriate relief.

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 Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its 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 aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged

in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent Connecticut Chiropractic Association is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Connecticut, with its principal business office located at 28 Main Street, East Hartford, Connecticut.

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

A. "CCA" means the Connecticut Chiropractic Association and its Executive Board, committees, officers, directors, agents, representatives, employees, successors, and assigns;

B. "Disciplinary action" means, but is not limited to, revocation or suspension of, or refusal to grant, membership, or the imposition of a reprimand, warning, probation, or any other penalty or condition;

C. "Person" means any natural person, corporation, partnership, unincorporated association, or other entity; and

D. "Regulating" means (1) adopting or maintaining any rule, regulation, interpretation, ethical ruling, policy, or course of conduct; (2) taking or threatening to take formal or informal disciplinary action; or (3) conducting investigations or inquiries.

II.

It is further ordered, That CCA, directly or indirectly, or through any corporate or other device, in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Prohibiting, regulating, or interfering with any of the following practices of its members:

1. Offering free services or services at discounted fees to consumers;

2. Advertising, including but not limited to:

(a) Advertising free services or services at discounted fees to consumers, including by use of coupons;

(b) Advertising that CCA considers to be "sensational," "undignified," or not in "good taste;" and

(c) Implying that they possess "unusual expertise," *provided, however,* that CCA may restrict members' claims of specialization, unless additional experience and educational requirements have been met that are approved by a recognized chiropractic accrediting agency.

B. Inducing, suggesting, urging, encouraging, or assisting any non-governmental person or organization to take any action that if taken by CCA would violate Part II.A. of this order.

Provided That, nothing contained in this order shall prohibit CCA from adopting, maintaining, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations, advertising, or other communications that CCA reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

III.

It is further ordered, That CCA shall:

A. Distribute by first-class mail hard copies of this order, the accompanying complaint, and an announcement in the form shown in Appendix A to this order in the following manner:

(1) Within thirty (30) days after the date this order becomes final, to each CCA member; and

(2) For five (5) years after the date this order becomes final, to each applicant for membership in CCA within thirty (30) days after CCA receives such application;

B. Within ninety (90) days after the date this order becomes final, publish this order, the accompanying complaint, and an announcement in the form shown in Appendix A to this order in *The Connecticut Yankee* (CCA's quarterly journal), or any successor publication, in the same size type normally used for articles that are published in *The Connecticut Yankee* or in that successor publication;

C. Within thirty (30) days after this order becomes final, remove from CCA's Ethical Code, Bylaws, and any other existing policy statement or guideline of CCA, any provision, interpretation, or policy statement that is inconsistent with Part II of this order;

D. Within sixty (60) days after this order becomes final, publish and distribute to all members of CCA and to all personnel, agents, or representatives of CCA, revised versions of CCA's Ethical Code, Bylaws, and any other existing policy statement or guideline of CCA;

E. File with the Federal Trade Commission within one hundred and twenty (120) days after the date this order becomes final, one (1) year after the date this order becomes final, and at such other times as the Federal Trade Commission may by written notice to CCA request, a verified report in writing setting forth in detail the manner and form in which CCA has complied and is complying with this order;

F. For a period of five (5) years after the date this order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, records adequate to describe in detail all action taken in connection with any activity covered by Parts II and III of this order, including all written communications and all summaries of oral communications, and all disciplinary action; and

G. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed changes in CCA, such as dissolution or reorganization resulting in the emergence of a successor corporation or association, or any other change in the corporation or association which may affect compliance obligations arising out of this order.

Commissioner Yao not participating.

APPENDIX A

[Date]

ANNOUNCEMENT

As you may be aware, the Connecticut Chiropractic Association ("CCA") has entered into a consent agreement with the Federal Trade Commission that became final on [Date]. The order issued pursuant to the consent agreement provides that CCA may not interfere if its members wish to engage in any of the following activities:

- (1) Offering free services or services at discounted fees to consumers;
- (2) Advertising free services or services at discounted fees to consumers, including by use of coupons;
- (3) Advertising that CCA considers to be "sensational," "undignified," or not in "good taste"; and
- (4) Implying that they possess "unusual expertise," provided, however, that CCA may restrict members' claims of specialization, unless additional experience and educational requirements have been met that are approved by a recognized chiropractic accrediting agency.

The order does not prevent CCA from formulating reasonable ethical guidelines prohibiting advertising or other communications that CCA reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

In particular, the agreement between CCA and the Federal Trade Commission means that as long as its members do not engage in falsehood or deception, CCA cannot prevent or discourage them from engaging in the practices listed above, among others.

For more specific information you should refer to the FTC order itself. A copy of the order is enclosed.

Keith Overland, D.C.
President
Connecticut Chiropractic
Association

IN THE MATTER OF
REMOVATRON INTERNATIONAL CORPORATION, ET AL.

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

Docket 9200. Final Order, Nov. 4, 1988—Modifying Order, Nov. 20, 1991

This order reopens the proceeding and modifies the Commission's 1988 final order [111 FTC 206]—requiring respondents to cease making certain claims about their hair-removal device—by setting aside a provision requiring an affirmative disclosure in conjunction with certain efficacy claims. However, the respondents are still prohibited by the order from making unsubstantiated hair-removal claims.

ORDER REOPENING THE PROCEEDING AND
MODIFYING CEASE AND DESIST ORDER

On July 23, 1991, Removatron International Corporation and Frederick E. Goodman (Petitioners) filed a petition pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Rules 2.51 and 3.72 of the Commission's Rules of Practice, 16 CFR 2.51 and 3.72, to reopen the proceeding and modify the final cease and desist order issued against them by the Commission on November 4, 1988, in Docket No. 9200 (111 FTC 206), and upheld by the United States Court of Appeals for the First Circuit on September 11, 1989, in *Removatron International Corp. v. FTC*, 884 F.2d 1489 (1st Cir. 1989).

The final order in this matter was the product of litigation concerning unsubstantiated claims of permanent or long-term (as opposed to temporary) hair removal for the Removatron radio frequency energy (RFE) tweezer-type epilation device. Part I.A of the order prohibits Petitioners from making permanent or long-term hair removal representations with respect to their RFE epilator unless they possess and rely upon competent and reliable scientific evidence that substantiates such representation. The order defines competent and reliable scientific evidence as adequate and well-controlled, double-blind clinical testing conforming to acceptable designs and protocols and conducted by a person or persons qualified by training and experience to conduct such testing. Part I.B of the order prohibits Petitioners, for a period of five (5) years, from representing that their

RFE epilator is intended to or is able to remove hair unless the following disclosure is also made:

IMPORTANT: There is no reliable evidence that [name of device treatments] provides anything more than *temporary* hair removal.

The request to reopen the proceeding to set aside Part I.B of the order was filed on July 23, 1991. The request was placed on the public record for thirty days for the purpose of receiving public comment on July 29, 1991. No comments were received during the comment period.

STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be altered, modified, or set aside if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require.¹ A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986) at 4. *See*, S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant change or changes causing unfair disadvantage); *see Phillips Petroleum Co.*, Docket No. C-1088, 78 FTC 1573, 1575 (1971) (modification not required for changes reasonably foreseeable at time of consent negotiations); *Pay Less Drugstores Northwest, Inc.*, Docket No. C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed condition must be unforeseeable, create severe competitive hardship and eliminate dangers order sought to remedy) (unpublished); *see also United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("clear showing" of changes that eliminate reasons for order or such that order causes unanticipated hardship).

¹ Section 5(b) provides, in part:

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

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

The language of Section 5(b) plainly anticipates that the burden is on the requester to make “a satisfactory showing” of changed conditions to obtain reopening of the order. *See also Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982) (requester must show “exceptional circumstances, new, changed or unforeseen at the time the decree was entered”). The legislative history also makes clear that the requester has the burden of showing, by means other than conclusory statements, why an order should be modified.² If the Commission determines that the requester has made the necessary showing, the Commission must reopen the order to determine whether the modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the requester fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. The requester’s burden is not a light one in view of the public interest in repose and finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974) (“sound basis for . . . [not reopening] except in the most extraordinary circumstances”); *RSR Corp. v. FTC*, 656 F.2d 718, 721-22 (D.C. Cir. 1981) (applying *Bowman Transportation* standard to FTC order).

CHANGED CONDITIONS OF FACT WARRANT REOPENING THE ORDER

Petitioners have requested that the Commission reopen and modify the order because changed conditions of fact and the public interest require such action. For the reasons described below, changes of fact warrant reopening and modifying the order against Petitioners. Having reopened and modified the order on the basis of changes of fact, the Commission does not reach the issue of whether the public interest warrants reopening.

Petitioners rely on a clinical study entitled “Evaluation of the Effect of Radio-Frequency Energy Delivered by the Removatron Hair Removal Device on Hair Regrowth” to support their request that Part

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

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

I.B of the order be set aside. The study was conducted by Nellie Konnikov, M.D., Assistant Professor of Dermatology, Tufts University School of Medicine; Chief, Dermatology Section, Boston VA Hospital; and Director, Dermatology Residency Program, Tufts-New England Medical Center. Dr. Konnikov concluded that Removatron's RFE device "appears to provide a safe, painless, and effective approach to the troublesome problem of unwanted hair." Dr. Konnikov bases this conclusion on her observation that contrary to the hair regrowth on the control sites, 46% of the facial hairs treated with the Removatron device could be considered with reasonable medical certainty to have been permanently removed.

Petitioners have also submitted the qualified opinion of a Medical Officer of the Food and Drug Administration's (FDA) Center for Devices and Radiological Health that the Konnikov study provides reasonable assurance of the efficacy of the Removatron RFE device. The Medical Officer, in a reference to the Standards for the Treatment of Permanent Hair Removal of the International Guild of Professional Electrologists, found that the range of effectiveness was in the minimum bracket of 40-50%—and the number of hairs studied per person was low. Consequently, he recommended that a statistical analysis of the study be conducted before the study could be pronounced an unqualified final determination that there is adequate evidence of safety and effectiveness of the Removatron device.³

Petitioners also had Dr. Eugene Van Scott, a dermatologist who testified as an expert on behalf of complaint counsel at the trial of this matter, review the Konnikov study. Dr. Van Scott stated that overall the study reported was designed quite well and the results appeared to be valid. However, he questioned whether the papilla was destroyed, the generally accepted definition of permanent hair removal.

Based on the foregoing, Petitioners argue that they have sufficient evidence on which to base representations of efficacy, *i.e.*, that Removatron's RFE device permanently removes hair. We do not agree. Arguably, the Konnikov study provides some evidence of permanent hair removal but it is by no means dispositive of this key issue. Supporting opinions are qualified, indicating that additional evidence will be required to substantiate permanent removal claims.

Dr. Van Scott's review of the Konnikov study is especially instructive. First, Dr. Scott proposes three possible effects of RFE on

³ The FDA, to our knowledge, has never conducted this statistical study. The FDA did compare the Konnikov study to the Standards of the International Guild of Professional Electrologists and determined there was not substantial equivalence between the RFE device and electrolysis.

the hair follicles' ability to grow hair, only one of which suggests the irreparable destruction of the papilla, the accepted definition of permanent removal. A second hypothesis is that the Removatron device merely extends the resting phase of the hair's growth period, the hair taking longer to grow back. A third hypothesis is that the Removatron device damages but does not destroy the papilla, causing the hair to grow back finer and shorter, so that it is no longer conspicuous but resembles the hair normally found in the affected region. The Konnikov study does not support the conclusion that permanent hair removal is the correct hypothesis among these three. Therefore, more study is needed.

Nevertheless, Dr. Van Scott has stated that he is convinced that RFE does something more than temporary hair removal. In his letter to the Petitioner Goodman, Dr. Van Scott wrote:

In my judgment this study does a great deal to satisfy the earlier criticisms and reservations regarding the effects of RFE on hair. In this regard consideration should be given however to positioning the claims for RFE, that is, "permanent removal" versus "diminishment of hirsutism" or some such statement to indicate that conspicuous hairs are eradicated, or conspicuous hairs fail to regrow. To insist on "permanent removal" invites the controversy over permanent destruction. In fact, if RFE can restore follicles to a state of normalcy (for the skin region involved) that is, convert follicles from producing coarse, long hairs to follicles producing short, fine hairs—which is suggested by the study of Dr. Konnikov—this would be cosmetically more desirable than trying to achieve baldness for the region. The result would be to normalize hair for that region.

Dr. Van Scott believes the study is evidence that something more profound than temporary hair removal is occurring.

PART I.B OF THE ORDER SHOULD BE SET ASIDE

Although the evidence presented is insufficient to substantiate a permanent removal representation, Part I.B does not require the same level of evidence to demonstrate a changed condition of fact. Since the evidence now demonstrates that Removatron's RFE epilation device achieves something more than temporary hair removal, Petitioners have shown that there is no need now for Part I.B of the order and that its continued application would be inequitable or harmful to competition.

It is therefore ordered, That the proceeding is hereby reopened and that Part I.B of the final order effective November 10, 1989, in Docket No. 9200 is hereby set aside.

IN THE MATTER OF
HOECHST CELANESE CORPORATION, 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 9216. Complaint, Nov. 17, 1988—Decision, Nov. 26, 1991

This consent order prohibits, among other things, a German company and its U.S. subsidiaries, for a period of ten years, from entering into any agreement, with any producer of acetal products, to allocate, divide or restrict competition in markets for acetal products. In addition, the consent order prohibits the respondents from using certain restrictions to limit competition from Daicel Chemical Industries and Polyplastics Company of Japan, their partners in a joint venture.

Appearances

For the Commission: *Rhett R. Krulla.*

For the respondents: *James T. Halverson, Shearman & Sterling,*
New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Hoechst Aktiengesellschaft, a corporation, Hoechst Corporation, a corporation, and Hoechst Celanese Corporation, a corporation, hereinafter sometimes referred to as respondents, have violated said Acts, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

DEFINITION

PARAGRAPH 1. For purposes of this complaint, "acetal" means the crystalline engineering thermoplastic polymer resin known as acetal, polyacetal or polyoxymethylene (POM), and includes both acetal homopolymers, manufactured from formaldehyde and consisting of repeating oxymethylene units with esterified terminal hydroxy

groups, and acetal copolymers, having oxyethylene groups inserted randomly along the polymer chains.

THE RESPONDENTS

PAR. 2. Respondent Hoechst Aktiengesellschaft ("Hoechst AG") is a corporation organized and existing under the laws of the Federal Republic of Germany, and has its principal place of business at D-6230 (Main) 80, Frankfurt, Federal Republic of Germany. Hoechst AG is the corporate parent of respondents Hoechst Corporation and Hoechst Celanese Corporation.

PAR. 3. Respondent Hoechst Corporation is a wholly-owned subsidiary of Hoechst AG, and is the corporate parent of respondent Hoechst Celanese Corporation. Hoechst Corporation is a corporation organized and existing under the laws of the State of Delaware, and has its principal place of business at Route 202-206 North, Bridgewater, New Jersey.

PAR. 4. Respondent Hoechst Celanese Corporation ("Hoechst Celanese") is a corporation organized and existing under the laws of the State of Delaware, and has its principal place of business at Route 202-206 North, Bridgewater, New Jersey. Hoechst Celanese is a wholly-owned subsidiary of Hoechst Corporation, and was formed through the merger of American Hoechst Corporation and Celanese Corporation ("Celanese") on February 27, 1987.

PAR. 5. At all times relevant herein, respondents or their predecessors have been engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12; and have been corporations 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.

PAR. 6. Hoechst AG and its affiliates (the "Hoechst Group") include approximately 250 companies, operating in more than 120 countries. The Hoechst Group's sales in 1987 were approximately \$20.6 billion. The Hoechst Group is one of the four largest producers and marketers of chemicals and chemical-related products in the world. At the time of the acquisition described below, the Hoechst Group sold acetal throughout the world, including in the United States, and engaged in research and development relating to acetal process and application technology.

PAR. 7. Hoechst Celanese manufactures and sells, principally to industrial customers, a diversified line of products, including textile

and industrial fibers, specialty and bulk chemicals, and engineering thermoplastics, including acetal. Hoechst Celanese owns and operates 29 manufacturing plants, 24 of which are located in the United States, three of which are located in Canada, and two of which are located in Europe. In 1987 Hoechst Celanese had revenues of approximately \$4.596 billion, assets of approximately \$5.388 billion, and operating income of approximately \$418 million.

OTHER PARTIES

PAR. 8. American Hoechst Corporation ("American Hoechst") was, at the time of the acquisition described below, a corporation organized and existing under the laws of the State of Delaware, and had its principal place of business at 1041 Route 202-206 North, Somerville, New Jersey. At the time of the acquisition described below, American Hoechst was a wholly-owned subsidiary of Hoechst AG, engaged in the production and sale of various petrochemicals, plastics, and pharmaceuticals in the United States. American Hoechst sold in the United States acetal supplied by Hoechst AG. American Hoechst had sales of approximately \$1.659 billion in 1986.

PAR. 9. At the time of the acquisition described below, Celanese Corporation was a corporation organized and existing under the laws of the State of Delaware, and had its principal executive offices and place of business at 1211 Avenue of the Americas, New York, New York. Celanese's overall net income was \$178 million in 1985 on sales of approximately \$3 billion. Celanese was the leading producer of acetal in the United States. In addition, Celanese owned a 41-percent interest in Ticona Polymerwerke GMBH ("Ticona"), the leading acetal producer in Europe, and owned a 45-percent interest in Polyplastics Co., Ltd. ("Polyplastics"), the leading acetal producer in Japan. Prior to the acquisition, Celanese licensed acetal technology to Ticona and to Polyplastics, and was a licensee of acetal technology from Ticona and Polyplastics.

PAR. 10. At the time of the acquisition described below, Ticona Polymerwerke GMBH was a foreign corporation organized and existing under the laws of the Federal Republic of Germany, and had its principal place of business at Kelsterbach, Federal Republic of Germany. Ticona was then jointly owned by Hoechst AG, which owned 59% of the capital stock of Ticona, and Celanese, which owned 41% of the capital stock of Ticona. Hoechst AG and Celanese had equal representation on Ticona's board of directors. Ticona was

engaged in the manufacture of acetal, and in research and development related to acetal. Acetal manufactured by Ticona was marketed and sold by Hoechst AG throughout the world, including in the United States. In addition, Hoechst AG managed the operations of Ticona, directly or through Hoechst AG officers and employees assigned to Ticona. Prior to the acquisition, Ticona licensed acetal technology to Celanese and to Polyplastics, and was a licensee of acetal technology from Celanese and Polyplastics.

THE ACQUISITION

PAR. 11. On or about November 3, 1986, Hoechst AG and American Hoechst commenced a cash tender offer for up to 100 percent of the issued and outstanding shares of Celanese common and preferred stock, with the intent of effecting a merger of Hostachem Acquisition Incorporated, a Delaware corporation wholly-owned by American Hoechst and Hoechst AG, into Celanese, all as contemplated in the Agreement of Merger entered into among Hoechst AG, American Hoechst and Celanese, on November 2, 1986. Pursuant to that Agreement, Celanese's Board of Directors approved Hoechst's tender offer, recommended its acceptance by Celanese stockholders, and agreed to approve the merger of Hostachem Acquisition Incorporated into Celanese following the tender offer.

PAR. 12. In February 1987, pursuant to the tender offer, American Hoechst acquired over 90 percent of the outstanding shares of common and preferred stock of Celanese. On or about February 27, 1987, American Hoechst was merged into Celanese and the surviving corporation was renamed Hoechst Celanese Corporation.

THE RELEVANT MARKETS

PAR. 13. For purposes of this complaint, the relevant line of commerce in which to evaluate the effects of the acquisition is the manufacture and sale of acetal.

PAR. 14. For purposes of this complaint, the relevant geographic market is the world.

PAR. 15. In 1986, approximately 700 million pounds of acetal were sold in the world, including approximately 115 million pounds of acetal that were sold in the United States. The world acetal market is highly concentrated, whether measured by the Herfindahl-Hirschmann Index or by four-firm and eight-firm concentration ratios.

PAR. 16. It is difficult to enter into the manufacture and sale of acetal.

PAR. 17. At the time of the acquisition described above, Celanese and Ticona were actual competitors in the manufacture and sale of acetal in the world, including in the United States.

PAR. 18. At the time of the acquisition, Celanese, and Hoechst AG and American Hoechst were actual competitors in the sale of acetal in the world, including in the United States.

THE EFFECTS OF THE ACQUISITION

PAR. 19. The effect of the aforesaid acquisition may be substantially to lessen competition with respect to the manufacture and sale of acetal in the world, including in the United States, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, because, among other things, the acquisition:

- a. Eliminated substantial actual competition between Celanese and Ticona;
- b. Eliminated substantial actual competition between Celanese, Hoechst AG and American Hoechst; and
- c. Significantly enhanced the likelihood of collusion or interdependent coordination among the remaining firms that sell or produce acetal.

THE VIOLATIONS CHARGED

PAR. 20. The acquisition of Celanese by American Hoechst and Hoechst AG violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

PAR. 21. The acquisition of Celanese by American Hoechst and Hoechst AG violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having heretofore issued its complaint charging respondents Hoechst Aktiengesellschaft, Hoechst Corporation, and Hoechst Celanese Corporation (hereinafter collectively "respondents") with 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 respondents having been served with a copy of that complaint, together with a notice of contemplated relief; 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 complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no public comment thereon having been received, 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 Hoechst Aktiengesellschaft ("Hoechst AG") is a company organized and existing under the laws of the Federal Republic of Germany, and has its principal place of business at D-6230 (Main) 80, Frankfurt, Federal Republic of Germany. Hoechst AG is the corporate parent of Respondents Hoechst Corporation and Hoechst Celanese Corporation.

2. Respondent Hoechst Corporation is a wholly-owned subsidiary of Hoechst AG, and is the corporate parent of Respondent Hoechst Celanese Corporation. Hoechst Corporation is a corporation organized and existing under the laws of the State of Delaware, and has its principal place of business at Route 202-206 North, Bridgewater, New Jersey.

3. Respondent Hoechst Celanese Corporation ("Hoechst Celanese") is a corporation organized and existing under the laws of the State of Delaware, and has its principal place of business at Route 202-206 North, Bridgewater, New Jersey. Hoechst Celanese is a wholly-owned subsidiary of Hoechst Corporation, and was formed through the merger of American Hoechst Corporation and Celanese Corporation ("Celanese") on February 27, 1987.

4. The Commission has issued and served upon Hoechst AG, Hoechst Corporation, and Hoechst Celanese (collectively, "Respondents") a complaint charging them with 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. Respondents have filed an answer to the complaint denying said charges.

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

ORDER

I.

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

A. "*Acetal*" means the crystalline engineering thermoplastic polymer resin known as Acetal, polyacetal or polyoxymethylene (POM), and includes both Acetal homopolymers, manufactured from formaldehyde or methanol and consisting of repeating oxymethylene units with esterified terminal hydroxy groups, and Acetal copolymers, having oxyethylene groups or other monomer groups, including 1-4 butanediolformal, inserted randomly along the polymer chains.

B. "*Acetal products*" means Acetal; trioxane; and Acetal to which fillers, reinforcing agents, and other polymers and/or chemical additives have been added where the Acetal is thirty (30) percent or more of the organic polymer content.

C. "*Acetal technology*" means patented and unpatented technology and know-how relating to the development, manufacture, sale, or use of Acetal products.

D. "*Acetal Assets and Businesses*" include but are not limited to all assets, properties, business and goodwill, tangible and intangible, utilized in the development, production, distribution or sale of Acetal products, including, without limitation, the following:

1. All machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property;

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, trademarks, patents, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes and quality control data;

3. Raw material and finished product inventories and goods in process;

4. All right, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits;

5. All right, title and interest in and to the contracts entered into in the ordinary course of business with customers (to the extent assignable) (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

6. All rights under warranties and guarantees, express or implied;

7. All separately maintained, as well as relevant portions of not separately maintained, books, records and files; and

8. All items of prepaid expense.

E. "*Before*" means on the date or at any time prior to that date.

F. "*Commercially implemented*" means technology that has been practiced commercially in a commercially-scaled facility for the manufacture of acetal products.

G. "*Control*" means "control" as it is defined at 16 CFR 801.1(b) on the date this order becomes final.

H. "*Daicel*" means Daicel Chemical Industries, Ltd., a corporation organized and existing under the laws of Japan (with its principal place of business at Osaka, Japan), its predecessors, subsidiaries, divisions, groups and affiliates controlled directly or indirectly by Daicel Chemical Industries, Ltd., and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns other than respondents.

I. "*Daicel VP*" means Daicel acting pursuant to paragraph VI of this order.

J. "*Daicel/Polyplastics site*" means any site in Japan at which Polyplastics manufactures Acetal products and any property owned by Daicel or by Polyplastics proximate to such site or connected to such site via supply or service lines.

K. "*Material confidential information*" means competitively sensitive or proprietary information not independently known to respondents from sources other than the acquired entity, and includes but is not limited to customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets.

L. "*Polyplastics*" means Polyplastics Company, Ltd., a corporation organized and existing under the laws of Japan (with its principal place of business at Osaka, Japan), its predecessors, subsidiaries,

divisions, groups and affiliates controlled directly or indirectly by Polyplastics Company, Ltd., and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

M. "*Polyplastics/TEPCO Acetal technology*" means all acetal technology that:

1. Polyplastics, independent of respondents and respondents' acetal technology, has developed or patented, or in the future develops or patents;

2. Polyplastics has licensed or otherwise obtained, or in the future licenses or otherwise obtains, from any person other than respondents;

3. Polyplastics had the right to use under license from respondents and commercially implemented at its Fuji City, Japan, facility before February 27, 1987; or

4. Has been provided to TEPCO by respondents or Polyplastics for commercial use in the design and operation of the facilities TEPCO now has under construction in Kaoshing, Taiwan, Republic of China, for the manufacture of acetal products as of the date that commercial production of acetal polymers commences at that facility; and all other such technology provided to TEPCO by respondents or Polyplastics and put in commercial use within six (6) months after the date that commercial production of acetal polymer commences at the Kaoshing facility.

N. "*Respondents*" means, individually and collectively:

1. Hoechst Aktiengesellschaft, a corporation organized and existing under the laws of the Federal Republic of Germany (with its principal place of business at Frankfurt, Federal Republic of Germany),

2. Hoechst Corporation, and Hoechst Celanese Corporation, two corporations organized and existing under the laws of Delaware (with their principal places of business at Bridgewater, New Jersey),

their predecessors, subsidiaries, divisions, groups and affiliates controlled directly or indirectly by Hoechst Aktiengesellschaft, Hoechst Corporation, or Hoechst Celanese Corporation, individually or collectively, and their respective directors, officers, employees, agents, and representatives and their respective successors and assigns. For purposes of this order the term "respondents" excludes Polyplastics and TEPCO.

O. "*Substantial purpose*" means fifty (50) percent or more of the

anticipated production from the incremental capacity is intended to be used for the stated purpose.

P. "TEPCO" means Taiwan Engineering Plastics Co., Ltd., a corporation organized and existing under the laws of Taiwan, Republic of China, (with its principal place of business at Taipei, Taiwan), its predecessors, subsidiaries, divisions, groups and affiliates controlled directly or indirectly by Taiwan Engineering Plastics Co., Ltd., and their respective successors and assigns.

Q. "United States" means the United States, including its territories and possessions.

R. "Viability and Competitiveness" means capable of operating independently at the same output as currently (at competitive prices) and capable of functioning independently and competitively in the acetal business.

II.

It is ordered, That, for a period of ten (10) years following the date this order becomes final, respondents do forthwith cease and desist from creating, maintaining, adhering to, participating in, or enforcing (including enforcing, after the ten-year period expires, any agreement entered into before the date this order becomes final with respect to: i) conduct within such period; or ii) conduct after such period by any person who initiated or engaged in similar conduct during such period) any agreement (if any) with any producer of acetal products to allocate, divide or restrict competition in markets for acetal products. Provided, however, respondents, Polyplastics, and TEPCO may, consistent with the terms of this order, enter into agreements with each other designating any of respondents, Polyplastics, or TEPCO an exclusive or nonexclusive distributor or selling agent for the sale of acetal products in any part of the world, except that respondents may not be designated an exclusive distributor or exclusive selling agent, in the United States, of Polyplastics, Daicel, or (to the exclusion of Polyplastics or other third parties) TEPCO. Provided, further, that respondents retain the right, in their sole discretion, to limit the use of acetal technology owned by respondents, except as required by this order.

III.

It is further ordered, That, for a period of ten (10) years following

the date this order becomes final, respondents shall forthwith cease and desist from creating, maintaining, adhering to, participating in, or enforcing any agreement (if any) (except for those actions permitted under paragraph II of this order) that:

A. Restricts the right of Daicel VI or Polyplastics to sell, cause to be sold, use, or cause to be used acetal products in the United States; or restricts the right of Daicel VI or Polyplastics to engage in the development or manufacture of acetal products in the United States using Polyplastics/TEPCO acetal technology, except as provided in paragraph VI of this order; or restricts the rights of customers of Polyplastics or Daicel to use or resell acetal products purchased from Polyplastics or Daicel VI. *Provided that*, to the extent that Polyplastics sells, causes to be sold, uses, or causes to be used acetal products in the United States during such period, acetal technology, including manufacturing technology for manufacture in Japan, necessary to effect sales or use in the United States shall be perpetually licensed to such entity for use in connection with sales or use of acetal products thereafter in the United States. *Provided, further*, that any of the Polyplastics/TEPCO acetal technology licensed, transferred and used by Daicel or Polyplastics for the construction of a new facility or expansion of an existing facility pursuant to operation of paragraph VI of this order shall be perpetually licensed to such entity for use in connection with such new facility or facility expansion, including but not limited to the right to manufacture at such facility and sell acetal products produced therein in the United States. *Provided, however*, that respondents may take action with respect to any shipment or sale of Acetal products in or into the United States by any person to the extent that respondents believe, in good faith, is reasonably necessary to protect respondents from direct or indirect liability under any law of the United States, including, but not limited to, the Toxic Substances Control Act.

B. Designates respondents the exclusive distributor or exclusive selling agent in the United States or any part thereof of acetal products manufactured by Daicel VI, Polyplastics, or (to the exclusion of Polyplastics or other third parties) TEPCO.

IV.

It is further ordered, That respondents shall take no action against:

A. Daicel VI or Polyplastics to enforce any patent of respondents necessary to utilize the Polyplastics/TEPCO Acetal technology with respect to the development, manufacture, use, or sale of acetal products in the United States; or

B. Any customer of Polyplastics or Daicel VI to enforce any patent of respondents necessary to utilize the Polyplastics/TEPCO acetal technology with respect to purchases of acetal products in the United States or purchases of acetal products for sale or use in the United States.

V.

It is further ordered, That, for a period of ten (10) years following the date this order becomes final, respondents shall take no action, directly or indirectly, to restrict, interfere with, or, except through competition by respondents in the open market, influence in any manner:

A. The selling price of acetal products (i) that Polyplastics or Daicel VI manufactures or sells in the United States; or (ii) that Polyplastics or Daicel VI sells for resale in the United States or sells for use in manufacture in the United States to the extent that respondents know that such products are destined for the United States;

B. The volume of acetal products that Polyplastics or Daicel VI manufactures or sells in the United States;

C. The volume of acetal products that Polyplastics or Daicel VI manufactures in Japan for sale into the United States or for use in manufacture in the United States; or

D. The geographic areas in which Polyplastics sells acetal products that Polyplastics obtains from TEPCO.

Provided, however, respondents may, consistent with the terms of this order, enter into a distribution arrangement or selling agency permitted under paragraph II of this order and may negotiate price and volume with respect to purchases by respondents from Polyplastics, TEPCO or Daicel. *Provided, further,* that respondents may exercise any of their rights permitted under paragraph VI of this order.

VI.

It is further ordered, That, for a period of ten (10) years following

the date this order becomes final, whenever Daicel submits in writing or by motion a proposal to the Board of Directors of Polyplastics for Polyplastics, using Polyplastics/TEPCO acetal technology, (1) to construct new facilities or expand existing facilities for the manufacture of acetal products in the United States; (2) to add production capacity at any then-existing Daicel/Polyplastics site in Japan (or, if necessary space is not available or costs would be substantially higher at then-existing Daicel/Polyplastics sites, at such other sites in Japan as Polyplastics may select), an express, substantial purpose of which is to supply Acetal products for sale or use in the United States; or (3) to construct production capacity at any site in Japan for the sole express purpose of supplying acetal products for sale or use in the United States:

A. Respondents shall, within 60 days after receipt of the proposal, either (1) agree in writing to the proposal and agree to make the necessary capital contribution, if any, as specified in the request; or (2) notify Daicel and Polyplastics in writing that respondents elect not to participate in the proposal;

B. If respondents elect not to participate in the proposal pursuant to paragraph VI. (A)(2) of this order, Daicel may, at its own sole election, pursue the proposal independently of Polyplastics,

1. At any site in the United States,

2. At any then-existing Daicel/Polyplastics site in Japan,

3. If necessary space is not available or costs would be substantially higher at then-existing Daicel/Polyplastics sites, at such sites in Japan as Daicel may select, provided Daicel agrees to designate Polyplastics an exclusive distributor or selling agent for the sale outside the United States of acetal products produced at such site, or

4. If the sole express purpose of the proposal is to supply acetal products for sale or use in the United States, at such sites in Japan as Daicel may select,

through a non-exclusive license by respondents and Polyplastics (without the right to sublicense except to an entity controlled by Daicel and which entity no other owner controls and no owner other than Daicel is engaged, at the time of the sublicense, in manufacturing industrial organic chemicals, plastics materials or synthetic resins or fibers anywhere in the world which, if manufactured in the United States, would be defined in Standard Industrial Classification (SIC) Codes 286 and 282) of the Polyplastics/TEPCO Acetal technology for

the manufacture of Acetal products in the United States or Japan for use in connection with the proposal. If Daicel so elects, it shall notify respondents and Polyplastics of its intention to pursue the proposal independently at least sixty (60) days prior to proceeding with the proposal. *Provided, however*, respondents may limit, in the license, the persons to whom the license may be assigned in the event of a sale of the licensed entity to exclude persons engaged, at the time of the sale, in manufacturing industrial organic chemicals, plastics materials or synthetic resins which, if manufactured in the United States, would be defined in Standard Industrial Classification (SIC) Codes 286 and 282.

C. Within sixty (60) days of receipt of notice from Daicel that Daicel intends to pursue independently the proposal, respondents shall, at their sole election, either:

1. Execute and cause Polyplastics to execute in favor of Daicel a license and authorization to Daicel to use all Polyplastics/TEPCO acetal technology in connection with the proposal at any then-existing Daicel/Polyplastics site in Japan (or, if necessary space is not available or costs would be substantially higher at existing sites, at such sites in Japan as Daicel may select provided Daicel agrees to designate Polyplastics an exclusive distributor or selling agent for the sale outside the United States of acetal products produced at such site; or, if the sole express purpose of the proposal is to supply acetal products for sale or use in the United States, at such sites in Japan as Daicel may select) or at any site in the United States and any subsequent expansion thereof. The royalty to be paid by Daicel for use of the Polyplastics/TEPCO acetal technology, either in the United States or Japan, shall be commercially reasonable, shall be paid by Daicel only to Polyplastics, and shall be distributed by Polyplastics in accordance with established practice. If Daicel agrees to designate Polyplastics an exclusive distributor or selling agent for the sale outside the United States of acetal products produced by Daicel pursuant to paragraph VI.(B)(3) of this order, respondents shall, as shareholders in Polyplastics, cooperate with Daicel in causing Polyplastics to agree to distribute or sell outside the United States, and to take such action as may be necessary to distribute or sell outside the United States, acetal products produced by Daicel pursuant to paragraph VI.(B)(3) of this order on terms and conditions no less favorable than those under which Polyplastics distributes or sells acetal products produced by respondents or by TEPCO;

2. Agree in writing to proceed with the original proposal through

Polyplastics, in accordance with paragraph VI.(A)(1) of this order, agree to support and vote in favor of the proposal, and agree to make the necessary capital contribution, authorize expenditure of the retained earnings of Polyplastics, or authorize financing of the proposal by debt, as specified in the proposal. If respondents elect to agree to proceed with the original proposal through Polyplastics,

a. Daicel must pursue the proposal through Polyplastics; and

b. Respondents must allow Daicel to pursue the proposal through Polyplastics and must support and vote in favor of, and take no action to impede, the proposal and shall, as shareholders in Polyplastics, cooperate with Daicel in taking such actions and in causing Polyplastics directors to take such action as may be appropriate to have the improvements, construction, or other proposal so funded to be made and done; or

3. Agree in writing to proceed with the proposal through Polyplastics and agree to support and vote in favor of the proposal, provided Daicel contributes all necessary capital funding, without use of the retained earnings of Polyplastics and without imposing on respondents financial liability for the capital cost of the proposal. If respondents make this election,

a. Daicel must pursue the proposal through Polyplastics;

b. Respondents must support and vote in favor of, and take no action to impede, the proposal and shall, as shareholders in Polyplastics, cooperate with Daicel in taking such actions and in causing Polyplastics directors to take such action as may be appropriate to have the improvements, construction, or other proposal so funded to be made and done; and

c. Respondents shall negotiate in good faith with Daicel to establish a satisfactory corporate and financial structure that equitably compensates Daicel for its investment, permits Daicel to realize such return on its investment as the project may yield, and, to the extent commercially feasible, protects respondents from loss. *Provided, however,* that the respective voting interests in Polyplastics of Daicel and respondents in existence on June 13, 1991, shall not be altered. *Provided further,* that, notwithstanding any agreement to the contrary, dilution of respondents' ownership shares in Polyplastics as a result of application of this paragraph VI.(C)(3) of this order shall not affect the rights of Polyplastics use of acetal technology under any license agreement.

D. If the respondents, Polyplastics, and Daicel are unable to agree on (i) the availability of sufficient space for the installation of new capacity for acetal products at then-existing Daicel/Polyplastics sites or the relative costs of constructing capacity at these sites or other sites in Japan; (ii) the site at which Polyplastics shall construct production capacity in Japan pursuant to paragraph VI of this order; (iii) the amount of the royalty or other terms of the technology license pursuant to paragraph VI.(C)(1) of this order; (iv) the establishment or operation of an exclusive distribution or sales agency pursuant to paragraph VI.(C)(1) of this order; or (v) a corporate and financial structure pursuant to paragraphs VI.(C)(3) or IX.(E)(2) of this order, Daicel may elect to cause the issue to be submitted to outside, independent, binding arbitration in the City, County, and State of New York. In the event Daicel so elects, respondents shall agree to submit to such arbitration, and the issue shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA") and the AAA's Supplementary Procedures for International Commercial Arbitration or any successor rules thereto. Judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The decision of the arbitrator, after confirmation by the court pursuant to 9 U.S.C. 9, or succeeding statutory provisions, shall be final and binding upon the parties, and the failure of respondents thereafter to abide by the arbitrator's award shall be a violation of this order.

VII.

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for ten (10) years, respondents shall not acquire, directly or indirectly, without the prior approval of the Commission, assets, or all or any part of the total outstanding stock or share capital of, or any other interest in, any entity (including, but not limited to Polyplastics) that owns or operates assets engaged in, used for or previously used for (and still suitable for use for) the production of acetal in any location in the world. *Provided, however*, these prohibitions shall not relate to the construction of new facilities by or for respondents or to the acquisition of compounding or recycling facilities. *Provided further*, that such prior approval shall not be required.

A. If respondents satisfy the conditions set forth in paragraphs VIII or IX of this order;

B. If, before the acquisition, respondents already control such entity and already own a sufficient proportion of the voting shares of such entity and have sufficient representation on the board of directors of such entity so that no other owner of such entity, and no group of owners other than respondents, can veto or block any action respondents may direct such entity to take;

C. If respondents acquire two (2) percent or less of any class of the outstanding stock or share capital of any entity, provided respondents' total ownership of such entity, including the stock or share capital to be acquired, does not exceed two (2) percent of any class of the outstanding stock or share capital of the entity;

D. If respondents acquire solely for the purpose of investment five (5) percent or less of any class of the outstanding stock or share capital of any entity provided respondents' total ownership of such entity, including the stock or share capital to be acquired, does not exceed five (5) percent of any class of the outstanding stock or share capital of the entity; or

E. If respondents acquire outstanding shares of Polyplastics provided the voting rights now exercised respectively by respondents and by Daicel with respect to Polyplastics do not change from the rights existing on June 13, 1991, and provided the total of the shares of Polyplastics owned by respondents including the shares to be acquired does not exceed fifty (50) percent of the total outstanding shares of Polyplastics.

VIII.

It is further ordered, That

A. If, in the absence of an acquisition agreement with an entity that neither owns nor operates nor has any interest in assets engaged in, used for, or previously used for (and still suitable for use for) the production of acetal in any location in the world (hereinafter "Acquired entity"), respondents announce their intention to acquire or commence an acquisition of, any interest in the Acquired entity and, before respondents obtain sufficient control of the Acquired entity to prevent an acquisition by the Acquired entity, such Acquired entity acquires stock or share capital of, or any other interest in, any third entity that has an interest in assets engaged in, used for or previously

used for (and still suitable for use for) the production of acetal (hereinafter "Third entity"), respondents may, in lieu of obtaining prior approval of such acquisition under paragraph VII of this order, comply with and satisfy each of the requirements of this paragraph VIII of this order;

B. If, in the absence of an acquisition agreement with an entity that neither owns nor operates nor has any interest in assets engaged in, used for, or previously used for (and still suitable for use for) the production of acetal in any location in the world (hereinafter "Acquired entity"), respondents announce their intention to acquire or commence an acquisition of, any interest in the Acquired entity and, before respondents obtain sufficient control of the Acquired entity to prevent an acquisition by the Acquired entity, such Acquired entity acquires assets (hereinafter "Third entity assets") that include any assets used in the production of acetal, respondents may, in lieu of obtaining prior approval of such acquisition under paragraph VII of this order, comply with and satisfy each of the requirements of this paragraph VIII of this order;

C. If respondents acquire fifty-one (51) percent or more of the total outstanding stock or share capital of any entity, other than Daicel, Polyplastics or TEPCO, that owns or operates assets engaged in, used for, or previously used for (and still suitable for use for) the production of acetal in any location in the world (hereinafter "Acquired entity"), respondents may, in lieu of obtaining prior approval of such acquisition under paragraph VII of this order, comply with and satisfy each of the requirements of this paragraph VIII of this order.

D. In order to make an acquisition under paragraphs VIII.(A), VIII.(B), or VIII.(C) of this order without obtaining the Commission's prior approval pursuant to paragraph VII, respondents shall comply with and fulfill each of the following requirements:

1. Respondents shall notify the Commission
 - a. At least thirty (30) days prior to making an acquisition under paragraph VIII.(C); and
 - b. As soon as practicable, and in any event, within three (3) days of respondents learning of the acquisition by the Acquired entity of any interest in a Third entity or of Third entity assets, as described in paragraphs VIII.(A) or VIII.(B) of this order.

Respondents shall file such notification with the Secretary of the Commission and shall file a copy thereof with the Assistant Director

for Compliance, Bureau of Competition. Such notification shall follow the format for filings under Section 7A of the Clayton Act, 15 U.S.C. 18a, and the Commission's Premerger Reporting Rules promulgated thereunder, 16 CFR 801, *et seq.*, and, in addition, shall include a verified written report setting forth in detail the manner and form in which respondents intend to comply with the provisions of this paragraph VIII of this order with respect to such acquisition. Such notification shall be in addition to any reporting, waiting period, and other requirements applicable to the transaction under Section 7A of the Clayton Act, 15 U.S.C. 18a and the Commission's Premerger Reporting Rules promulgated thereunder, 16 CFR Parts 801, 802, 803.

2. For all acquisitions under paragraph VIII.(A) of this order, as soon as respondents have sufficient control over the Acquired entity to do so, respondents shall place all stock and share capital of the Third entity in a non-voting trust until said stock or share capital is divested. For all acquisitions under paragraphs VIII.(B) or VIII.(C) of this order, respondents shall comply with all terms of paragraph VIII.(H) of this order. Respondents' obligations under paragraph VIII.(H) of this order shall take effect as soon as respondents have sufficient control over the Acquired entity to satisfy the terms of paragraph VIII.(H) and shall continue in effect until such time as respondents have divested all the Properties to Be Divested, as specified respectively in paragraphs VIII.(D)(3)(a), VIII.(D)(3)(b), and VIII.(D)(3)(c) of this order, or until such other time as paragraph VIII.(H) provides.

3. Within twelve (12) months after:

a. The date when respondents have sufficient control over the Acquired entity, pursuant to paragraph VIII.(A) of this order, to divest stock or share capital of the Third entity, respondents shall divest, absolutely and in good faith, all the stock or share capital of the Third entity ("the Properties to Be Divested");

b. The date when respondents have sufficient control over the Acquired entity, pursuant to paragraph VIII.(B) of this order, to divest assets of the Acquired entity, respondents shall divest, absolutely and in good faith, all the Acetal Assets and Business of the Acquired entity and also divest such additional Third entity assets and effect such arrangements encompassed within the Third entity assets that are necessary to assure, insofar as possible under the circumstances of divesting the Third entity assets, the Viability and Competitiveness of

the Acetal Assets and Businesses of the Acquired entity ("the Properties to Be Divested");

c. The date of any acquisition under paragraph VIII.(C) of this order, respondents shall divest, absolutely and in good faith, all the Acetal Assets and Businesses of the Acquired entity and also divest such additional assets and businesses of the Acquired entity and effect such arrangements that are necessary to assure the Viability and Competitiveness of the Acetal Assets and Businesses of the Acquired entity ("the Properties to Be Divested").

4. Respondents shall divest the Properties to Be Divested only to an acquiring entity or entities that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. Respondents shall demonstrate, in their application for approval of a proposed divestiture,

a. For divestitures to be effected pursuant to paragraph VIII.(D)(3)(c) of this order, the Viability and Competitiveness of the Properties to Be Divested; or

b. For divestitures to be effected pursuant to paragraphs VIII.(D)(3)(a) or VIII.(D)(3)(b) of this order, that the proposed divestiture assures, insofar as possible under the circumstances of divesting the Third entity or the Third entity assets, the Viability and Competitiveness of the Properties to Be Divested and that respondents have done nothing to decrease the Viability and Competitiveness of the Properties to Be Divested relative to the condition in which they existed at the time respondents acquired control over the Acquired entity. *Provided that*, respondents have no obligation to go outside the Third entity or the Third entity assets to enhance the Viability and Competitiveness of the Properties to Be Divested.

The purpose of the divestiture is to ensure (insofar as possible, for divestitures to be effected pursuant to paragraphs VIII.(D)(3)(a) or VIII.(D)(3)(b) of this order, under the circumstances of divesting the Third entity or the Third entity assets) the continuation of the Properties to Be Divested as ongoing, viable businesses engaged in the development, manufacture and sale of acetal, and to remedy any lessening of competition resulting from the acquisition.

5. Within sixty (60) days after the date respondents file with the Commission the notice required by paragraph VIII.(D)(1) of this order and every sixty (60) days thereafter until respondents either (1) withdraw such notification and abandon the proposed acquisition, or

(2) have fully complied with the provisions of paragraph VIII of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying and have complied with those provisions. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of substantive contacts or negotiations for the divestiture of the Properties to Be Divested, including the identity of all parties contacted. Respondents also shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and reports and recommendations concerning divestiture.

E. If Respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Properties to Be Divested within the time required by paragraph VIII.(D)(3) of this order, respondents shall consent to the appointment by the Commission of a trustee to divest:

1. In the case of an acquisition under paragraphs VIII.(A) or VIII.(B) of this order, the Properties to Be Divested; and
2. In the case of an acquisition under paragraph VIII.(C) of this order, the stock or other share capital of the Acquired entity.

If, however, prior to the end of the twelve-month period, respondents have submitted an application for approval of a proposed divestiture, the divestiture period shall be extended until the Commission approves or denies the submitted plan.

F. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by respondents to comply with this order.

G. If a trustee is appointed by the Commission or a court pursuant to paragraphs VIII.(E) or VIII.(F) of this order, respondents shall consent to the following terms and conditions regarding the trustee's

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

2. The trustee shall, subject to the prior approval of the Commission, have the exclusive power and authority to divest, as specified in paragraph VIII.(E) of this order, the Properties to Be Divested and the stock or other share capital of the Acquired entity and to effect the additional obligations as set out in this order.

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

4. Respondents shall cause, subject to an appropriate confidentiality agreement, the trustee to have full and complete access to the personnel, books, records and facilities related to the Acquired entity, or any other relevant information, as the trustee may reasonably request. Respondents shall cause to be developed such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by respondents shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or the court for a court-appointed trustee.

5. Subject to respondents' absolute and unconditional obligation to divest at no minimum price, and the purpose of the divestiture as stated in paragraph VIII.(D)(4) of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each acquiring entity for the divestiture of the Properties to Be Divested or the stock or other share capital of the Acquired entity, as applicable. The divestiture shall be made in the manner set out in paragraph VIII.(E) of this order, *provided, however,* if the trustee receives bona fide offers from more than one acquiring entity or entities, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondents from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants (all of whom shall be subject to appropriate confidentiality agreements) as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondents and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's completing the divestitures specified in paragraph VIII.(E) of this order.

7. Except in the case of reckless disregard of his or her duties or intentional wrong doing, respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order.

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

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph VIII.(G)(1) of this order.

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

11. The trustee shall have no obligation or authority to operate or maintain the Acquired entity.

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

H. From the date respondents acquire fifty-one (51) percent or more of the stock or other share capital of the Acquired entity pursuant to paragraph VIII.(C) of this order, or have sufficient control over the Acquired entity pursuant to paragraph VIII.(B) of this order to satisfy the terms of this paragraph VIII.(H), until the day after the divestiture required by this paragraph VIII of this order has been completed, respondents (meaning for purposes of this paragraph VIII.(H) of this order, respondents excluding the Acquired entity and excluding all personnel connected with the Acquired entity as of the date respondents acquire the stock or other share capital of the acquired entity) will hold the stock and other share capital of the Acquired entity separate and apart on the following terms and conditions:

1. The Acquired entity shall be held separate and apart and shall be operated independently of respondents except to the extent that respondents must exercise direction and control over the Acquired entity to assure compliance with this order.

2. Respondents shall not influence, exercise direction over, or exercise control over, directly or indirectly, the Acquired entity, *provided, however*, that respondents may exercise only such direction and control over the Acquired entity as is necessary to assure compliance with this order.

3. Respondents shall maintain the viability and competitiveness and marketability of the Acquired entity and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair its marketability or viability and competitiveness. *Provided that*, for acquisitions pursuant to paragraph VIII.(B) of this order, respondents have no obligation to go outside the Third entity assets to enhance the viability and competitiveness of the Third entity assets.

4. Respondents shall not permit any director, officer, employee, or agent of respondents to also be a director, officer or employee of the Acquired entity. Respondents may exercise any voting rights associated with the stock and share capital of the Acquired entity only to the extent necessary to assure compliance with this order.

5. Except as required by law or as reported by the auditor (provided for in subparagraph VIII.(H)(6) of this order) and except to the extent that necessary information is exchanged in the course of evaluating the acquisition of the Acquired entity, defending investigations or litigation, obtaining legal advice, acting to assure compliance with this order (including accomplishing the divestitures), or negotiating

agreements to complete the divestitures, respondents shall not receive or have access to, or the use of, any of the Acquired entity's material confidential information not in the public domain, except as such information would be available to respondents in the normal course of business if the acquisition of the Acquired entity had not taken place. Any such information that is obtained pursuant to this subparagraph VIII.(H)(5) of this order shall only be used for the purpose set out in this subparagraph VIII.(H)(5) of this order.

6. Respondents may retain an independent auditor to monitor the operation of the Acquired entity. Said auditor may report to respondents on all aspects of the operation of the Acquired entity other than the Third entity or the Acetal Assets and Businesses of the Acquired entity but shall not disclose to respondents material confidential information concerning the Acquired entity.

7. Respondents shall not change the composition of the management of the Acquired entity except that the Acquired entity shall have the power to remove employees for cause.

8. Any employee of respondents who obtains or may obtain confidential information under this paragraph VIII.(H) of this order shall enter a confidentiality agreement prohibiting disclosure of confidential information until the day after the divestiture required by this paragraph VIII of this order has been completed.

9. All earnings and profits of the Acquired entity shall be retained separately in the Acquired entity.

10. Should the Federal Trade Commission or the Attorney General seek in any proceeding to compel respondents to divest themselves of the Acquired entity or to compel either respondents or the acquired entity to divest any assets or businesses of the Acquired entity, or to seek any other injunctive or equitable relief, respondents shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the acquisition of the Acquired entity.

I. Nothing contained in this order shall prevent the Commission or the Attorney General from taking any action to prevent any acquisition of the Acquired entity by respondents, including an action under Section 7A of the Clayton Act, 15 U.S.C. 18a, or Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b).

IX.

It is further ordered, That, notwithstanding the provisions of paragraph VII of this order, which require prior approval, respondents may acquire, without the prior approval of the Commission, stock or share capital of Polyplastics, or any other interest therein, provided each of the following conditions of this paragraph IX of this order are satisfied and are complied with by respondents:

A. For a period of ten (10) years following the date this order becomes final, respondents shall take no action to solicit Daicel to tender or otherwise sell any stock or share capital of Polyplastics or any other interest therein other than those actions necessary for respondents to preserve their rights under paragraph IX.(B) of this order. *Provided, however,* that this paragraph IX.(A) of this order does not apply to an acquisition of Polyplastics shares pursuant to paragraph VII.(E) of this order.

B. The stock or share capital of Polyplastics or other interest therein is tendered to respondents pursuant to the right of first refusal contained in paragraph 2.5 of the Main Agreement, dated June 25, 1962 between Daicel and Celanese, which states in pertinent part:

[I]f at any time while both [Daicel and Celanese] are owners of shares of POLYPLASTICS the party so desiring (herein sometimes called "Offeror") will give to the other party (herein sometimes called "Offeree") a first right to purchase in the following manner:

- I. The Offeror will give to the Offeree a notice and offer in writing stating
 - (a) the number of shares of POLYPLASTICS offered for sale to Offeree,
 - (b) the price per share of the shares so offered and the place and currency of payment, and
 - (c) that the said offer shall remain open and irrevocable for a period of sixty days.
- II. If the said offer is accepted in writing and unconditionally prior to its expiration, Offeree shall have a further period of ninety days to make payment in full for the shares so sold.
- III. If the said offer is not accepted Offeror may offer and sell the said shares, subject to the applicable provisions of Japanese law, by public or private sale at any time or from time to time, within a period of twelve months from expiration or earlier refusal of the said offer to any third part or parties, at a price per share not less than the price per share fixed in the notice and offer to Offeree for settlement at the same place and in the same currency as stated in such notice. The parties agree to take all action necessary to permit such public or private sale.

If the Offeror does not sell the shares so offered within such twelve months period, the said shares shall again be subject to a first right of purchase as aforesaid;

C. For a period of ten (10) years following the date this order becomes final, the respective voting rights exercised by respondents and by Daicel with respect to Polyplastics shall not change from the rights existing on June 13, 1991;

D. For a period of ten (10) years following the date this order becomes final, respondents do not obtain, in total holdings, more than fifty (50) percent of the total outstanding shares of Polyplastics;

E. During the ten (10) year period following the date this order becomes final, prior to entering into any agreement with Daicel pursuant to which respondents would obtain more than fifty (50) percent of the outstanding shares of Polyplastics upon expiration of paragraphs VII and IX of this order, respondents shall satisfy and comply with each of the following conditions:

1. At least thirty (30) days prior to executing such agreement, respondents shall deliver written notification to the Commission of the proposed agreement. Respondents shall file such notification with the Secretary of the Commission and shall file a copy thereof with the Assistant Director for Compliance, Bureau of Competition. Such notification shall follow the format for filings under Section 7A of the Clayton Act, 15 U.S.C. 18a, and the Commission's Premerger Reporting Rules promulgated thereunder, 16 CFR 801, *et seq.*, and, in addition, shall include a verified written report setting forth in detail the manner and form in which respondents intend to comply with the provisions of this paragraph IX of this order with respect to such acquisition. Such notification shall be in addition to any reporting, waiting period, and other requirements applicable to the transaction under Section 7A of the Clayton Act, 15 U.S.C. 18a and the Commission's Premerger Reporting Rules promulgated thereunder, 16 CFR Parts 801, 802, 803;

2. Prior to execution of such agreement, respondents and Daicel shall establish a corporate and financial structure that will assure that Daicel retains, without expiration, equitable ownership of, and realizes the total profit or loss resulting from, any subsequent investment made by Daicel, or any subsequent capital contribution made by Polyplastics or to Polyplastics made by Daicel, pursuant to paragraph VI of this order, while preserving respondents' future ownership rights in the then existing assets and operations of Polyplastics. If respondents and Daicel are unable to agree on a satisfactory corporate and financial structure, Daicel may elect binding arbitration, in

accordance with the provisions of paragraph VI.(D) of this order, to determine the structure; and

3. Execution and consummation of such agreement shall have no effect on any rights available to Daicel pursuant to paragraph VI of this order, and Daicel shall retain, after execution or consummation of any such agreement, all rights available to it pursuant to paragraph VI of this order.

X.

It is further ordered, That this order shall not be construed to prohibit respondents from engaging in any action, conduct, agreement, or other course of dealing, not affecting United States commerce. The meaning of "affecting United States commerce" shall be determined with reference to the judicial interpretation of the phrase "affecting commerce" as set forth in Section 7 of the Clayton Act, 15 U.S.C. 18. *Provided, however,* that nothing in this paragraph X. of this order shall affect respondents' obligations under this order with respect to any acquisition by respondents of all or any part of the assets, stock or share capital of, or any other interest in, Polyplastics or Daicel.

XI.

It is further ordered, That this order shall not be construed to prohibit respondents from engaging in any action, conduct, agreement, or other course of dealing under compulsion of a foreign sovereign government or an agency thereof, to the extent such compulsion would immunize those activities from a finding of illegality under the Sherman Act, 15 U.S.C. 1, *et seq.*, provided:

A. Respondents shall not, directly or indirectly, induce or solicit such compulsion by any foreign sovereign government or any agency thereof; and

B. Respondents shall notify the Secretary of the Commission within the earlier of:

1. Fifteen (15) days after any legal counsel of Hoechst Aktiengesellschaft or Hoechst Celanese Corporation becomes aware that any foreign sovereign government or any agency thereof is considering such compulsion; or

2. Twenty (20) days after any officer or director of Hoechst

Celanese Corporation, any member of the Management Board of Hoechst Aktiengesellschaft, or any of respondents' representatives on the Polyplastics Board of Directors becomes aware that any foreign sovereign government or any agency thereof is considering such compulsion and recognizes that such compulsion might affect the operation of any provision of this order.

Such notification shall be in the form of a verified written statement and shall include all information concerning such compulsion known to or believed by respondents, the basis for the information, a statement of the manner in which the information was obtained, and a statement of the effect of the compulsion on the requirements of the order.

XII.

It is further ordered, That, within sixty (60) days after the date this order becomes final, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying and have complied with the provisions of this order.

XIII.

It is further ordered, That, one year from the date this order becomes final and annually for nine years thereafter, respondents shall file with the Commission a verified written report of their compliance with this order.

XIV.

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 any of their respective principal offices, respondents shall permit any duly authorized representatives of the Commission:

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

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

XV.

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

Commissioner Owen recused and Commissioner Yao not participating.

IN THE MATTER OF

O'NEILL, INCORPORATED

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
TEXTILE FIBER PRODUCTS IDENTIFICATION ACT AND
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3352. Complaint, Dec. 9, 1991—Decision, Dec. 9, 1991

This consent order requires, among other things, the California-based company, d/b/a Onax, Inc., to label or otherwise identify the constituent fiber content, percentages of fiber content, manufacturer's name, and country of origin for their textile fiber products, as required by the Textile Fiber Products Identification Act. In addition, the order requires the respondent to distribute a copy of the order to each of its operating divisions.

Appearances

For the Commission: *Sylvia J. Kundig* and *Jeffrey A. Klurfeld*.

For the respondent: *Paul B. Meltzer*, *O'Neill, Incorporated*, Santa Cruz, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that O'Neill, Incorporated, a corporation, also trading and doing business as Onax, Inc. ("respondent"), has violated the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. O'Neill, Incorporated is a corporation organized, existing and doing business under the laws of the State of California. Its office and principal place of business is 1071 41st Avenue, Santa Cruz, California.

PAR. 2. Respondent is an importer, manufacturer, and wholesaler of textile fiber products, including, but not limited to, wearing apparel constructed of neoprene ("neoprene-type garments"), such as wet-suits, that consist of a rubber substance enclosed between two layers of a knit fabric.

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

PAR. 4. The neoprene-type garments constitute Textile Fiber Products, as that term is defined by the Textile Fiber Products Identification Act, 15 U.S.C. 70 *et seq.*, and the Rules and Regulations promulgated thereunder, 16 CFR 303.

PAR. 5. The neoprene-type garments were misbranded by respondent in that they were not stamped, tagged, labeled, or otherwise identified as required by Section 4(b) of the Textile Fiber Products Identification Act, 15 U.S.C. 70b, and in the manner and form prescribed by the Rules and Regulations promulgated under that Act, 16 CFR 303.

PAR. 6. Under Section 3(f) of the Textile Fiber Products Identification Act, 15 U.S.C. 70(a), a violation of that Act and the Rules and Regulations promulgated thereunder, is an unfair method of competition and an unfair and deceptive act or practice under the Federal Trade Commission Act, 15 U.S.C. 45.

PAR. 7. The acts or practices of respondent, as alleged in this complaint, were and are in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder. These acts and practices constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45.

Commissioner Yao not participating.

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 San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, their 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 aforesaid draft of complaint, a statement that the signing of

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules; the Commission hereby makes the following jurisdictional findings and enters the following order:

1. O'Neill, Incorporated is a corporation organized, existing and doing business under the laws of the State of California. Its office and principal place of business is 1071 41st Avenue, Santa Cruz, California.

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

3. 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 O'Neill, Incorporated, a corporation, trading and doing business under that name or as Onax, Inc. or by any other name, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale or sale of any textile fiber product, as that term is defined by the Textile Fiber Products Identification Act, 15 U.S.C. 70 *et seq.*, do forthwith cease and desist from:

Offering for sale or selling any such textile fiber product without the product being stamped, tagged, labeled, or otherwise identified as

required by Section 4(b) of the Textile Fiber Products Identification Act and in the manner and form prescribed by the Rules and Regulations promulgated under that Act.

It is further ordered, That respondent 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 in the corporation which may affect the compliance obligations that arise out of this order.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent shall, within sixty (60) days after service on it 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.

Commissioner Yao not participating.

IN THE MATTER OF

SPANISH TELEMARKETING INDUSTRIES, INC., ET AL.

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

Docket C-3353. Complaint, Dec. 20, 1991—Decision, Dec. 20, 1991

This consent order prohibits, among other things, three California telemarketing companies and an individual, that produce Spanish-language television advertisements for a weight loss product, from representing that any weight control food, drug, product, device, or service causes weight loss without increased physical activity and/or decreased caloric intake.

Appearances

For the Commission: *Sylvia J. Kundig.*

For the respondents: *Alan Weil, Armato, Gaims, Weil, West & Epstein, Los Angeles, CA.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Spanish Telemarketing Industries, Inc., a corporation, Nickolas Telemarketing Industries, Inc., a corporation, and Sylvia George, Inc., a corporation, and Stewart Brown, individually and as an officer and director of Spanish Telemarketing Industries, Inc., Nickolas Telemarketing Industries, Inc., and Sylvia George, Inc., ("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:

PARAGRAPH 1. (a) Respondent Spanish Telemarketing Industries, Inc., is a corporation organized, existing and doing business under the laws of the State of California. Its offices and principal place of business is 3219 San Fernando Road, Los Angeles, California.

(b) Respondent Nickolas Telemarketing Industries, Inc., is a corporation organized, existing and doing business under the laws of the State of California. Its offices and principal place of business is 3219 San Fernando Road, Los Angeles, California.

(c) Respondent Sylvia George, Inc., is a corporation organized,

existing and doing business under the laws of the State of California. Its offices and principal place of business is 3219 San Fernando Road, Los Angeles, California.

(d) Respondent Stewart Brown is an individual who has been, and is now, an officer and director of Spanish Telemarketing Industries, Inc., Nickolas Telemarketing Industries, Inc., and Sylvia George, Inc. At all times material to this case, he has formulated, directed, and controlled the acts and practices of the corporate respondents, including the acts and practices alleged in this complaint. His principal place of business is located at 3219 San Fernando Road, Los Angeles, California.

PAR. 2. Respondents have directed, participated in, and assisted others in the offering for sale, sale and distribution of a weight loss regimen ("Faja Fantastica"). Respondents also have directed, participated in, and assisted others in the creation and dissemination to the public of Spanish language advertisements and promotional materials that offer for sale the Faja Fantastica.

PAR. 3. 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. 4. Faja Fantastica consists of an approximately seven-inch wide nylon covered rubber belt and a moisturizing cream. In their advertisements, respondents refer to the Faja Fantastica as a "weight-removal plan" and a "fat-removal plan." The respondents refer to the nylon covered rubber belt as a "corset"; and the moisturizing cream is referred to as the "fat-removal cream." As advertised, Faja Fantastica is a "drug" and/or "device" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 5. Typical of respondents' advertising for Faja Fantastica, but not necessarily all-inclusive thereof, are Spanish language commercials aired nationwide on television stations that have foreign language programming ("the commercials"). Translated texts of the commercials are attached to this complaint as Exhibit A.

PAR. 6. The commercials contain, *inter alia*, the following claims:

(a) "Let the Weight-Removal plan go to work for you by ridding you of those undesirable excess pounds and inches."

(b) "Night or day, the Fat-Removal plan helps you achieve that figure you've always dreamed of, without the need for diets or strenuous exercises. With the Fat-Removal plan you lose pounds and inches from where you most need it!"

(c) "Just take a small amount of the Fat-Removal Cream, apply vigorously where you'd like to slim down, allow for your skin to absorb, and then, put on your corset!"

(d) "Lose those extra pounds and inches! Achieve a total reduction [loss] of pounds and inches without starving to death and without strenuous exercises."

(e) "Just apply to those areas where you want to lose inches the fastest. The fantastic Corset's plan works better in the areas where your overweight accumulates the most. It dramatically reduces those extra inches and it helps you lose those undesirable pounds."

PAR. 7. By and through the use of the statement referred to in paragraph six, and others of similar import and meaning in other advertisements or promotional materials not specifically set forth in this complaint, respondents have represented, directly or by implication, that use of Faja Fantastica will cause an individual to lose weight without an increase in physical exercise and/or a decrease in caloric intake.

PAR. 8. In truth and in fact, use of Faja Fantastica will not cause an individual to lose weight without an increase in physical exercise and/or a decrease in caloric intake. Therefore, respondents' representation as set forth in paragraph seven was, and is, false and misleading.

PAR. 9. In the commercials, respondents feature the following consumer endorsements or testimonials:

(a) [Unidentified woman] "I already lost my first 12 pounds and without any effort."

(b) [Mrs. Flores] "The more I use my Fat-Removal, the better I look. I've already lost fifteen pounds and four inches from my waist."

PAR. 10. By and through the use of the statements referred to in paragraph nine, and others of similar import and meaning in other advertisements or promotional materials not specifically set forth in this complaint, respondents have represented, directly or by implication, that the consumer endorsements or testimonials are representative of what consumers will generally achieve using Faja Fantastica in actual, although variable, conditions of use.

PAR. 11. In truth and in fact, the consumer endorsements or testimonials are not representative of what consumers will generally achieve with Faja Fantastica in actual, although variable, conditions of use. Therefore, the respondents' representation as set forth in paragraph ten was, and is, false and misleading.

PAR. 12. By and through the use of the statements in paragraphs six and nine and others of similar import and meaning in Exhibit A or in other advertisements or promotional materials not specifically set

forth in this complaint, respondents have represented, directly or by implication, that at the time the respondents made the representations set forth in paragraphs seven and ten, they possessed and relied on a reasonable basis for the representations.

PAR. 13. In truth and in fact, at the time the respondents made the representations set forth in paragraphs seven and ten, respondents did not possess and rely on a reasonable basis for the representations. Therefore, the representation set forth in paragraph twelve was, and is, false and misleading.

PAR. 14. The acts or practices of respondents, as alleged in this complaint, were and are to the prejudice and injury of the public and dissemination by respondents of the aforesaid false and misleading representations constituted and now constitutes unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act and false advertisements in violation of Section 12 of the Federal Trade Commission Act.

Commissioner Yao not participating.

Complaint

114 F.T.C.

EXHIBIT A

Page 1
(START)Sylvia George
Faja Quita Peso
60 Sec Spot
Job No. C-Quita-60

(Weight Removal Corset)

Spokerson 1 (Ms Pilar Verdes)

Pilar Verdes
Known Colombian
and Commentator

Are you one of those people who has been
arduously trying to lose that excess of inches from
your waist, hips, or thighs?

Fat Removal
Corset

Then, allow me to recommend you something
very, very special designed to remove
that undesirable fat very fast: the
Fat-Removal Corset.

The surprising body-slimmer which helps you to
get rid of that undesirable excess fat!

It helps you to quickly get rid of
excess fat!

EXHIBIT A

754

Complaint

Sylvia George
Quita Peso
60 Sec Spot
Job No. C-Quita-60

Page 2

Spokeperson 2

Has already lost 12 pounds

I have already lost my first twelve pounds, with no effort at all!

Spokesperson 1 (Ms Verdes)

Let the Weight-Removal plan go to work for you by ridding you of those undersirable excess: pounds and inches.

The Fat-Removal Courset Plan
helps you be more Slender!

Look and feel much more glamorous!

under jars: FOLLOW THE DIRECTIONS

The Fat-Removal Plan could give you the success you need to be slender + [the "extra-inch"] slimmer.

Call, and order right now!

Sylvia George
Quita Peso
Job No. C-Quita-60

Page 3

Fat-Removal
Corset

Call Right Now
1-800-829-2111

Voice 2

One-Eight Hundred-Eight-Twenty Nine-Twenty One-Eleven
One-Eight Hundred-Eight-Twenty Nine-Twenty One-Eleven
One-Eight Hundred-Eight-Twenty Nine-Twenty One-Eleven
One-Eight Hundred-Eight-Twenty Nine-Twenty One-Eleven

Sylvia George
Fat Removal Corset
90 Sec Spot
Job No. C-Quita-90

Page 1

Use translation to Job C-Quita-60 as follows: (i) Page 1 up to

(ii) Then, start from translation A, page 2 follow to end of page 4.

(iii) Use Page 3 of C-60.

90 Sec Spot
Job No. C-Quita-90

Page 2

Translation A

Spokesperson 3

Affidavits on File

It's a pleasure to wake up every morning feeling more thin and slender, knowing that my Fat-Removal Corset is working!

Spokesperson 2:

Has already lost 12 pounds

I have already lost my first twelve pounds, with no effort at all!

Spokesperson 1: (Ms Verdes)

Night or day, the Fat-Removal plan helps you achieve that figure you've always dreamed of!, without the need for diets or strenuous excersices. With the Fat-Removal plan you lose pounds and inches from where you most need it!

Lose Weight where you most need it!

754

Complaint

90 Sec Spot
Job No. C-Quita-90

Page 3

Spokesperson 4

The more I use my "Fat-Removal", the better I look. I've already lost fifteen pounds and four inches from my waist.

Mrs. Flores has already lost
15 pounds

And lost 4 Inches of Waist!

My husband is enjoying watching me
in my new wardrobe!

90 Sec Spot
Job No: C-Quita-90

Page 4

Spokesperson 1 (Ms Verdes):

Let the fat removal plan go to work
for you by ridding you of those
undesireable excess pounds and inches.

Just take a small amount of the Fat-Removal
Cream, apply vigourously where you'd like to
slim down, allow for your skin to absorb, and
then, put on your corset!

The Fat-Removal Corset's Plan
helps you be more slender!

Look and feel much more glamorous!

The Fat-Removal plan could give you
the success you need to be slender and slimmer.

Follow the Directions

Call, and order right now!
Page 3 of C-Quita-60 numbers read 3 times.

754

Complaint

Sylvia George
1 Minute Spot
Fantastic Corset
Job No: FRF-RR-SO

Page 1

Voice 1:

This is the miraculous corset that helps you become slender quickly!

LOSE WEIGHT NOW

It's the Fantastic Corset! The corset can be used at any time and anywhere because it's very comfortable.

MARGARITA MORAN

The corset easily adjusts to your body and automatically shapes (molds) your figure.

SLIM-DOWN 24 HOURS A DAY

The advantage of the Fantastic Corset's surprising slimming power.

INCREDIBLE SLIMMING POWER

Achieve that beautiful and shapely figure and that beautiful waist.

Sylvia George
Fantastic Corset
1 Minute Spot
Job No: FRF-RR-SO

Page 2

Achieve that beautiful and
shapely figure!

Lose those extra pounds and inches!
Achieve a total reduction [loss] of pounds
and inches without starving to death
and without strenuous excersices.

Works even better with the
FANTASTIC CREAM

Start to lose inches to achieve a new
and beautiful body almost immediately.

LOSE WEIGHT NOW

And Now! The Corset's [working] plan
works even better with the FANTASTIC CREAM
because it intensifies [strengthens, amplifies]
the corset's incredible slimming powers to help
you become slender, quickly!
And it's so easy to use.

754

Complaint

Sylvia George
Fantastic Corset
1 Minute Spot
Job No: FRF-RR-SO

Page 3

Voice 2

Call right now! One-Eight Hundred-Eight-Twenty
nine-Twenty One-Eleven.

One-Eight Hundred-Eight-Twenty, Nine-Twenty One-
Eleven.

Don't lose this opportunity. Call right now!

One-Eight Hundred-Eight-Twenty Nine-Twenty One-
Eleven.

CALL RIGHT NOW!
1-800-829-2111
and receive
two for the price
of one!
* this week only *

Sylvia George
2 Minute Spot
Fantastic Corset
Job No: FRF-RR-120

Page 1

Use pages 1 and 2 completely of
the translation of Job No. FRF-RR-SO

Still Voice 1:

[missing the plural s
in Spanish]

Just apply to those areas where you want to
lose inches the fastest.
The Fantastic Corset's plan works better in the

Works even better with the
FANTASTIC CREAM

areas where your overweight accumulates
the most. It dramatically reduces those
extra inches and it helps you lose those
undesirable pounds.

Voice 2

For this week, and this week only you'll
receive two corsets with their creams for
the price of one. This fabulous offer is
only valid this week.

CALL RIGHT NOW!
1-800-829-2111
and receive
two for the price of one
* this week only *

754

Complaint

Sylvia George
2 Minute Spot
Fantastic Corset
Job No: FRF-RR-120

Page 2

Spokesperson:

If you seriously want to look real good,
then you can't be left without your
Fantastic Corset!

The Fantastic Corset guarentees
suprising results starting from day one!

All my family wears it! My best friends
[female gender: amigas] wear it!
I wear it! You, too, should wear it!

Voice 2:

CALL RIGHT NOW!
1-800-829-2111

and receive
two for the price
of one!
* this week only *

Don't forget to order it to receive two
corsets with their creams for the price
of one! But, call right now, because
this offer is valid this week only!

Sylvia George
Fantastic Corset
2 Minute Spot
7-14-80 FOR-88-120

Page 3

Spokesperson:

The Fantastic Corset's plan
is guaranteed

Order your Fantastic Corset's plan right now! And, if for any reason whatsoever you're not completely satisfied with your corset, send it back and keep your cream with no further obligations.

Voice 2:

CALL RIGHT NOW!
1-800-829-2111
and receive
two for the price
of one!
* this week only *

Call right now! One-Eight Hundred-Eight-Twenty Nine-Twenty One-Eleven. One-Eight Hundred-Eight-Twenty Nine-Twenty One-Eleven. Don't lose this opportunity. Call this minute One-Eight Hundred-Eight-Twenty Nine-Twenty One-Eleven.

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 San Francisco 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 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 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 Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. a. Spanish Telemarketing Industries, Inc., is a corporation organized, existing, and doing business under the laws of the State of California. Its offices and principal place of business is 3219 San Fernando Road, Los Angeles, California.

b. Nickolas Telemarketing Industries, Inc., is a corporation organized, existing, and doing business under the laws of the State of California. Its offices and principal place of business is 3219 San Fernando Road, Los Angeles, California.

c. Sylvia George, Inc., is a corporation organized, existing, and doing business under the laws of the State of California. Its offices and principal place of business is 3219 San Fernando Road, Los Angeles, California.

d. Stewart Brown is an individual who is, and at all material times

was, an officer and director of Spanish Telemarketing Industries, Inc., Nickolas Telemarketing Industries, Inc., and Sylvia George, Inc. His principal place of business is located at 3219 San Fernando Road, Los Angeles, California.

2. 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.

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 corporate respondents, their successors and assigns and their officers; and Stewart Brown, individually and as an officer of corporate respondents; and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of Faja Fantastica, a moisturizing cream and/or girdle, any substantially similar products, devices, or combination of such products or devices in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that the product will cause an individual to lose weight without increased physical activity and/or decreased caloric intake.

II.

It is further ordered, That corporate respondents, their successors and assigns and their officers; and Stewart Brown, individually and as an officer of corporate respondents; and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, marketing, or other promotion of any weight control product, device or service, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication the performance or efficacy of any weight control product, device or service. For purposes of this order, weight control product, device, or service shall

include any food, drug, product, device, or service designed or used to prevent weight gain or to produce weight loss, reduction or elimination of fat, slimming, or a caloric deficit in a user of the food, drug, product, device, or service.

III.

It is further ordered, That corporate respondents, their successors and assigns and their officers; and Stewart Brown, individually and as an officer of corporate respondents; and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any food, drug, product, device, or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that the food, drug, product, device, or service will cause an individual to lose weight without a prominent disclosure that weight loss can only be obtained through increased physical activity and/or decreased caloric intake. The disclosure shall be in the same language as the advertisement or commercial for the food, drug, device, product, or service and in close proximity to the representation.

IV.

It is further ordered, That corporate respondents, their successors and assigns and their officers; and Stewart Brown, individually and as an officer of corporate respondents; and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any food, drug, product, device, or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication that the food, drug, product, device, or service will, can, or may provide or help provide any health-related benefit, unless, at the time of making the representation, respondents possess and rely on a reasonable basis consisting of competent and reliable scientific evidence that substantiates the representation. For purposes of this order, scientific evidence shall mean tests, analyses, research, studies, or other evidence,

conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the relevant profession to yield accurate and reliable results.

V.

It is further ordered, That corporate respondents, their successors and assigns and their officers; and Stewart Brown, individually and as an officer of corporate respondents; and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any product or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Using, publishing, or referring to any endorsement (as endorsement is defined in 16 CFR 255(b)) unless respondents have good reason to believe that at the time of the use, publication, or reference, the endorsement reflects the honest opinions, findings, beliefs, or experience of the endorser and contains no representation which would be false or unsubstantiated if made directly by respondents; and

B. Representing, directly or by implication, that any endorsement of the product or service represents the typical or ordinary experience of members of the public who use the product or service, unless that is the case.

VI.

It is further ordered, That respondents are jointly and severally liable for consumer redress in the amount of one hundred thousand dollars (\$100,000) and shall, within five (5) days of the date that this order becomes final, deposit the sum of one hundred thousand dollars (\$100,000) into an escrow account established and managed by the Commission. These funds shall be used to provide redress to consumers who were injured by respondents or others in connection with the acts and practices alleged in the complaint, and to pay any attendant costs of administration. The final determination of eligibility for, and amount of, refunds to be paid to consumers shall rest with the Commission. If the Commission determines that the direct payment of said funds to eligible consumers is wholly or partially impracticable, then, in lieu of making direct consumer redress, the Commission shall

cause said funds to be paid to the United States Treasury. Respondents shall be notified as to how the funds are disbursed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein described shall be deemed a payment of any fine, penalty, or punitive assessment.

VII.

It is further ordered, That respondents shall, for at least three (3) years after the date of service of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying, at a place designated by the Commission, complete records regarding respondents' compliance with this order, such records to include, but not be limited to:

A. All advertisements, promotional materials, documents, or other materials covered by this order;

B. All materials relied on to substantiate any claim or representation covered by this order;

C. All materials in their possession, custody, or control that contradict, qualify, or call into question such representation or the basis on which respondents relied for such representation; and

D. All materials that demonstrate respondents' compliance with this order.

VIII.

It is further ordered, That the respondents shall, for three (3) years from the date of entry of this order, distribute a copy of this order to each present and future managerial employee.

IX.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to the proposed change, of any proposed change in the corporate respondents 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 the order.

X.

It is further ordered, That respondent Stewart Brown shall, for a period of five (5) years from the date of service of this order, promptly notify the Commission, in writing, of his discontinuance of his affiliation with any corporate respondent, or his new affiliation with any other business or employment that engages in any acts or practices covered by any provision of this order. For each such new affiliation, the notice shall include the name and address of the new business or employment, and a description of respondent's duties and responsibilities.

XI.

It is further ordered, That respondents shall, within one hundred and twenty (120) days after the date of service of this order upon them 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 Yao not participating.

IN THE MATTER OF
KREEPY KRAULY USA, INC.

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

Docket C-3354. Complaint, Dec. 20, 1991—Decision, Dec. 20, 1991

This consent order prohibits, among other things, a Florida manufacturer of automatic swimming pool cleaning devices from engaging in or enforcing any agreement with any dealer to establish or maintain the dealer's resale prices. In addition, the respondent is required to rescind the paragraph of its dealer agreements that requires dealers to agree to maintain resale prices, to refrain from maintaining resale prices, and to notify its officers, sales personnel, dealers, and distributors that dealers are allowed to determine their own selling prices.

Appearances

For the Commission: *Michael E. Antalics* and *Karen A. Mills*.

For the respondent: *Steven B. Feirman* and *Arthur I. Cantor*,
Brownstein, Zeidman & Schomer, Washington, D.C.

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 Kreepy Krauly USA, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

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

- (1) "*Respondent*" means Kreepy Krauly, U.S.A., Inc., its predecessors, subsidiaries, divisions, groups, and affiliates controlled by Kreepy Krauly USA, Inc., and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.
- (2) "*Product*" means any swimming pool cleaning device or part for such device.

(3) “*Dealer*” means any person, partnership, or corporation, not owned by respondent, that sells any product in the course of its business.

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 13801 N.W. 4th Street, Sunrise, Florida.

PAR. 2. Respondent is now, and for some time has been, engaged in the manufacture, advertising, offering for sale, sale and distribution of products.

PAR. 3. Respondent maintains and has maintained a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as “commerce” is defined in the Federal Trade Commission Act.

PAR. 4. In connection with the sale and distribution of its products, respondent has entered into agreements with dealers pursuant to which the dealers have agreed to maintain suggested retail prices.

PAR. 5. The aforesaid acts and practices therefore constituted and now constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

Commissioners Starek and Yao not participating.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Kreepy Krauly, USA, Inc., a corporation, hereinafter sometimes referred to as respondent or “Kreepy Krauly”, and 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, as amended, 15 U.S.C. 45; and

Respondent, by its duly authorized officer, and its attorney, and counsel for the Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by

respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Proposed respondent Kreepy Krauly, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 13801 N.W. 4th St., in the City of Sunrise, State of Florida.

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 purposes of this order, the following definitions shall apply:

(1) "*Kreepy Krauly*" or "*respondent*" means Kreepy Krauly, USA, Inc., its predecessors, subsidiaries, divisions, groups, and affiliates controlled by Kreepy Krauly USA, Inc., and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

(2) "*Product*" means any swimming pool cleaning device or part for such device.

(3) "*Dealer*" means any person, partnership or corporation, not owned by Kreepy Krauly, that sells any product in the course of its business.

(4) "*Resale price*" means any price, price floor, price ceiling, price range, or any mark-up, formula, margin of profit, or any other

technique for pricing any product at retail. Such term includes, but is not limited to, any suggested, established, or customary resale price as well as the retail price at any dealer.

II.

It is ordered, That respondent Kreepy Krauly, directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with the manufacture, offering for sale, sale, or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, attempting to enter into, maintaining, or attempting to enforce any agreements with any dealer fixing, establishing, controlling or maintaining, directly or indirectly, the resale price at which any dealer may sell any product, or otherwise coercing or requiring any dealer to maintain or adhere to any resale price.

III.

It is further ordered, That, for a period of five years from the date on which this order becomes final, respondent Kreepy Krauly shall clearly and conspicuously state the following on each page of any list, advertising, book, catalogue, or promotional material where respondent has suggested any resale price to any dealer:

ALTHOUGH KREEPY KRAULY MAY SUGGEST RESALE PRICES FOR PRODUCTS, DEALER IS FREE TO DETERMINE ON ITS OWN THE PRICES AT WHICH IT WILL SELL THE PRODUCTS.

IV.

It is further ordered, That respondent do forthwith cease and desist from including in dealer agreements paragraph III.D. and the reference to paragraph III.D. in paragraph VIII.B.3., and shall, within thirty days from the date on which this order becomes final, by sending to dealers the letter attached as Exhibit A, cancel, rescind, and sever paragraph III.D. of each of respondent's dealer agreements, and the reference to paragraph III.D. in paragraph VIII.B.3. of each of respondent's dealer agreements.

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Decision and Order

V.

It is further ordered, That within thirty days of the date on which this order becomes final, respondent shall mail a copy of the letter attached as Exhibit A, together with a copy of this order, to all of respondent's present dealers, to all present officers and sales personnel of respondent, and to all distributors of respondent.

VI.

It is further ordered, That respondent notify the Commission at least thirty days prior to any change in the corporate 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 this order.

VII.

It is further ordered, That respondent shall within sixty days from the date on which this order becomes final, and annually thereafter for five years on the anniversary date of this order, file with the Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with this order.

Commissioners Starek and Yao not participating.

EXHIBIT A

Dear Retailer:

Kreepy Krauly USA, Inc. ("Kreepy Krauly") has agreed, without admitting any violation of the law, to the entry of a Consent Order by the Federal Trade Commission prohibiting certain pricing practices. A copy of the Order is enclosed herewith.

The Order specifies that you are free to make your own determination as to the price at which you sell our products. Kreepy Krauly may not take any action to coerce you to maintain or adhere to the suggested retail price or any resale price or price level. In addition, Paragraph III.D. of the Kreepy Krauly Dealer Agreement is hereby cancelled and rescinded.

Should you have any questions concerning this letter or the enclosed Order, please feel free to contact me.

Sincerely,

Ted Mignone
Executive Vice President
Kreepy Krauly USA, Inc.

IN THE MATTER OF

SOUTHBANK IPA, INC., ET AL.

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

Docket C-3355. Complaint, Dec. 20, 1991—Decision, Dec. 20, 1991

This consent order requires, among other things, a Florida association and its 23 obstetrician/gynecologist members to dissolve Southbank IPA and Southbank Health Care Corp.; prohibits each physician respondent from entering into any agreement with any other physician respondent or any competing physician to fix, stabilize, or tamper with any fee, price, or other aspect or term associated with any physician's services; and prohibits the physician respondents from dealing with any third-party payor on collectively determined terms.

Appearances

For the Commission: *David M. Narrow, Linda Blumenreich, Kathleen Kenyon and James C. Egan, Jr.*

For the respondents: *Jack R. Bierig, Sidley & Austin, Chicago, IL. and Donald W. Weidner, Florida Physicians Association, Jacksonville, FL.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (Title 15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents named above have violated and are violating 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 stating its charges as follows:

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

A. "*Third-party payor*" means any person or entity that engages in the process of reimbursing for, purchasing, or paying for health care services provided to any other person.

B. "*Participating provider*" means any physician or other person

or entity providing medical or other health care services that has entered into an agreement with a third-party payor to provide certain medical or other health care services to subscribers or enrollees of the third-party payor, or under any plan or program of the third-party payor, according to the terms and conditions for participation established or offered by the third-party payor.

PAR. 2. A. The twenty-three physician respondents are individuals who are or have been engaged in the private practice of obstetrics/gynecology for a fee in Jacksonville, Florida. Their addresses are as follows:

Wade Barnes, M.D., 836 Prudential Drive, Suite 1202, Jacksonville, Florida;

Ernest Ferrell, M.D., 836 Prudential Drive, Suite 1202, Jacksonville, Florida;

Cynthia Flanders, M.D., 4205 Belfort Road, Suite 3004, Jacksonville, Florida;

Donald Freedman, M.D., 4130 Salisbury Road, Suite 2000, Jacksonville, Florida;

James Hayes, M.D., 836 Prudential Drive, Suite 1608, Jacksonville, Florida;

John Huddleston, M.D., 25 Prescott Street, N.E., Atlanta, Georgia;
James Joyner, M.D., 580 W. 8th Street, Suite 711, Jacksonville, Florida;

Hormoz Khosravi, M.D., 4123 University Boulevard, Suite D, Jacksonville, Florida;

Peter McCranie, M.D., 836 Prudential Drive, Suite 1203, Jacksonville, Florida;

H. Wyatt McNeill, M.D., 820 Prudential Drive, Suite 502, Jacksonville, Florida;

Herman Miller, M.D., 820 Prudential Drive, Suite 306, Jacksonville, Florida;

Qudratullah Mojadidi, M.D., 580 W. 8th Street, Suite 6007, Jacksonville, Florida;

Richard Myers, M.D., 836 Prudential Drive, Suite 1001, Jacksonville, Florida;

Paul Oberdorfer, M.D., 1501 San Marco Boulevard, Jacksonville, Florida;

Norman Pack, M.D., 836 Prudential Drive, Suite 1001, Jacksonville, Florida;

Wilford Paulk, M.D., 836 Prudential Drive, Suite 1001, Jacksonville, Florida;

Raymond William Quinlan, M.D., 836 Prudential Drive, Suite 1800, Jacksonville, Florida;

Alexander Rosin, M.D., 820 Prudential Drive, Suite 408, Jacksonville, Florida;

Wilbur Rust, M.D., 820 Prudential Drive, Suite 215, Jacksonville, Florida;

Kenneth Sekine, M.D., 836 Prudential Drive, Suite 802, Jacksonville, Florida;

Jeffrey Stowe, M.D., 836 Prudential Drive, Suite 802, Jacksonville, Florida;

Carol Wyninger, M.D., 1501 San Marco Boulevard, Jacksonville, Florida; and

Vernon Zeigler, M.D., 4205 Belfort Road, Suite 3004, Jacksonville, Florida.

B. Respondents Southbank IPA, Inc. ("Southbank IPA") and Southbank Health Care Corp., Inc. ("Southbank Health Care Corp.") are corporations organized, existing, and doing business under and by virtue of the laws of the State of Florida. Their principal offices and places of business are located in Jacksonville, Florida, and their registered agent is Ms. Barbara Suddath Strickland, c/o Mahoney, Adams, Mylam, Surface & Grimsely, 100 Laura Street, Jacksonville, Florida.

PAR. 3. The physician respondents formed Southbank Health Care Corp. and Southbank IPA. Southbank IPA is a subsidiary of Southbank Health Care Corp. and is controlled by it. The physician respondents are the shareholders of Southbank Health Care Corp. and constitute the membership of Southbank IPA.

PAR. 4. The acts and practices of the respondents, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 5. Except to the extent that competition has been restrained as alleged herein, the physician respondents have been and are now in competition among themselves and with other providers of obstetrical/gynecological services in the Jacksonville, Florida, area or elsewhere.

PAR. 6. Physicians, including the physician respondents, are often paid for their services by third-party payors, including health

maintenance organizations ("HMOs"). HMOs and other third-party payors generally invite physicians (and sometimes certain other health care providers) to become participating providers by entering into written agreements or contracts to treat the subscribers or enrollees of their health care plans. These contracts establish the terms and conditions of the relationship between physicians and third-party payors, including the fees to be paid for treating subscribers or enrollees. Through such contracts, HMOs and other third-party payors may obtain discounts from physicians' usual fees, and physicians may obtain access to additional patients.

PAR. 7. Third-party payors in Jacksonville compete with each other on the basis of price, coverage offered, physician and hospital quality and availability, and other factors that are important to consumers. Reimbursements to physicians are a large component of a third-party payor's costs and, therefore, are significant to a third-party payor in determining what to charge consumers for its health care coverage.

PAR. 8. Absent agreements among competing physicians on the terms, including price, on which they will treat subscribers or enrollees of health care plans offered or provided by third-party payors, competing physicians decide individually whether to enter into contracts with third-party payors to treat their subscribers or enrollees.

PAR. 9. The physician respondents are, and at all material times have been, members of the medical staff of Southern Baptist Hospital of Florida, Inc. d/b/a Baptist Medical Center in Jacksonville, Florida, and hold staff privileges in obstetrics and/or gynecology at Baptist Medical Center. They constitute nearly the entire active staff of obstetrician/gynecologists at Baptist Medical Center. Because only members of the hospital's medical staff may admit patients to Baptist Medical Center, the physician respondents, when acting in concert, effectively control access to Baptist Medical Center's obstetrical/gynecological facilities and services. Because these facilities and services are highly regarded in Jacksonville, the ability of third-party payors to attract subscribers or enrollees is significantly enhanced by having obstetrician/gynecologists at Baptist Medical Center as participating providers.

PAR. 10. SunCare HMO, Inc. ("SunCare HMO") began operating in Jacksonville in 1986. In 1988, it was acquired by AV-MED, Inc. d/b/a AV-MED Health Plan and SunCare HMO, Inc.

PAR. 11. Prior to the formation of Southbank IPA in May 1987,

most or all of the physician respondents were members of SunCare IPA, Inc. ("SunCare IPA"), through which they provided covered services to SunCare HMO's subscribers or enrollees pursuant to contractual agreements between each physician respondent and SunCare IPA, and between SunCare IPA and SunCare HMO. As members of SunCare IPA, the physician respondents shared the risk of financial loss with other physicians in SunCare IPA if the total costs of services provided by members of SunCare IPA to subscribers and enrollees of SunCare HMO exceeded anticipated levels. As members of SunCare IPA, the physician respondents also agreed to participate in programs and follow guidelines designed to assure that physicians in SunCare IPA provided high quality services, while controlling the costs of those services.

PAR. 12. AmeriPlan Health Services, Ltd. ("AmeriPlan") and its successor, Principal Health Care of Florida, Inc., is an HMO offering health care coverage in the Jacksonville area.

PAR. 13. SunCare HMO, AmeriPlan/Principal Health Care of Florida, Inc., and other third-party payors compete with each other to provide health care coverage to consumers in the Jacksonville area.

PAR. 14. Beginning in 1986, the physician respondents agreed not to compete with respect to whether, and on what terms, they would treat subscribers or enrollees of at least some third-party payors' health care plans. The physician respondents conspired to resist efforts by third-party payors: (a) to obtain low fees from the physician respondents for their services; and (b) to implement other policies and requirements designed to contain costs and enhance the quality of services for consumers.

PAR. 15. Both SunCare HMO and AmeriPlan/Principal Health Care, Inc. met concerted opposition from some or all of the physician respondents at various times beginning in 1986. The physician respondents agreed to treat SunCare HMO's subscribers or enrollees only after concertedly forcing it to eliminate a cost-containment measure that required SunCare HMO subscribers or enrollees to consult their primary care physician before going to an obstetrician/gynecologist specialist for treatment. The physician respondents, acting concertedly, forced AmeriPlan/Principal Health Care, Inc. to agree to increase the fees it paid for obstetrical services in 1986 and again in 1987.

PAR. 16. To further the conspiracy described in paragraph 14, the physician respondents:

A. Formed Southbank IPA and Southbank Health Care Corp. in May 1987, with certain of the physician respondents serving as the officials of those organizations, to negotiate collectively on their behalf with third-party payors;

B. Agreed to refuse to contract individually with any third-party payor that had a contract with, or was in the process of negotiating a contract with, Southbank IPA;

C. Agreed not to enter into contracts with any other individual practice association ("IPA") or similar organization to treat third-party payors' subscribers at Baptist Medical Center without the permission of Southbank IPA;

D. Agreed on a schedule of the fees to be charged by the physician respondents, as members of Southbank IPA, to third-party payors for obstetrical/gynecological services provided by the physician respondents pursuant to agreements entered into between Southbank IPA and third-party payors; and

E. Agreed on a list of "negotiating points" for their representatives from Southbank IPA to use in negotiations with third-party payors as to the terms on which the physician respondents, through Southbank IPA, would contract with, or become participating physicians in, third-party payors or their plans or programs.

PAR. 17. Unlike many other physician groups that have formed IPAs, the physician respondents have not placed themselves jointly at financial risk for losses that might occur from Southbank IPA's operation. Unlike other IPAs, Southbank IPA does not provide new or more efficient services, or enable its members to provide new or more efficient services. Southbank IPA is a vehicle created by the physician respondents to facilitate their engaging in collective decisions on fees and other terms to be sought from third-party payors, and to collectively pressure or coerce third-party payors to accept those fees and terms.

PAR. 18. Upon its formation in May 1987, Southbank IPA requested its members to submit to it letters of resignation from SunCare HMO and SunCare IPA, and suggested language for the letters. All of the physician respondents, who were members of Southbank IPA, submitted resignation letters to Southbank IPA. Each resignation letter stated that by virtue of the physician respondent's membership in Southbank IPA, his or her future participation in SunCare HMO, if any, would be through Southbank IPA. In June 1987, Southbank IPA forwarded the resignation letters of the physician respondents to

SunCare HMO and SunCare IPA. When contacted individually by SunCare HMO, each physician respondent refused to deal with SunCare HMO except collectively, through Southbank IPA.

PAR. 19. In December 1987, after several months of negotiations with Southbank IPA, and after agreeing to make various other concessions, under threat of a concerted boycott by the physician respondents, SunCare HMO agreed to increase its payments to the physician respondents for obstetrical and gynecological services.

PAR. 20. In 1989, the physician respondents, acting collectively through Southbank IPA, again threatened to boycott SunCare HMO unless it agreed to increase its payments to them. For the second time, SunCare HMO was forced to increase its payments to the physician respondents.

PAR. 21. The increased payments identified in paragraphs 19 and 20 raised SunCare HMO's costs. These costs have been passed on to SunCare HMO's subscribers and enrollees in the form of higher premiums.

PAR. 22. By engaging in the acts and practices described in paragraphs 14 through 21, respondents have combined or conspired with each other to fix the fees they charge to third-party payors, to boycott third-party payors, and otherwise to restrain competition among obstetrician/gynecologists in the Jacksonville, Florida area.

PAR. 23. The actions of the respondents described in paragraphs 14 through 22 have had the purpose or effect, or the tendency and capacity, to restrain competition unreasonably and to injure consumers in the following ways, among others:

A. By restraining trade unreasonably and hindering competition among obstetrician/gynecologists in the Jacksonville, Florida, area;

B. By fixing and/or increasing the fees that obstetrician/gynecologists in the Jacksonville, Florida, area receive from third-party payors; and

C. By depriving consumers and third-party payors of the benefits of competition among obstetrician/gynecologists in the Jacksonville, Florida, area.

PAR. 24. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. The violation or the effects thereof, as herein alleged, are continuing and will continue or recur 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 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 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 Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Southbank IPA, Inc., and respondent Southbank Health Care Corp., Inc., are corporations organized, existing, and doing business under and by virtue of the laws of the State of Florida, with their offices and principal places of business located in Jacksonville, Florida. Their registered agent is Ms. Barbara Suddath Strickland, Mahoney, Adams, Mylam, Surface & Grimsley, 100 Laura Street, Jacksonville, Florida.

2. Wade Barnes, M.D., Ernest Ferrell, M.D., Cynthia Flanders, M.D., Donald Freedman, M.D., James Hayes, M.D., John Huddleston, M.D., James Joyner, M.D., Hormoz Khosravi, M.D., Peter McCranie, M.D., H. Wyatt McNeill, M.D., Herman Miller, M.D., Qudratullah Mojadidi, M.D., Richard Myers, M.D., Paul Oberdorfer, M.D., Norman Pack, M.D., Wilford Paulk, M.D., R. William Quinlan, M.D., Alexander Rosin, M.D., Wilbur Rust, M.D., Kenneth Sekine, M.D., Jeffrey Stowe,

M.D., Carol Wyninger, M.D., and Vernon Zeigler, M.D. (hereinafter "physician respondents") are obstetrician/gynecologists practicing or who have practiced at Southern Baptist Hospital of Florida, Inc. d/b/a Baptist Medical Center, Jacksonville, Florida. Each physician respondent is or has been licensed and does or has done business under and by virtue of the laws of the State of Florida. Their addresses are as follows:

Wade Barnes, M.D., 836 Prudential Drive, Suite 1202, Jacksonville, Florida;

Ernest Ferrell, M.D., 836 Prudential Drive, Suite 1800, Jacksonville, Florida;

Cynthia Flanders, M.D., 4205 Belfort Road, Suite 3004, Jacksonville, Florida;

Donald Freedman, M.D., 4130 Salisbury Road, Suite 2000, Jacksonville, Florida;

James Hayes, M.D., 836 Prudential Drive, Suite 1608, Jacksonville, Florida;

John Huddleston, M.D., 25 Prescott Street, N.E., Atlanta, Georgia;

James Joyner, M.D., 580 W. 8th Street, Suite 711, Jacksonville, Florida;

Hormoz Khosravi, M.D., 4123 University Boulevard, Suite D, Jacksonville, Florida;

Peter McCranie, M.D., 836 Prudential Drive, Suite 1203, Jacksonville, Florida;

H. Wyatt McNeill, M.D., 820 Prudential Drive, Suite 502, Jacksonville, Florida;

Herman Miller, M.D., 820 Prudential Drive, Suite 306, Jacksonville, Florida;

Qudratullah Mojadidi, M.D., 580 W. 8th Street, Suite 6007, Jacksonville, Florida;

Richard Myers, M.D., 836 Prudential Drive, Suite 1001, Jacksonville, Florida;

Paul Oberdorfer, M.D., 1501 San Marco Boulevard, Jacksonville, Florida;

Norman Pack, M.D., 836 Prudential Drive, Suite 1001, Jacksonville, Florida;

Wilford Paulk, M.D., 836 Prudential Drive, Suite 1001, Jacksonville, Florida;

Raymond William Quinlan, M.D., 836 Prudential Drive, Suite 1800, Jacksonville, Florida;

Alexander Rosin, M.D., 820 Prudential Drive, Suite 408, Jacksonville, Florida;

Wilbur Rust, M.D., 820 Prudential Drive, Suite 215, Jacksonville, Florida;

Kenneth Sekine, M.D., 836 Prudential Drive, Suite 802, Jacksonville, Florida;

Jeffrey Stowe, M.D., 836 Prudential Drive, Suite 802, Jacksonville, Florida;

Carol Wyninger, M.D., 1501 San Marco Boulevard, Jacksonville, Florida; and

Vernon Zeigler, M.D., 4205 Belfort Road, Suite 3004, Jacksonville, Florida.

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.

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

A. "*Southbank IPA*" means Southbank IPA, Inc., and its Board of Directors, committees, officers, representatives, agents, employees, successors, and assigns.

B. "*Southbank Health Care Corp.*" means Southbank Health Care Corp., Inc., and its Board of Directors, committees, officers, representatives, agents, employees, successors, and assigns.

C. "*Physician respondents*" means the obstetrician/gynecologist members of Southbank IPA and shareholders of Southbank Health Care Corp. named in paragraph two of the complaint.

D. "*Third-party payor*" means any person or entity that reimburses for, purchases, or pays for all or any part of the health care services provided to any other person, and includes, but is not limited to: health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Shield and Blue Cross plans; health maintenance organizations; preferred provider organizations; government health benefits programs; administrators of self-insured health benefits programs; and employers or other entities providing self-insured health benefits programs.

E. "*Integrated joint venture*" means a joint arrangement to provide

health care services, on a prepaid or other basis, in which physicians who would otherwise be competitors pool their capital to finance the venture, by themselves or together with others, and share substantial risk of adverse financial results caused by unexpectedly high utilization or costs of health care services.

II.

It is ordered, That each physician respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of health care services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, forthwith shall cease and desist from entering into, attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, or continuing or attempting to continue any combination, agreement or understanding, express or implied, with any other physician respondent(s), or with any competing physician(s), to:

A. Fix, stabilize, or tamper with any fee, fee schedule, price, pricing formula, conversion factor, or other aspect or term of the fees charged or to be charged for any physician's services; or

B. Deal with any third-party payor on collectively determined terms by, among other things:

(1) Agreeing or combining, attempting to agree or combine, or taking any action, directly or indirectly, in furtherance of any agreement or combination to fix, stabilize, or tamper with the amount, manner of calculation, or any term of reimbursement or payment from, or the price or any term of purchase by, any third-party payor for any physician's services;

(2) Agreeing with another physician or physicians to negotiate, or acting jointly with another physician or physicians, directly or indirectly (*e.g.*, through any agent or representative), to negotiate with any third-party payor concerning any term, requirement, or other aspect of being, becoming, or remaining a participating physician in any third-party payor or any program or plan of any third-party payor;

(3) Agreeing or acting jointly with another physician or physicians, directly or indirectly, to boycott or threaten to boycott, to refuse or threaten to refuse to deal with, to withdraw or threaten to withdraw

from participation in, or not to participate or threaten not to participate in, any third-party payor or any program or plan of any third-party payor; or

(4) Agreeing or acting jointly with another physician or physicians, directly or indirectly, to coerce or threaten to coerce, or to pressure, induce, encourage, influence, urge, or advise any physician to boycott or threaten to boycott, to refuse or threaten to refuse to deal with, to withdraw or threaten to withdraw from participation in, or not to participate or threaten not to participate in, any third-party payor or any program or plan of any third-party payor.

Provided, however, that nothing in this order shall prohibit any physician respondent from:

(1) Entering into an agreement or combination with any physician with whom the physician respondent practices medicine in partnership, or in a professional corporation, or who is employed by the same person as the physician respondent, to deal with any third-party payor on collectively determined terms;

(2) Forming, facilitating the formation of, or participating in an integrated joint venture and dealing with any third-party payor on collectively determined terms through the joint venture, as long as the physicians participating in the joint venture remain free to deal individually with any third-party payor that declines to deal with the integrated joint venture, and the third-party payor is on notice that the physicians are free to deal individually with the third-party payor at any time that it declines to deal with the integrated joint venture;

(3) Offering to participate or participating with other physicians in bona fide utilization review, quality assurance, or credentialing activities in connection with the provision of physician services, or in any bona fide program for the professional peer review of fees charged by individual physicians in individual cases;

(4) 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; or

(5) Providing information or views, individually or collectively with other physicians, to any third-party payor concerning any issue, including reimbursement.

III.

It is further ordered, That the physician respondents shall:

A. Dissolve Southbank IPA and Southbank Health Care Corp. within one hundred eighty (180) days after the date on which this order becomes final; and

B. File a verified written report demonstrating how they have complied with paragraph III.A. of this order within two hundred ten (210) days after the date on which this order becomes final.

IV.

It is further ordered, That respondents Southbank IPA and Southbank Health Care Corp. shall:

A. Within thirty (30) days after the date on which this order becomes final, and prior to the dissolutions provided for in paragraph III.A. of this order, distribute by first-class mail a copy of this order and the accompanying complaint to each third-party payor doing business in Duval County, except that for purposes of this paragraph IV.A. of this order, the phrase "employers or other entities providing self-insured health benefits programs," as otherwise included in the definition of "third-party payor" in paragraph I.D. of this order, shall be limited to the entities enumerated in the Appendix attached to this order; and

B. Within sixty (60) days after the date on which this order becomes final, and prior to the dissolutions provided for in paragraph III.A. of this order, file a verified written report demonstrating how they have complied with paragraph IV.A. of this order.

V.

It is further ordered, That each physician respondent shall:

A. File a verified written report with the Commission within sixty (60) days after the date on which this order becomes final, and annually thereafter for three (3) years on the anniversary of the date the order became final, and at such other times as the Commission, by written notice, may require, setting forth in detail the manner and form in which he or she has complied and is complying with this order. As part of any report filed pursuant to this paragraph V.A. of this

order, each physician respondent shall notify the Commission if he or she has discontinued the practice of medicine, discontinued the practice of obstetrics or gynecology, moved his or her practice to a different address, or entered into any new medical practice whose activities involve the provision of obstetrical or gynecological services in Duval County, Florida. Such report shall include the physician respondent's new business address and a statement of the nature of the new business or employment in which the physician respondent is newly engaged, as well as a description of the physician respondent's duties and responsibilities in connection with the business or employment;

B. For a period of five (5) years after the date on which this order becomes final, notify the Commission in writing within thirty (30) days after he or she forms or participates in the formation of, or joins or participates in, any integrated joint venture as described in proviso (2) to paragraph II. of this order; and

C. For a period of five (5) years after the date on which this order becomes final, maintain and make available to Commission staff, for inspection and copying upon reasonable notice, records sufficient to describe in detail any joint activities undertaken pursuant to any of the provisos to paragraph II. of this order.

Commissioner Yao not participating.

APPENDIX

Alliance Mortgage Company 25 West Forsyth Street Jacksonville, FL 32202	Allied-Bendix Corporation 7575 Baymeadows Way Jacksonville, FL 32216
Alton Packaging Corporation P.O. Box 4484 Jacksonville, FL 32216	American Transtech 8000 Baymeadows Way Jacksonville, FL 32216
Anheuser Busch, Inc. P.O. Box 18017 Jacksonville, FL 32219	Atlantic Drydock P.O. Box 138 Jacksonville, FL 32226
Barnett Bank of Jacksonville 100 Laura Street Jacksonville, FL 32202	Container Corporation North Eighth Street Fernandina Beach, FL 32034

Duval Federal Savings and Loan Association 1 North Hogan Street Jacksonville, FL 32202	Florida Publishing Company P.O. Box 1949F Jacksonville, FL 32231
Florida Rock Industries, Inc. 155 East 21st Street Jacksonville, FL 32206	Gate Petroleum Company 9540 San Jose Boulevard Jacksonville, FL 32217
Huntley Jiffy Stores, Inc. 1890 Kingsley Avenue Orange Park, FL 32073	ITT Rayonier, Inc. P.O. Box 2002 Fernandina Beach, FL 32034
Jacksonville Kraft Paper Company, Inc. P.O. Box 18019 Jacksonville, FL 32229	Jacksonville Shipyards, Inc. P.O. Box 2347 Jacksonville, FL 32203
Maxwell House Division 735 East Bay Street Jacksonville, FL 32202	North Florida Shipyards, Inc. P.O. Box 3863 Jacksonville, FL 32202
Revlon Professional Products P.O. Box 37557 Jacksonville, FL 32236	SCM Corporation P.O. Box 389 Jacksonville, FL 32218
Sears, Roebuck & Company 9501 Arlington Expressway Jacksonville, FL 32211	Southern Bell 20th Floor #4BB1 301 West Bay Street Jacksonville, FL 32201
Suddath Van Lines, Inc. 5266 Highway Avenue Jacksonville, FL 32205	Vistakon, Inc. 1417 San Marco Boulevard Jacksonville, FL 32207